**CORPORATE LAW ELECTRONIC BULLETIN**   
**Bulletin No 21, May 1999**

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

with the support of

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the Australian Stock Exchange   
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1. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) COUNCIL OF FINANCIAL REGULATORS ANNUAL REPORT - 1998

On 28 April 1999 the Chairman of the Council of Financial Regulators, Reserve Bank Governor Ian Macfarlane, released the Council’s 1998 Annual Report. The Report outlines the work of the Council in providing a high-level forum for co-operation and collaboration among Australia’s main financial regulatory agencies.

The Council was established in 1998 as the successor to the Council of Financial Supervisors. It forms part of wide-ranging changes to Australia’s financial regulatory structure in 1998, prompted by the recommendations of the Financial System Inquiry. These changes include the establishment of a single prudential regulator - the Australian Prudential Regulation Authority (APRA); the establishment of a separate regulator to deal with market integrity and consumer protection issues across the financial system - the Australian Securities and Investments Commission (ASIC); and revised responsibilities for the Reserve Bank of Australia (RBA), involving its withdrawal from prudential supervision of banks but more extensive regulatory powers in the payments system. These three authorities form the membership of the new Council.

"Australia’s new financial arrangements are being implemented at a time when crises in emerging markets have threatened global financial and economic stability, leading to a rail of proposals for improving domestic regulatory structures and international regulatory co-operation. Council members are working individually and together to ensure that the new arrangements will promote confidence in the Australian financial system," Mr Macfarlane said. "Apart from assisting the bedding-down of Australia’s new financial arrangements and monitoring international regulatory developments, a major focus for the Council in 1998 has been the Year 2000 issue. The Council has been keen to encourage disclosure of Year 2000 preparations in the Australian financial sector and to co-ordinate the Year 2000 activities and international commitments of its members.

Copies of the Report can be found on each member’s internet site or by phoning:

Reserve Bank of Australia (02) 95519721, www.rbaogov.au   
Australian Prudential Regulation Authority (02) 92103000, www.apra.gov.au   
Australian Securities and Investments Commission (02) 99112600, www.asic.gov.au

(B) JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT: INQUIRY INTO CORPORATE GOVERNANCE AND ACCOUNTABILITY ARRANGEMENTS FOR COMMONWEALTH GOVERNMENT BUSINESS ENTERPRISES

On 21 May 1999 the Chairman of the JCPAA, Mr Bob Charles, MP, announced that the JCPAA will conduct an inquiry into Corporate Governance Arrangements for Commonwealth Government Business Enterprises (GBEs). The JCPAA reported on commercialisation in the Commonwealth Public Sector in 1995. That report included comment on the Commonwealth Government’s Accountability and Ministerial Oversight Arrangements for Government Business Enterprisesissued in June 1993.

A Review of GBE Governance Arrangementswas released in March 1997 and, taking account of that review, the Commonwealth Government adopted new Governance Arrangements for Commonwealth Government Business Enterprises in June 1997which took effect from 1 July 1997.

Key elements of the new governance arrangements for GBEs are:

- the Commonwealth’s interest to be represented by two ‘Shareholder Ministers’, the portfolio Minister and the Minister for Finance and Administration;

- GBEs should follow a disclosure principle similar to continuous disclosure requirements of the Australian Stock Exchange listing rules; and

- Shareholder Ministers to assess the financial performance of GBEs on a regular basis.

The JCPAA considers that the timing is appropriate for a parliamentary review of the current GBE governance arrangements. The JCPAA will seek the views of GBEs, relevant Commonwealth portfolio departments and other interested parties regarding the appropriateness, effectiveness and efficiency of the governance arrangements, and the quality and timeliness of performance reporting achieved under the arrangements.

The JCPAA will explore the following specific matters:

- whether additional parts of current GBE governance arrangements should be the subject of legislation;

- whether more GBEs should be companies;

- whether governance arrangements are being reasonably applied to GBEs undergoing sale or restructuring;

- the form and content of GBE statements of corporate intent and the process of Parliamentary scrutiny including scrutiny of the financial affairs of GBEs;

- whether governance arrangements relating to GBEs’ management of risk need to be strengthened;

- the adequacy of proposed annual reporting requirements for GBEs; and

- whether administrative law should apply to GBEs.

Submissions should be sent before 2 July 1999 to:

The Secretary   
Joint Committee of Public Accounts and Audit   
Parliament House   
Canberra ACT 2600   
jcpa@aph.gov.au

(C) PARLIAMENTARY JOINT COMMITTEE REPORT ON THE CORPORATE LAW ECONOMIC REFORM PROGRAM BILL 1998

On 12 May 1999 the Parliamentary Joint Committee on Corporations and Securities released its Report on the Corporate Law Economic Reform Program Bill 1998. The Bill has been summarised in previous Bulletins (see Bulletin No 16 - December 1998). The Committee concludes that the Bill will make a significant contribution to achieving the objectives of promoting business and market activity leading to important economic outcomes including enhanced market efficiency and integrity and investor confidence.

In its Report the Committee recommends that, subject to a small number of amendments, the Bill be passed in its current form. The amendments to the Bill recommended by the Committee are:

- Nominee for foreign holders of securities: sections 615 and 619 of the Bill be amended to require that the nominee be approved in all cases by ASIC.

- Compulsory acquisitions: section 664A of the Bill be amended so that a compulsory acquisition can only occur within six months of the proclamation of the legislation or within six months of the person seeking to make the acquisition becoming a 90 per cent holder. The compulsory acquisition notice required by section 661B be required to draw the readers’ attention to their rights under sections 661E and 661D. A notice to the holders of convertible securities under section 665B be required to include the additional information given to recipients of compulsory acquisition notices under the compulsory acquisition powers set out in section 664C(1)(c)-(e). Sections 663C and 665C be amended so that any court order made under those sections applies to all securities of the same class.

- Capital gains tax: rollover relief from capital gains tax should be provided where shares are compulsorily acquired and when a takeover offer for a publicly listed company is accepted on a scrip for scrip basis. An amending tax bill should be introduced urgently to accompany debate on this legislation to give effect to this recommendation. Failing this, the legislation should be amended so that a potential unwanted capital gains tax liability provides an absolute defence against compulsory acquisition.

- Sophisticated investors: legislation should clarify the sanctions applicable to a licensed dealer who breaches section 708(8)(c) and such sanctions should be given further consideration under the Corporate Law Economic Reform Program Paper No 6.

- Return of securities: section 724(2)(b) and 724(2)(c) be amended to replace the term "reasonable opportunity" with a minimum period of ten working days.

- Quotation of securities: the Bill be amended to revert to the position under the current law on the quotation of securities. An issue of securities should be void if the disclosure document states that the securities will be quoted on a securities exchange and the securities are not admitted for quotation. The Bill should also require the return of application monies to investors under those circumstances.

- Consideration offered and collateral benefits: the operation of section 621(4) be extended to all bids, including non-cash only bids; and that section 623(2) and 623(3) be removed from the Bill. However, the Committee may given this matter further consideration.

The Report is available on the website of the Joint Parliamentary Committee (http://www.aph.gov.au/senate/committee/corp\_sec\_ctte/index.htm).

2. RECENT ASIC DEVELOPMENTS

(A) ASIC SETTLES ACCOUNTING ACTION AGAINST MEDIA ENTERTAINMENT GROUP LIMITED

On 3 May 1999 ASIC agreed to settle Federal Court action against Media Entertainment Group Limited (MEG). ASIC took proceedings against MEG to force it to comply with the accounting standards.

In 1998 MEG released half year financial statements for the accounting period ending 31 December 1997 which recognised revenue as soon as contracts for services were signed. ASIC believed the amounts due to MEG under contracts were not permitted to be recorded as revenue until services had been provided and that MEG’s recognition of revenue upon signing contracts did not give a true and fair view of the financial position and performance of the company.

The effect of MEG’s accounting treatment at that time was to record approximately $3.5 million as sales revenue, although if the company had adopted a revenue recognition policy which accorded with the accounting standards, the sales revenue would have been approximately $1.6 million.

ASIC issued Federal Court proceedings seeking a declaration that MEG’s financial statements did not comply with the applicable accounting standards and an order that MEG revise its financial statements so that revenue was only recognised after services had been performed.

ASIC has agreed to settle this matter on terms which provide that:

(a) MEG lodges with ASIC and distributes to its shareholders, on or before 30 June 1999 revised financial statements for the year ending 30 June 1998 prepared in accordance with ASIC’s interpretation of applicable accounting standards;

(b) MEG prepares and lodges future financial statements in accordance with ASIC’s interpretation of the applicable accounting standards; and

(c) MEG agrees to pay ASIC’s disbursements of the proceedings.

ASIC Chief Accountant Jan McCahey said financial reporting is one of the cornerstones of an informed market. "The accounting standards are designed to promote consistent and comparable financial reporting," Ms McCahey said. "ASIC is prepared to litigate to enforce the accounting standards where it believes that a failure to comply may result in the market being misled." "ASIC decided to settle this matter because the terms of settlement achieve the same outcome as a favorable court case and because the company has agreed to address ASIC’s concerns by preparing revised financial statements."

(B) ASIC ISSUES FINAL POLICY ON SERVICED STRATA SCHEMES

On 5 May 1999 ASIC issued its final policy on how the Corporations Law and ASIC Act applies to the promotion and operation of serviced strata arrangements.

The Policy Statement (140) is substantially similar in content to the revised Interim Policy Statement 140 (IPS 140) which was issued on 16 December 1998. However, a number of presentational and fine-tuning amendments have been made to take into account the 21 written submissions received regarding the content of revised IPS 140.

PS 140 deals with arrangements where owners of real property such as strata title units or community title interests make their real estate available to a manager for use as part of a serviced apartment, hotel, motel or resort complex. ASIC Chairman Alan Cameron said the final policy confirms that the primary focus of ASIC is that investors in serviced strata arrangements regulated under the Corporations Law receive appropriate disclosure about the benefits, risks and costs associated with the investment.

Copies of PS 140 are available from the ASIC Infoline on 1300 300 630 and from the Policy and Practice page of the ASIC internet home page on http://www.asic.gov.au.

(C) ASIC EXTENDS EMPLOYEE SHARE RELIEF

On 10 May 1999 ASIC announced it had decided to extend the relief it grants from the prospectus provisions of the Corporations Law for employee share issues. The Commission will now allow employers to offer their long-term casual employees an opportunity to participate in the company’s employee share schemes without having to produce a prospectus.

ASIC reviewed its policy because it recognised employment practices in Australia are changing. Many more employers are employing long-term casual employees in agreements which benefit both the employer and employees.

The extension of ASIC’s policy is designed to ensure that regulatory requirements do not disadvantage longer-term employees by unduly restricting their ability to access share schemes. In making this decision ASIC considered that share schemes are sometimes used as part of the overall attraction of the employment package offered by major companies and to reward employee performance.

Under the new policy employers will be able to seek relief from the prospectus provisions of the Corporations Law where they have casual employees who have been employed for more than a year and whom the company regard as equivalent to their part-time employees.

Relief will not be extended to contractors and other staff who do not have a long term relationship with the company. This is to ensure the exemptions for employee schemes are not used to avoid the proper application of the prospectus requirements of the Law.

(D) ASIC TO DISPOSE OF 8.5 MILLION COMS21 SHARES

On 13 May 1999 ASIC revealed how it intended to dispose of the 8.5 million Coms21 shares which the Federal Court vested in it last month.

The Federal Court made the ruling after finding that Terra Industries Inc and Peter Gray, a principal of Sydney stockbroker firm, PG Intercapital Limited had breached the substantial shareholding provisions of the Corporations Law. The final amount of Coms21 shares vested in ASIC were 8,492,250. The Federal Court judgment is summarised in Section 4(C) of this Bulletin.

On 7 May 1999, the court made further orders regarding the disposal of the shares vested in ASIC. The orders required ASIC to instruct a broker or brokers to dispose of all of the shares by sales to be completed by 30 August 1999, and that no more than 10% of the total number of shares vested from Lost Ark Nominee Pty Ltd (a PG Intercapital nominee company) is to be sold during any trading week except with the consent of Peter Gray. Approximately 7.8 million shares were vested from Lost Ark.

Otherwise the shares will be disposed of in a manner that ASIC thinks fit but calculated to achieve the maximum return compatible with protecting the interests of shareholders of Coms21 and promoting an efficient, competitive and informed market.

Consistent with the court direction, ASIC is making it publicly known that it has appointed Macquarie Equities Limited as broker to dispose of the shares. ASIC will inform the market about the progress of the sale of shares by lodging a substantial shareholder notice whenever a notifiable change (decline in holding by 1%) occurs.

(E) EXTENSIONS OF BIDS AND TRUTH IN TAKEOVERS

On 16 May 1999 ASIC announced it will allow an extension to an unconditional takeover bid where the bidder’s entitlement moves to more than 50% of the target company’s voting shares in the last seven days of the bid. ASIC said this will apply even if during the course of a bid statements to the contrary were made before it became obvious that control would pass.

Following approaches from Castwo Pty Ltd, a company in the Consolidated Press Holdings group,the bidder for Hoyts, the Commission registered a variation which has extended the current bid by 14 days to 31 May 1999.

ASIC recently confirmed it was looking closely at the broad issue of statements by both targets and bidders during takeovers and those involved in takeovers needed to be aware that ASIC would move to protect shareholders’ rights.

The Commission in reaching this decision was conscious that the CLERP Bill 1998 provided for a mandatory extension of a bid in the above circumstances and that the Parliamentary Joint Committee report on that Bill was supportive of the Bill and in particular it was not critical of that provision.

ASIC believes that the extension to the bid for Hoyts did not cause significant harm to the credibility of the market, despite the bidder’s earlier statement that the bid would not be extended. Given that control passed in the last few days of the bid, to have refused an extension would have deprived small investors of an opportunity to reconsider their position after a change in control.

In many cases the target board may wish to reassess its earlier recommendation to shareholders and have insufficient time to communicate their revised views before the scheduled close of the bid. ASIC will consider an application by a bidder to extend a bid, where the board changes its recommendation.

Although ASIC may register notices of extension, bidders and their advisers must exercise extreme care before making statements that there will be no further extensions of a bid or no increase in the consideration.

ASIC expects that matters such as the likelihood of obtaining a board recommendation for the bid in the event the price is raised or that the bid may need to be extended because of significant late acceptances which leave small shareholders disadvantaged will be properly considered before statements of that type are made to the market. Parties remain liable for any losses suffered by investors who have relied upon false, misleading or deceptive statements.

(F) ASIC LAUNCHES ELECTRONIC COMPANY REGISTRATION

On 17 May 1999 ASIC launched its new Electronic Company Registration (ECR) service which enables new companies to be registered within minutes via the Internet.

ASIC’s ECR system enables the entire process of registering a company to be conducted online, using smart cards and public key encryption to generate and authenticate digital signatures, with access to an electronic payment facility.

ASIC Commissioner Jillian Segal said ASIC’s electronic lodgement system substantially reduces administrative costs for company registrations, both to ASIC and to its intermediary clients. "These cost savings will be passed on to business by the intermediaries, who are primarily specialists in company registrations and, to a lesser extent, accountants and solicitors," Ms Segal said. "At least one of our intermediaries has already substantially reduced its charges to business for registering companies electronically as a result of the cost savings and efficiencies they have achieved with ECR. "Having successfully demonstrated the use of digital signatures to authenticate documents and to enable secure trading, potentially valued at $70 million per year with ECR, we will apply the technology to other areas and for other documents lodged with ASIC," Ms Segal said. "As well as reducing the cost of company registrations, both in time and money, ECR makes it easier to register new companies. Instead of having to physically attend busy ASIC business centres to register a company over the counter, the entire process can now be conducted via the Internet.

ECR cuts the time required to register a company from hours to just minutes - a certificate of registration is typically issued within 30 seconds of commencing data transmission. Electronic company registrations can also be submitted and processed outside of normal business hours.

The ECR system is the first fully operational system in Australia to use digital signatures generated by smart cards and one of a very few in the world, according to leading e-commerce consultant, David Jonas of Electronic Trading Concepts (ETC). "It is pleasing to see ASIC and Australia playing such a leading role in the areas of authentication and data protection, which are key issues being discussed at major international fora, including the OECD Ministers meeting and the European Union-sponsored Global Business Dialogue last year. Their resolution is seen to be crucial to the take-up of the global information economy," Mr Jonas said.

(G) ASIC WARNS ABOUT MOVING FROM HOT ROCKS TO HOT STOCKS

On 19 May 1999 ASIC announced it is increasing its scrutiny of companies that fundamentally change the direction of their business to acquire internet and other "hi-tech" assets. The move follows ASIC becoming aware of a number of recent cases of such companies sending out documents with inadequate disclosure prior to shareholder meetings which are called to propose the acquisition of internet and other "hi-tech" assets.

ASIC Chief Accountant, Jan McCahey, today wrote to the Institute of Chartered Accountants in Australia, Australian Society of Certified Practicing Accountants and Australian Institute of Company Directors expressing ASIC’s concern about the inadequate disclosure.

In one recent case, a junior explorer proposed to acquire an internet site and its associated intellectual property rights in return for an issue of shares, the issue giving the vendor a substantial interest in the company. In cases like these the Corporations Law requires the company to seek the approval of its shareholders for the share issue to occur, with members being given an information memorandum and independent expert’s report to enable them to properly consider the transaction.

ASIC reviewed the information memorandum and independent expert’ reports and found substantial deficiencies. The company was told if the documents were sent out in their current form, ASIC would consider enforcement action which would involve obtaining a Court order preventing the meeting from going ahead unless the disclosure deficiencies were addressed.

Among the disclosure deficiencies found were that:

- the independent expert, an accountant, simply accepted the book value of the company’s exploration tenements and did not obtain an independent valuation by a geologist or other expert in valuing mining tenements;

- the independent expert made statements about the expected usage and financial viability of the internet site without setting out in detail the basis for the conclusions.

Similar deficiencies were found in the independent expert’s report obtained by another junior explorer asking for its members’ approval to acquire shares in a high technology company, again in return for the issue of sufficient shares to give the vendor of the technology company control of the explorer.

In that case the independent expert, again an accountant, did obtain a valuation from a specialist in the technology area concerned, which ASIC considers to be necessary in these types of cases. However, the specialist did not set out in detail the basis for his conclusions and the major assumptions used.

Ms McCahey said that when a company seeks to make a fundamental change in the direction of its business, it is as if its shareholders are being asked for the first time whether they want to invest in the company. "In these cases shareholders should get the same quality of information as they would get in a prospectus for an initial public offering," she said. "ASIC will look very carefully at any proposed change of business by a company to ensure the information provided to members of the company, in particular any independent expert’s or specialist’s report, is accurate and useful. "ASIC and ASX will also cooperate to ensure that companies do not try to get around the provisions of the Corporations Law and Stock Exchange Listing Rules requiring a proposed change of business to be approved by members", Ms McCahey said.

(H) TRANSITIONAL REQUIREMENTS OF MANAGED INVESTMENTS

On 19 May 1999 ASIC reminded schemes which are required to convert to the Managed Investments regime that they must have a meeting of members unless either the trustee or manager retires by 30 June 1999. The schemes which must comply with this requirement include management companies and trustees or representatives of prescribed interest schemes.

Section 1452 of the Corporations Law, as modified by ASIC Policy Statement 135, sets out which prescribed interest schemes need to convert to managed investments schemes (Policy Statement 135 can be accessed through the ASIC website "www.asic.gov.au").

ASIC is aware that some schemes are choosing to go to a meeting of members after 30 June 1999 in any case. However, trustees, representatives and management companies of all prescribed interest schemes should be aware that a meeting of members is mandatory for those prescribed interest schemes which need to convert to the managed investments regime if a retirement notice is not given by 30 June 1999.

For further information contact:

Pauline Vamos   
National Compliance Adviser   
Managed Investments National Team   
Tel. (02) 9911 2369

(I) ASIC HEARING - A GUIDE TO WHAT TO EXPECT

On 25 May 1999 ASIC issued its new Hearings Practice Manual which gives people attending ASIC administrative hearings a detailed guide on what to expect.

ASIC National Enforcement Director Joe Longo said the new Hearings Practice Manual, replacing the old Hearings Manual, reflected the need to clarify and confirm ASIC’s approach to administrative hearings, particularly proposed banning or other licensing action. Mr Longo said experience has shown that people and their advisers have inappropriately expected a hearing in the nature of a formal trial, when in fact, matters of this kind are expected to be handled quickly and informally, as well as fairly.

"The new Hearings Practice Manual makes it clear that "judicial" processes have no place in ASIC’s administrative hearings," he said. "Administrative action to protect the public by banning people, for example, from the securities and futures industry, imposing conditions on their licence or prohibiting a person from acting as a director, are important and increasingly significant parts of ASIC’s enforcement strategy.

The Hearings Practice Manual and the Information Sheet are available on ASIC’s

home page on "www.asic.gov.au"or from the ASIC Infoline on 1300 300 630.

(J) AUSTRALIA SIGNS MOUs WITH SPAIN AND SOUTH AFRICA

On 26 May 1999 ASIC announced that it has entered into Memoranda of Understanding with the Comisión Nacional Del Mercado De Valores (CNMV) of Spain and with the Financial Services Board (FSB) of South Africa during a meeting of the International Organisations of Securities Commissions (IOSCO) in Lisbon.

The MoUs aim to enhance investor protection in Australia, South Africa and Spain by ensuring that the investigation of breaches of securities laws can attempt to overcome jurisdictional difficulties associated with cross border enforcement activities. In this regard the MoUs will contribute to the integrity and efficiency of the securities markets in Australia, South Africa and Spain.

The MoUs will provide a framework for the exchange of information and investigative assistance between ASIC and Spain’s CNMV and ASIC and South Africa’s FSB in securities and futures matters including securities fraud, insider trading, market manipulation, and disclosure requirements for securities acquisitions and prospectuses.

MoUs also exist between ASIC and securities and futures regulators in the United States, United Kingdom, France, Italy, New Zealand, Papua New Guinea, Hong Kong, China, Canada, Thailand, Brazil, Indonesia, Germany and Malaysia.

3. RECENT ASX DEVELOPMENTS

(A) ASX DISCUSSION PAPER

The ASX has prepared a discussion paper to seek the views of interested persons on issues about proposed amendments to the Equities rules, practical issues in connection with the open interface and possible future directions in relation to shared trading gateways and the equities on-market crossing rule. The paper is in 3 parts:

Part A: Significant dealing rules. These amendments address issues that have arisen with two of the more significant dealing rules: crossings during Normal Trading, and client order precedence. Included in these proposals are changes to address implementation of the Open Interface. Part B: Open Interface. These amendments address issues that have arisen in relation to Section 2 of the Business Rules with implementation of the Open Interface. Part C: These amendments address miscellaneous issues. The closing date for comments is 4 June 1999.

The Discussion Paper is available on the ASX internet website (http://www.asx.com.au/openinterface/) and can be located through the ‘What’s New’ icon.

(B) CONTRACT NOTES

New regulations modifying the contract note requirements contained in section 842 and 843 of the Corporations Law were introduced earlier this year.

The new regulations allow:

- contract notes to be sent electronically;

- a single contract note to be given for multiple transactions for the same client;

- price averaging over a series of transactions to effect an order; and

- commission and fees to be charged on principal transactions with a non-dealer.

The ASX Business Rules have also been amended to complement the new regulations. In the equities market the price averaging provisions apply over 3 days but are limited to Professional Investors (as defined in the Rules) and in the derivatives market, price averaging will be permitted for retail investors but is allowed only over 1 day.

(C) THIRD PARTY CLEARING

As a part of the ASX commitment to increase the efficiency and flexibility of its market place, changes have been made to the regulatory framework which will enable participants to out source their clearing and settlement commitments (including settlement risk) to a third party.

Third Party Clearing has been introduced by ASX in response to market driven demands for greater choice and flexibility in the way brokers are able to structure their business. As a result of the implementation of Third Party Clearing participating organisations will have a number of choices about the way they structure their business in the future, including:

- the opportunity to specialise as either an Executing broker or a Clearer,

- continuing as a full service broker undertaking both execution and settlement; or

- continuing as a full service broker while also offering services as a Third Party Clearer.

(D) YEAR 2000

New Rules have been incorporated in the ASX Business Rules to better enable the Exchange to respond adequately to SEATS and DTF systems related problems, and specifically, any Year 2000 problems. The rules will allow the Exchange to act in a pro-active manner to protect the market if there is likely to be an adverse effect on the operation of the market or functioning of SEATS (and the Derivatives Trading Facility) due to some fact or matter impairing the operation of a Participating Organisation’s (and Participant’s) Open Interface Device.

(E) Warrants

A Guidance Note setting out ASX policy on the electronic distribution of Warrant Offering Circulars has been sent to warrant issuers and Participating Organisations by Circular.

ASX considers that warrant issuers should be able to distribute Offering Circulars electronically provided that the underlying policy of the disclosure requirements of the Business Rules is met. The disclosure requirements seek to ensure that prospective investors can make informed decisions based on an Offering Circular that contains all relevant information about the warrants being offered.

ASX has adopted a policy which is based on ASIC Policy Statement 107 Electronic Prospectuses and the class order granting relief to issuers to distribute electronic prospectuses on certain conditions (CO 96/1578 Electronic Prospectuses).

For the purpose of this policy, an electronic Offering Circular is one that is in electronic form, issued on the internet or other computer networks or on a disk, tape, CD-ROM or other article and contains information predominantly in text form.

4. RECENT CORPORATE LAW DECISIONS

(A) ABROGATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN EXAMINATIONS REGARDING COMPANIES IN LIQUIDATION

Morton v Joynson [1999] FCA 530, Federal Court of Australia, VG 3430 of 1998, Weinberg J, 30 April 1999

Morton was the liquidator of Kennington Laundry and Drycleaners Pty Ltd (Kennington). In October 1998, Morton commenced proceedings (No VG 3350 of 1998) to which the four respondents were George Joynson (first respondent), his sister, Mary Mosely (second respondent) (both directors of Kennington), and also Mary Joynson (third respondent) and William Mosely (fourth respondent), who were the spouses of the first and second respondents respectively. In those proceedings, the liquidator alleged the four respondents had contravened ss 232((2), 232(4) and 588G of the Corporations Law (the Law).

In the course of the winding up, the liquidator summonsed the first and second respondents to be examined about the examinable affairs of Kennington. Those summonses were issued pursuant to s 596A of the Law which provides for the mandatory examination of the examinable officers, including directors, of a corporation in the course of its winding up. There was no objection to those summonses.

The liquidator also applied to summon the third and fourth respondents pursuant to s 596B of the Law which provides that a court may exercise its discretion to summon a person for examination about a corporation’s examinable affairs if the court is satisfied that the person has been concerned in the examinable affairs of the corporation and may have been guilty of misconduct in relation to the corporation; or may be able to give information about examinable affairs of the corporation. The summons also required the third and fourth respondents to produce various documents at the examination, principally personal tax returns, statements of personal assets and liabilities, titles to valuable personal property and documents pertaining to the transfer or assignment of personal assets.

The third and fourth respondents submitted that it was oppressive and unfair that they be required to attend for examination and to produce the documents identified above. In this proceeding, the third and fourth respondents sought to have those summonses set aside. They contended that:

- the proceedings brought by the liquidator were civil in nature, but involved allegations which might expose them to prosecution for offences under the Law. They argued that, in the ordinary course, a court would not require those respondents to provide statements in advance of the final hearing and would not require them to answer interrogatories or to produce on discovery any documents which might tend to incriminate them. The respondents argued the liquidator should not, by causing the respondents to be examined under s 596B, be able to obtain in civil proceedings brought by him a forensic advantage to which he would not ordinarily be entitled;

- it would be unfair and oppressive to require the respondents to be examined under s 596B because the privilege against self-incrimination was abrogated under s 597(12); hence any answers given by them could be used against them in the civil proceedings;

- the liquidator issued the summonses for an ulterior purpose, namely to obtain a forensic advantage to which he was not entitled;

- the documents which the liquidator sought to have produced were not relevant to the examinable affairs of Kennington; they related solely to the ability of the respondents to meet any amount of damages arising out of the civil proceedings.

The liquidator argued that the fact that he might obtain a forensic advantage by examining the respondents did not render such an examination oppressive or an abuse of process; and that such an advantage was within the purview of the statute. The legislature had provided protection to examinees in s 597(12A) which made evidence obtained in the course of an examination inadmissible in criminal proceedings or in subsequent proceedings for the imposition of a penalty, but this protection did not extend to civil proceedings.

Weinberg J refused to set aside the summonses, holding there was nothing oppressive or unfair in requiring the third and fourth respondents to be examined about Kennington’s examinable affairs, having regard to the evidence concerning their involvement with Kennington. In evidence, the transcripts of the liquidator’s examinations of the first and second respondents had revealed a transaction involving Kennington and the fourth respondent which might have been voidable under s588FE(4) of the Law. It was also deposed that the third respondent had handled the accounts of the Kennington; she was responsible for drawing up cheques to pay the company’s creditors and had been present at a meeting at which the sale of the company’s business was discussed. The liquidator was legitimately entitled to examine the extent of involvement on the part of the third and fourth respondents in the management of Kennington and to explore the possibility of recouping monies which may have been improperly paid, by way of preference, to them. The liquidator was also entitled to explore the asset position of the third and fourth respondents to determine whether it was worthwhile continuing the proceedings already instituted against them.

(B) COMPLETE UNWORKABILITY OF RELATIONSHIP BETWEEN QUASI-PARTNERS NOT NECESSARY FOR WINDING UP ON THE JUST AND EQUITABLE GROUND

Stapp v Surge Holdings Pty Ltd [1999] FCA 545, No NG 3158 of 1998, Federal Court of Australia, Katz J, 5 May 1999

The applicant, Mr Stapp, sought an order for the winding up of Surge Holdings Pty Ltd (Surge), of which he was a contributory and director. The other contributory of Surge was Ms Charlotte Morison; the other director of Surge was Mr Graham Morison, Ms Morison’s husband.

Mr Stapp sought winding up of Surge on 4 grounds but principally relied on s 461(1)(k) of the Corporations Law, that it was just and equitable that the company be wound up.

The events leading to the application centred around the sale of a house. Surge was involved in the business of property development. It had previously sold two houses, and the sale of a third was due to be completed on 3 March 1998. Shortly before that date, Mr Morison informed Mr Stapp that there was a delay, and settlement had been postponed till the end of March. At the time, Surge owed the National Australia Bank (NAB) approximately $185,000. This debt was personally guaranteed by Mr Stapp, which guarantee was reinforced by a mortgage of Mr Stapp’s family home. At a meeting on 10 March 1998 between Mr Morison, Mr Stapp and a manager of NAB, Mr Morison reiterated that settlement of the sale of the house would take place at the end of March and the proceeds would be applied to pay off the company’s debt to the bank and to other creditors, including Ms Morison, Mr Morison’s parents, and Raviso Pty Ltd, a company controlled by Mr Stapp.

In fact settlement occurred on 13 March 1998, and, unbeknown to Mr Stapp at the time, the proceeds were applied by Mr Morison to pay debts owed to the Metway Bank (which financed the development of the house), Ms Morison, and Mr Morison’s parents. None of the proceeds went to the NAB or to Mr Stapp’s family company, Raviso Pty Ltd, and the application of the proceeds had not been discussed beforehand, as was the usual practice from the sale of the first two houses, between Mr Stapp and Mr Morison.

Mr Stapp sought winding up on the just and equitable ground on the basis that the company involved an association between himself and Mr Morison which was founded on a personal relationship involving mutual confidence and an understanding he would participate in the conduct of the company’s business. Mr Stapp submitted he had lost confidence in Mr Morison and had been excluded from participation in the conduct of the company’s business.

Mr Stapp relied primarily on Thomas v Mackay Investments Pty Ltd (1996) 22 ACSR 294 in which Justice Owen of the Supreme Court of Western Australia had applied Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, the leading House of Lords decision on the concept of quasi-partnership.

In Thomas’s case, Owen J held there was no necessary limit to the generality of the words ‘just and equitable’ though typical examples of when an order will be made included ‘the failure of the corporate substratum’, and ‘the breakdown of a quasi-partnership’.

Mr Stapp also relied on the New South Wales Court of Appeal decision in Kokotovich Constructions Pty Ltd v Wallington (1995) 17 ACSR 478 in which a winding up order was affirmed on appeal. The Court of Appeal referred to the winding up of a prosperous and successful company as being an extreme measure, but the limited nature of the company’s then current activities justified taking such an extreme step. Here, Mr Stapp presented evidence that the company was not successful or prosperous and was not engaged in any activities, having no funds to do so and no means to obtain funds.

Resisting the application, Ms Morison did not submit that it was inappropriate for the court to treat the company as a quasi-partnership. Instead, she submitted it was necessary to examine the relationship closely and while it was true there were some differences between the parties, the company’s business had not become completely unworkable.

Katz J held Ms Morison’s submission incorrectly conflated the two distinct circumstances discussed by Owen J. Owen J’s reference to final and conclusive abandonment of the company’s business was made in the context of his Honour’s discussion of winding up on the basis of failure of corporate substratum. It was not necessary to show complete unworkability of a company’s business to show there had occurred a breakdown of a quasi-partnership.

Katz J held that Mr Stapp had a justifiable lack of confidence in the conduct and management of Surge’s affairs by Mr Morison and this lack of confidence did not spring from being merely outvoted on the company’s domestic affairs.

Four matters justified the lack of confidence:

- Mr Morison’s false assertion that settlement would not occur till the end of March;

- Mr Morison’s false assertion that the proceeds would be applied to discharge the debt to NAB;

- Mr Morison’s failure to follow usual practice to consult Mr Stapp with respect to distributing the proceeds of the sale;

- Mr Morison’s assumption of control of Surge’s books and records to the exclusion of Mr Stapp.

Under these circumstances, there had been a breakdown of the quasi-partnership underlying the corporate structure and winding up was ordered on the just and equitable ground.

(C) VESTING OF SHARES IN ASIC ON DELIBERATE FAILURE TO GIVE NOTICES OF SUBSTANTIAL SHAREHOLDING

ASIC v Terra Industries Inc, PG Intercapital Ltd, Lost Ark Nominees Pty Ltd, Merrill Lynch Equities (Australia) Ltd, Merrill Lynch (Australia) Pty Ltd and Peter Gray [1999] FCA 525, V 3059 of 1999, Federal Court of Australia, Merkel J, 30 April 1999

In 1998, Coms 21, a public listed company, was the subject of two failed takeover offers and much speculative trading in its shares. In December 1998, Terra Industries Inc (Terra Industries) purchased approximately 12.9 million shares in Coms 21, being 12.9% of the capital of Coms 21, in four separate parcels on 23, 24, 30 and 31 December.

The four parcels were purchased pursuant to Terra Industries’ instructions, but Terra Industries never paid any of the amounts due on them. With respect to the first parcel of shares, as a result of a fraud, Merrill Lynch paid PG Intercapital the amount due, but was never repaid by Terra Industries. To meet its obligations under the ASX rules, PG Intercapital, the stockbroking firm which transacted the purchases on behalf of Terra Industries, completed the purchases of the second, third and fourth parcels and paid the vendor’s broker. Pursuant to a pre-existing agreement, Gray, a stockbroker with and shareholder in PG Intercapital, was liable to indemnify PG Intercapital against any loss arising from any transaction which was executed by him as a dealer. Thus, Gray was liable to PG Intercapital for the amounts due by Terra Industries. Also, pursuant to ASX rules, upon default of the client, a broker is entitled to sell sufficient number of shares as is necessary to recoup the monies paid. Accordingly, PG Intercapital acquired the right to dispose of the shares to the extent necessary to satisfy Terra Industries’ liability to it.

On 8 January 1999, Gray partially discharged his liability to indemnify PG Intercapital by borrowing $2.7 million and paying that money to PG Intercapital; then on 29 January 1999 Gray discharged the balance of his liability under the indemnity (also by borrowing from the Intercapital Group Ltd). As security for the loans, Gray granted a mortgage over his interest in the shares. Thus from 8 January 1999, Gray was subrogated to the rights of PG Intercapital in respect of the second, third and fourth parcels, including the right to dispose of them. But it was not until 25 February 1999 that Gray lodged a substantial shareholder notice with ASIC.

The present proceeding concerned the consequences of contravention of s 709 of the Law constituted by Terra Industries’ failure to lodge a substantial shareholder notice within two business days of 30 December 1998, being the date on which its shareholding increased beyond 5%, and the failure of Gray to lodge a substantial shareholder notice within two business days of 8 January 1999, the date he acquired the power to dispose of the shares.

ASIC sought an order vesting all four parcels of shares in it. ASIC contended the contraventions of s 709 by Terra Industries and Gray were wilful and serious and as a result of their conduct, the market was uninformed and misinformed, thereby securing financial advantages to Gray.

Gray contended that his contravention of s 709 should be excused under s 743 because it was due to inadvertence, submitting that he did not believe he had acquired a ‘relevant interest’, and the vesting order sought by ASIC was unfairly prejudicial to Gray and therefore could not be made because of s 744(2) of the Corporations Law.

Merkel J found Gray to not be a credible witness and that his omission to lodge a substantial shareholder notice was deliberate as he perceived that it was not to his financial advantage to disclose his interest. Gray was entirely reliant on the market price of the Coms 21 shares to repay his loans from Intercapital Ltd, and disclosure of Terra Industries’ default would have had a depressive effect on the price. Further, Gray’s failure to seek legal advice was deliberate.

Merkel J held that the acquisition of 12.9% of a company’ shares by a new entrant clearly signalled the likelihood of a takeover offer; in those circumstances, public identification of the likely offeror lies at the heart of the rationale for the disclosure of substantial shareholdings under the Law.

As a consequence of the contraventions of s 709 by both Terra Industries and Gray, the market was inadequately informed and misinformed. The purchases by Terra Industries were ‘phantom’ in nature, and it never intended to pay for them unless convenient for it to do so. These facts were concealed from the market.

The issue then was whether an order vesting the shares in ASIC should be granted. Gray contended that the power of a court to grant such an order was subject to the rights of third parties to dispose of the shares. Gray submitted that his right to dispose of the shares had priority under the Law over any competing right of ASIC in reliance on ss 744(9), 601AE and 601AD.

Merkel J rejected this contention, holding that upon a vesting of shares in ASIC under an order, interests in the shares of third parties, to the extent of any inconsistency with ASIC’s interest, cannot prevail over ASIC’s interest; any other contention would render the relevant statutory provisions nugatory. Merkel J held that where a contravention occurs in respect of a substantial shareholding, the shareholding acquired is subject to the provisions of the Law which operate in respect of the contravention. Thus Terra Industries’ shares and the relevant interest subsequently acquired by Gray were subject to the power of the court, inter alia, to make a vesting order or to direct their disposal under s 741.

Merkel J made orders vesting the shares in ASIC for the purpose of their disposition by sale. As regards Terra Industries, depriving it of its disposal rights would prevent it benefiting from its contravention, and from using those rights to influence the market for Coms 21 shares. Gray’s conduct in maintaining an uninformed and misinformed market meant that although the vesting orders would be prejudicial to Gray, the prejudice would not be unfair. Further, the continued significant strategic importance of the shares meant that there remained a real risk that the shares may be used to benefit Terra Industries or the third parties involved in the contraventions if the power of disposition over the shares remained with Gray.

Note: ASIC’s stated intentions regarding disposal of the shares are summarised in section 2(D) of this Bulletin.

(D) DEED OF COMPANY ARRANGEMENT EFFECTIVELY EXECUTED BY THE COMPANY NOTWITHSTANDING INVALID AFFIXING OF THE COMPANY SEAL

MYT Engineering Pty Ltd v Mulcon Pty Ltd [1999] HCA 24, High Court of Australia, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, 13 May 1999

On 28 September 1994, the creditors of the first appellant, MYT Engineering Pty Ltd (MYT) resolved, pursuant to s 439C of the Law, that MYT should execute a deed of company arrangement. Section 444B(2) requires the company to execute the deed of company arrangement within 21 days after the end of the meeting of creditors or such further period as the court allows on an application made within those 21 days.

MYT had only two directors and shareholders, Mr Pullen and Mr Edmonds (the third appellant). On 29 September 1994, Pullen went overseas and left the affairs of MYT in Edmonds’ hands.

On 19 October 1994 (within the 21 day period), a deed of company arrangement was executed, and MYT’s company seal was stamped to the document and its affixing was witnessed by Edmonds who purported to attest to the affixing of the seal both as director and as secretary.

However, MYT’s articles of association required that every document to which the seal was affixed should be signed by a director and countersigned by another director or a secretary. As there was no countersignature, the affixing of the seal to the deed of company arrangement did not accord with the articles.

The respondent, an unsecured creditor, challenged the validity of the deed of company arrangement, seeking a declaration that MYT’s administration had come to an end on 19 October 1994 (the end of the 21 day period), the effect of which was that the company was taken to have passed a special resolution to enter into voluntary liquidation pursuant to s s 446A(2). The respondent was successful at first instance and on appeal before the NSW Court of Appeal.

Before the High Court, the appellants contended that the steps taken did constitute valid execution of the deed of company arrangement by the company.

In a joint judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ held that, read as a whole, Part 5.3A of the Corporations Law, which deals with a company under administration, did not require that a deed of company arrangement be executed as a deed. Section 9 distinguished between a ‘deed’ (which must be executed under seal) and a ‘deed of company arrangement’ and, by contrast with the Bankruptcy Act 1966 (Cth), there was no explicit requirement that the instrument of the deed of company arrangement be executed and delivered as a deed.

Their Honours then examined the effect of s 437C which provides that when a company is under administration, a person cannot perform a function or power as an officer of the company without the administrator’s written approval. At issue was whether execution of the deed was required to be by the administrator acting for the company or by officers of the company with the administrator’s written authority, or by someone appointed under s 444B(3) (ie pursuant to authority conferred by resolution of the board).

Their Honours held that the Law required that ‘the company’ execute the instrument; thus Part 5.3A required a visible expression of the company’s assent to the terms recorded in the instrument. Further, both the administrator and the company were required to execute the deed of company arrangement.

The issue then was whether Edmonds’ act of affixing the company seal and signing in purported attestation constituted execution by or on behalf of the company. Their Honours held that s 182(7) applied. At the time of the events, it read that a ‘document requiring authentication by a company may be authenticated by the signature of an officer of the company and need not be authenticated under the common seal of the company’. The definition of ‘document’ in section 9 encompassed a deed of company arrangement, and so Edmonds’ signature was sufficient to authenticate, in the sense of giving legal validity, the document on behalf of MYT.

Kirby J also allowed the appeal, but for different reasons. Kirby J held that a deed of company arrangement did require formal execution in the form of a deed. It was then a question of whether relief was available under s 445G which empowers a court to declare void or validate a deed of company arrangement. Kirby J held that section 445G(3) was addressed at alleviating the effects of minor slips and mistakes in the execution of deeds of company arrangement and was capable of applying to a case (such as this) where execution of a deed of company arrangement has been attempted but is invalidly effected. His Honour also considered that it was possible for a court under s 445G to provide retrospective relief from what would otherwise be the consequences of the invalid execution of the deed within the 21 day period (that the company would automatically be placed into liquidation). Kirby J therefore considered that the matter would be remitted to the Court of Appeal to decide whether, in the circumstances, the provisions of Pt 5.3A were "substantially complied with" and whether "injustice will result for anyone bound by the deed if the contravention is disregarded". In the light of its decisions on those issues it would then be up to the court to decide whether to declare the deed valid pursuant to s 445G(3) notwithstanding the non-compliance with s 444B(2) of the Law.

(E) IT WAS NEITHER JUST NOR EQUITABLE TO WIND UP THE COMPANY WHERE THE APPLICANT HAD CHOSEN TO ENTER INTO THE CORPORATE STRUCTURE KNOWING HE WOULD FIND IT DIFFICULT TO WORK WITH THE OTHER DIRECTOR

Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd; Guerinoni v Guerinoni Investments Pty Ltd, COR 335 of 1998 and COR 357 of 1998, Supreme Court of Western Australia in Chambers, Sanderson M, 22 April 1999

This proceeding concerned applications for the winding up on the just and equitable ground (s 461(1)(k) of the Law) of two corporations which formed part of a family business.

The two corporations for which the applicant sought winding up were Argyle Concrete and Quarry Supplies Pty Ltd (Argyle) and Guerinoni Investments Pty Ltd (Investments). These two companies were essentially holding companies, passively owning the plant and equipment and property, while a third company, Guerinoni Nominees Pty Ltd (Nominees) operated the trading business. Together, these three companies operated the family business. This corporate structure had been established in 1992.

The applicant, Michael Guerinoni (Michael), was the eldest child of the founder of the family business. Michael and his younger brother, Steven, were directors in each of the three companies as was their father, Charlie. The two brothers, along with their parents and a sister, Lisa, each held shares in Investments and Argyle. Shares in Nominees were held in a family trust controlled by the father, and of which the three children were beneficiaries. Effectively, Steven and Lisa had power to control the business as the father generally acted in accord with Steven’s wishes.

It was common ground that Michael and Steven did not, and never had, got along. Michael contended that the relationship had deteriorated to the point where the only possible option was for the winding up of the companies on the just and equitable ground.

Master Sanderson stated that the starting point for any consideration of when a company will be wound up on the just and equitable ground is Lord Wilberforce’s judgment in Ebrahimi v Westbourne Galleries in which Lord Wilberforce listed some of the factors whose existence would be relevant to the grant of a winding up order such as where an association was formed on the basis of a personal relationship involving mutual confidence, where there was an agreement that the shareholders would participate in the conduct of the business, and where there was a restriction on the transfer of a member’s interest such that the member could not take his or her stake and go elsewhere. However the just and equitable provision did not entitle one party to disregard his or her obligations to the company, though it did entitle a court to subject the exercise of legal rights to equitable considerations.

The applicant submitted that all these factors were present in this case. The respondents contended that there had never been a relationship of mutual confidence between Michael and Steven, that the relationship had always been tense and any deterioration was occasioned by Michael’s actions to try to exclude Steven from the running of the business and in particular in competing against the family business through a company run by Michael and his wife.

The respondents also submitted that the evidence disclosed no basis for the winding up of Investments and Argyle, the passive holders of assets. If anything, the difficulties lay in the running of Nominees. An application by Michael for the winding up of Nominees had been dismissed on the basis that he was not a contributory. The respondents submitted the collateral purpose of the applications was to effectively destroy Nominees and the family business.

Master Sanderson dismissed the applications, holding that the applicant had entered into the corporate structure well knowing that he would find it difficult to work with Steven. Further, the applicant knew the advantages of the corporate structure (taxation advantages and protecting the assets of the family business in the case of family breakdown) and he could not now dismantle it for his convenience. The difficulties of running the family business were largely of the applicant’s own making; he had refused to attend meetings, had consciously excluded Steven from management and had failed to utilise Steven’s professional expertise. Nothing Steven or Lisa had done could be seen as unreasonable in the context of running the family business. Also, Michael had breached his fiduciary duties by competing with the business. Finally Master Sanderson held that the proper approach where there are inter-related companies is to consider what effect the winding up of a particular company will have; the interrelationship of various companies is one factor to be considered. Here, Master Sanderson agreed that the collateral purpose of the applications was to impact severely upon the family business, and any damage to Nominees should be avoided if possible.

(F) PART A STATEMENT NOT DEFICIENT FOR FAILING TO DISCLOSE SPECULATIVE MATERIAL

Cultus Petroleum NL v OMV Australia Pty Ltd, No 2179/99, Supreme Court of NSW, Santow J, 5 May 1999

The plaintiff, Cultus Petroleum NL (Cultus) was the target of a contested takeover. The defendant, OMV Australia Pty Ltd (OMVA), was the cash bidder. Cultus sought to restrain OMVA from distributing the offer contained in its Part A Statement to Cultus’s shareholders, and a declaration that the Part A Statement did not comply with the requirements of cl 17 of section 750 of the Law in that it did not disclose certain information material to the making by an offeree of a decision whether or not to accept the takeover offer. Cultus also sought a declaration that OMVA was in possession of confidential information of Cultus and an order restraining the disclosure of that information, being the same information Cultus contended was required to be disclosed in the Part A Statement.

Cultus also sought a declaration that an agreement made between OMVA and Portfolio Partners was in breach of section 697, which prohibits ‘escalator agreements’, and was thus void. Cultus contended that pursuant to the agreement, OMVA derived a prohibited benefit, the right to be paid an additional amount calculated by reference to the takeover price. Under the agreement, Portfolio Partners was paid $10 by OMVA and agreed to accept OMVA’s subsequent takeover offer, with the right to terminate its pre-acceptance should a higher bid be made.

(1) SECTION 697

OMVA submitted that the only benefit Portfolio Partners derived was the option fee of $10 which was not determined by reference to the amount to be paid under the relevant takeover offer and the ability to terminate its pre-acceptance did not constitute a prohibited benefit.

Santow J agreed with OMVA. The agreement amounted to a conditional agreement to accept the takeover offer when made. The benefits derived by Portfolio Partners derived from accepting the takeover offer; they were not calculated by reference to it, and the benefit derived from the right to terminate pre-acceptance was not a benefit of the kind prohibited by s 697. The benefit was not conferred upon Portfolio Partners, it was simply retained and was inherently speculative in nature, depending on whether a competing offer emerged or not.

(2) THE PART A STATEMENT DISCLOSURE

The disputed information related to a joint venture agreement. The participants in this joint venture included Cultus and Gulf Australia (Cartier) Pty Ltd, a subsidiary of Gulf Australia Resources Ltd (Gulf Australia) which in turn was held by Gulf Canada Resources Ltd (Gulf Canada). Gulf Canada was in the process of selling its interest in Gulf Australia. Gulf Canada prepared an Information Memorandum, which was provided to prospective purchasers upon entering into a confidentiality agreement. On 30 March 1999, OMVA’s parent company, OMV Aktiengesellschaft, entered into a confidentiality agreement with Gulf Canada and was provided with the Information Memorandum. On 8 April 1999, the directors of OMVA convened to consider the Information Memorandum; they concluded that the information was not material and did not require disclosure in its Part A statement.

Cultus contended that the information was material and did require disclosure, and that if it were material and confidential, the offer could not proceed until the information ceased to be confidential or material. Alternatively, if the duty of disclosure prevailed over the duty of confidentiality, or if the information were material but not confidential, the Part A statement should be amended before being sent out.

Santow J examined the principles to be applied in determining whether information is material for the purposes of cl 17 of s 750. Santow J stated that a matter is material if it is necessary to enable an offeree to make an informed assessment of the offer, such as a fact having substantial bearing on the target company’s net worth. The duty is to disclose information, not speculation, and there was a duty not to disclose material which is potentially misleading, such as a prediction which is not properly substantiated. Further, the deficiencies in the Part A Statement should be clear and serious before the court would grant an injunction.

In applying these principles, Santow J accepted OMVA’s assessment of the Information Memorandum as being a marketing document, containing forecasts, potential strategies and other highly speculative projections beyond the knowledge or control of OMVA, Cultus or Gulf. Santow J held that disclosure was not required as inclusion of such speculative material in the Part A Statement was potentially misleading and that OMVA was not in a position to provide additional information which would obviate this potential.

Santow J also stated that had the information been material, its disclosure would have been required despite any obligation of confidentiality; where there is a conflict between cl 17 and a private equitable duty of confidentiality, cl 17 must prevail.

Santow J was highly critical of Cultus, saying that ‘[t]here has developed a pattern in takeover defences in indulging in wasteful and expedient tactical litigation, designed not for the benefit of ensuring that shareholders are properly informed but simply to buy time. To issue proceedings such as this at the last minute casts doubt upon the bona fides of the Plaintiff, an impression reinforced by a number of other grounds raised and subsequently abandoned as to the alleged misleading nature of the Part A Statement. That is not to say that in a proper case where a Part A Statement is misleading the target should not take proper action promptly to restrain the sending out of the offer or at any rate restrain it until appropriate additional material has been included. This was not such a case’.

Santow J ordered the plaintiff to pay the defendant’s costs on an indemnity basis.

5. RECENT ACCOUNTING DEVELOPMENTS

(A) URGENT ISSUES GROUP

The UIG is a committee established by the Australian Society of Certified Practising Accountants (ASCPA), The Institute of Chartered Accountants in Australia (ICAA), the Australian Accounting Standards Board (AASB) and the Public Sector Accounting Standards Board (PSASB). It comprises 16 members who are senior members of the financial reporting community representing the interests of preparers, auditors and users in the private and public sectors, the Australian Securities and Investments Commission (ASIC) Chief Accountant sits on the UIG as an observer. The UIG’S role is to review on a timely basis financial reporting issues that are likely to receive divergent or unacceptable treatment in the absence of authoritative guidance. The objective of the UIG is to reach a Consensus on the appropriate accounting treatment. The UIG cannot reach a Consensus that changes or conflicts with existing Accounting Standards and Statements of Accounting Concepts.

The major items discussed at the UIG meeting on 6 May 1999 are outlined below.

(i) The UIG agreed a Consensus that provisions for major maintenance must not be recognised as a liability, or as accumulated depreciation or as a reduction in the carrying amount of an asset. Provided the Consensus is not vetoed by the AASB and PSASB it will apply to all reporting entities for reporting periods ending on or after 30 June 1999. Initial adjustments necessary to comply with the requirement of the Consensus must be made against opening balances.

(ii) The UIG continued its consideration of a draft Abstract which proposed that "naked" sold options would not qualify for designation as a hedge and that "ratio" or "leverage" options should be considered effective as a hedge only to the extent that the principal amount of the sold option is matched by the principal amount of the bought option.

(iii) The UIG considered a draft Abstract which dealt with a range of issues relating to accounting for bonus shares as defined in the Corporations Law. Those issues encompassed such matters as whether the equity section of the statement of financial position should be increased when shares are issued for no consideration; and whether, for financial reporting purposes, shares issued in lieu of cash dividends and shares issued to employees as compensation for past or expected future services are issued for consideration and, as such, are not bonus shares. Members considered submissions from constituents on the implications of the proposals on accounting for, and the taxation status of, dividend plans and employee share schemes.

Members agreed that the equity of the entity is not increased when shares are issued for no consideration and decided that the issues relating to accounting for dividend reinvestment plans, share election plans and employee share plans should be dealt with as separate issues. Members also agreed that before proceeding with these projects they would first consider a brief paper on whether the issue of shares in lieu of cash dividends or to employees as compensation for past or expected future services is a cost to the company.

(iv) The UIG considered a number of Issue Proposals and added the following projects to its work program:

Condition-Based Depreciation. Members agreed that it was important to identify the key characteristics of condition-based depreciation and to determine whether those characteristics complied with the requirements of Amounting Standards.

Rollover of Foreign Currency and Gold Hedges. Members noted that the principal issue in this proposal related to the designation of a financial instrument as a hedge.

Early Termination of Interest Rate Swaps. Members agreed that the accounting for interest rate swaps should be clarified.

The UIG reviewed the IASC’S Standing Interpretations Committee Interpretation 13 "Jointly Controlled Entities - Non-Monetary Contributions by Venturers" and agreed that Accounting Standards in Australia would require the venturer to recognise the gain or loss on the portion of the asset that was sold or contributed to the joint venture entity.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

J Bird, ‘The Duty of Care and the CLERP Reforms’ (1999) 17 Company and Securities Law Journal 141

As part of its Corporate Law Economic Reform Program (CLERP), the federal government has proposed what appear to be significant amendments to the directors’ duty of care. The Corporate Law Economic Reform Bill 1998 (Cth) amends the statutory formulation of the duty, contains provisions on the scope of permissible delegation and reliance by directors and, most importantly, introduces a statutory business judgment rule into Australian law. This article outlines the current state of the duty of care and examines the effect of the proposed amendments. It is concluded that the amendments may provide some comfort to directors but will have little impact on the development of the law on the duty of care.

R A Zakrzewski, ‘The Law Relating to Single Director and Single Shareholder Companies’ (1999) 17 Company and Securities Law Journal 156

Single director and single shareholder companies are relatively new to Australian corporations law. The provisions by which they were introduced in 1995 brought with them a number of difficulties. These were recently addressed in the Company Law Review Act 1998 (Cth). This article traces the development of the law in relation to such companies and discusses the legal, policy and practical concerns surrounding the creation and operation of such companies.

T Ciro, ‘Gaming Laws and Derivatives’ (1999) 17 Company and Securities Law Journal 171

This article analyses the impact gaming and wagering laws have had in the area of financial derivatives. Gaming statutes have proven to be problematic in both on-exchange and over-the-counter markets. The article examines the historical origins of the legislation both in Australia and the UK. The article is critical of the application of gaming statutes in the area of financial instruments. Indeed, the application of these laws to this area indicates a complete misunderstanding of both the nature and substance of financial markets. The article agrees with the recommendation put forward by the Companies and Securities Advisory Committee for the removal of all gaming laws from over-the-counter markets.

I Ramsay, ‘Note: Can a Majority Shareholder Bring an Oppression Action?’ (1999) 17 Company and Securities Law Journal 187

R Baxt, ‘Note: Cutting Back the Powers of the Australian Securities & Investments Commission - A Warning or an Aberration?’ (1999) 17 Company and Securities Law Journal 189

B Pape, ‘Note: Liquidators and Infant Shareholders’ (1999) 17 Company and Securities Law Journal 192

K Santow, Codification of Directors’ Duties (1999) 73 Australian Law Journal 336

A Finlay, ‘CLERP: Non-Executive Directors’ Duty of Care, Monitoring and the Business Judgment Rule’ (1999) 27 Australian Business Law Review 98

M Whincop, ‘The Political Economy of Corporate Law Reform in Australia’ (1999) 27 Federal Law Review 77

R Grantham, ‘The Doctrinal Basis of the Rights of Company Shareholders’ (1998) 57 Cambridge Law Journal 554

N Calleja, ‘To Delegate or Not to Delegate: Board Committees and Corporate Performance in Australia’s Top 100 Companies’ (1999) 21 Sydney Law Review 5

T Ikeda, ‘Bankruptcy Law in Japan and Its Recent Development’ (1999) (No 46) Osaka University Law Review 9

M Gulati, ‘When Corporate Managers Fear a Good Thing is Coming to an End: The Case of Interim Nondisclosure’ (1999) 46 University of Los Angeles Law Review 675

R Painter, ‘Responding to a False Alarm: Preemption of State Securities Fraud Causes of Action’ (1998) 84 Cornell Law Review 1

J Poole and P Roberts, ‘Shareholder Remedies: Corporate Wrongs and the Derivative Action’ [1999] Journal of Business Law 99

Y Amihud, K Garbade and M Kahan, ‘A New Governance Structure for Corporate Bonds’ (1999) 51 Stanford Law Review 447

L Hamermesh, ‘Corporate Democracy and Stockholder-Adopted By-Laws’ (1998) 73 Tulane Law Review 409

D Chow, ‘Reorganisation and Conversion of a Joint Venture into a Wholly Foreign-Owned Enterprise in the People’s Republic of China’ (1998) 73 Tulane Law Review 619

W White, ‘Taming the Market: The New Russian Securities Law and the Protection of Shareholder Rights’ (1998) 37 Columbia Journal of Transnational Law 125

S Block-Lieb, ‘Permissive Bankruptcy Abstention’ (1998) 76 Washington University Law Quarterly 781

(1998) 13 (No 4) Asia-Pacific Legal Developments Bulletin. Articles include:

- Singapore - Companies to be Allowed to Purchase Their Own Shares

- Taiwan - Enforcement of Foreign Arbitration Awards

- Hong Kong - Takeovers and Mergers Code Revised

M Grub, ‘A Trend Towards More Shareholder Value in Germany: Recent Developments in German Stock Corporation Law’ (1999) 10 International Company and Commercial Law Review 42

P Omar, ‘Alternative Dispute Resolution in French Company Law’ (1999) 10 International Company and Commercial Law Review 75

B Romanek, ‘The SEC’s Year 2000 Campaign’ (1999) 27 International Business Lawyer 129

M Brown, ‘Legal Aspects of Acquiring a Publicly Traded US Company’ (1999) 27 International Business Lawyer 133

T Fisher and J Martel, ‘Should We Abolish Chapter 11 of the Federal Bankruptcy Reform Act? Evidence from Canada’ (1999) 28 Journal of Legal Studies 233

R Karmel, ‘Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor’ (1998) 61 Law and Contemporary Problems 33

M Fox, ‘The Political Economy of Statutory Reach: US Disclosure Rules in a Globalizing Market for Securities’ (1998) 97 Michigan Law Review 696

D Nagy, ‘Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O’Hagan Suggestion’ (1998) 15 Ohio State Law Journal 1223

C Yablon and S Sparling, ‘United States v Adlman: Protection for Corporate Work Product?’ (1998) 64 Brooklyn Law Review 627

(1998) 76 Washington University Law Quarterly 447-682. Special issue on the Implications of the Private Securities Litigation Reform Act. Articles include:

- E Weiss and J Moser, ‘How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates’

- D Branson, ‘Securities Litigation in State Courts - Something Old, Something New, Something Borrowed’

- H Sale, ‘Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-Information Standard on 1933 and 1934 Act Claims’

- W Lerach, ‘The Private Securities Litigation Reform Act of 1995 - Twenty-Seven Months Later’

- R Rosen, ‘The Statutory Safe Harbour for Forward-looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?’

M Berkahn, ‘The Derivative Action in Australia and New Zealand: Will the Statutory Provision Improve Shareholders’ Enforcement Rights?’ (1998) 10 Bond Law Review 74

M Stadler, ‘Treatment of Shareholder Loans to Undercapitalised Corporations in Bankruptcy Proceedings’ (1998) 17 Journal of Law and Commerce 55

P Ireland, ‘Company Law and the Myth of Shareholder Ownership’ (1999) 62 Modern Law Review 32

R Grantham and C Rickett, ‘Directors’ "Tortious" Liability: Contract, Tort or Company Law?’ (1999) 62 Modern Law Review 133

M Gillen and P Potter, ‘The Convergence of Securities Laws and Implications for Developing Securities Markets’ (1998) 24 North Carolina Journal of International Law and Commercial Regulation 83

J Logan, ‘The Troubled State of Chapter 13 Bankruptcy and Proposals for Reform’ (1998) 51 Southern Methodist University Law Review 1569

H Wambach, ‘The Deductibility of Business Expenses Incurred in a Hostile Takeover’ (1998) 51 Southern Methodist University Law Review 1603

A Ahmed, ‘Introducing Asset Securitisation to Indonesia’ (1998) 19 University of Pennsylvania Journal of International Economic Law 823

Corporate Governance: An International Review, Volume 7 No 1, January 1999. Articles include:

- M Latham, ‘The Corporate Monitoring Firm’

- G Maassen and F Van der Bosch, ‘On the Supposed Independence of Two Tier Boards: Formal Structure and Reality in the Netherlands’

- A Zattoni, ‘The Structure of Corporate Groups: The Italian Case’

- H Udueni, ‘Power Dimensions in the Board and Outside Director Independence: Evidence From Large Industrial UK Firms’

Corporate Governance: An International Review, Volume 7 No 2, April 1999. Articles include:

- W Bernhardt, ‘Stock Options For or Against Shareholder Value? New Compensation Plans for Top Management and the Interests of Shareholders’

- G Slinger, ‘Spanning the Gap - The Theoretical Principles that Connect Stakeholder Policies to Business Performance’

- J Weimer and J Pape, ‘A Taxonomy of Systems of Corporate Governance’

- V Dulewicz and P Herbert, ‘The Priorities and Performance of Boards in UK Public Companies’

Organisation for Economic Co-operation and Development, ‘General Principles of Company Law for Transition Economies’ (1999) 24 Journal of Corporation Law 190

R D Ellis, ‘Securitization Vehicles, Fiduciary Duties, and Bondholders’ Rights’ (1999) 24 Journal of Corporation Law 295

T F Blackwell, ‘The Revolution Is Here: The Promise of a Unified Business Entity Code’ (1999) 24 Journal of Corporation Law 333

W E Gibson, ‘Are Swap Agreements Securities or Futures?: The Inadequacies of Applying the Traditional Regulatory Approach to OTC Derivatives Transactions’ (1999) 24 Journal of Corporation Law 379

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