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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) MELBOURNE UNIVERSITY COMMERCIAL LAW PROGRAM

In 2001 ninety subjects will be offered in The University of Melbourne’s Graduate Law Program. In the corporate and securities law area, subjects offered include Corporate Governance and the Duties of Directors, Electronic Commerce Law, Financial Sector Regulation, The International Financial System, Managed Investments Law, Principles of Corporate Insolvency, Regulation of Securities Offerings, Securitisation Law, and the Electronic Corporation.

New degree programs offered in 2001 include the Master of Banking and Financial Services Law, the Master of e-Law, and the Graduate Diploma in e-Business Law.

Teachers in the Program include leading Australian and international academics as well as leading practitioners.

For further information, including a 2001 Handbook, please contact the Graduate Studies Office, Faculty of Law, The University of Melbourne, telephone 61 3 8344 6190, email graduate@law.unimelb.edu.au, Internet "<http://graduate.unimelblaw.com.au>".

(B) REGISTRATION OF COMPANY CHARGES

The Department of Trade and Industry in the United Kingdom has published a consultation document titled "Registration of Company Charges". The paper identifies a number of areas for law reform. The paper is available on the Department’s website at "<http://www.dti.gov.uk/cld/review.htm>".

(C) AUSTRALIA HAS WORLD’S HIGHEST SHARE OWNERSHIP

The Minister for Financial Services & Regulation, the Hon Joe Hockey has announced that Australia has the highest rate of per capita share ownership in the world.

- 54 per cent of Australians own shares either directly or indirectly.

- Total share ownership in Australia has increased from 34 per cent in May 1997 to 53 per cent in November 1999.

Share Ownership (%)

Australia 54
Canada 52
US 48
UK 40
New Zealand 38
Germany 25

These percentages include direct and indirect share ownership.

Source: Australian Stock Exchange, 2000 Australian Share Ownership Study, 28 September 2000.

(D) ASX OWNERSHIP LIMITS FREED UP

On 10 October 2000 the Minister for Financial Services & Regulation, the Hon Joe Hockey, announced plans to free up the ownership limits on the Australian Stock Exchange.

The ASX will now have a 15 per cent ownership limit. Anyone wanting to buy more than 15 per cent will have to apply to the Minister to seek a variation of the limit. A higher limit may be approved if the acquisition is in the national interest.

Currently the ASX has a 5 per cent limit. The new rules apply to market operators and clearing and settlement facilities that are of national significance.

Other measures in the Bill will allow ASIC to apply a ‘fit and proper’ person test to controllers and senior managers of Australian financial markets and clearing facilities. ASIC will have to report at least annually to the Minister on the adequacy of their supervision.

The ownership limits will be similar to ones already applying to deposit-taking institutions under the Financial Sector (Shareholding) Act 1998.

These changes will be included in the Financial Services Reform Bill. The Bill is planned for introduction into Parliament by the end of this year.

(E) FINANCIAL SERVICES REFORM UPDATE
(By Marianne Robinson, Manager, Compliance Solutions, [Phillips Fox](http://www.phillipsfox.com.au))

Since the Minister for Financial Services and Regulation, the Hon Joe Hockey, released the draft Financial Services Reform Bill on 11th February 2000, there has been a growing appreciation of just how far reaching these reforms will be and the implications for distribution of financial products in the future. Certain aspects of the licensing and disclosure reforms will provide an impetus for the use of e-commerce as a preferred distribution channel.

The Bill proposes the introduction of a single licensing and consumer protection regime for financial sales, advice and dealings in financial products. It also introduces a consistent approach to financial product disclosure for retail clients. There will be a shift from a regulatory system based on product to a licensing system based on the activity performed and the level of competency required to perform that activity.

Licensees will either be issuers or distributors and they will be able to provide financial services and products though their representatives. These will be directors, employees or authorised representatives.

(1) Definitions

The provisions of the new Chapter 7 of the Corporations Law centre around two key concepts, carrying on a financial services business and the definition of a financial product.

For the purposes of the new Chapter 7 of the Corporations Law, the general definition of a financial product will mean a facility for:

(a) making a financial investment;

(b) managing a financial risk; or

(c) making non-cash payments.

A financial services business is defined for the purposes of the draft Bill to include businesses which:

- provide financial product advice;

- deal in a financial product;

- make a market for a financial product;

- operate a registered managed investment scheme under Chapter 5C of the Corporations Law ; or

- provide a custodial or deposit service.

(2) Licence requirements

The requirement to have an Australian Financial Services Licence will apply whether or not a person provides financial services to wholesale or retail clients.

To obtain a licence, there will be a need to meet all the obligations of a financial services licensee. These fall into the following broad bands:

- provide services in an efficient, fair and honest way;

- comply with the conditions on the licence;

- monitor and supervise compliance by representatives;

- have sufficient financial, technological and human resources;

- maintain relevant competencies, skills and experience;

- ensure that representatives are trained and competent;

- provide internal and external dispute resolution services;

- have adequate risk management systems;

- comply with the client funds provisions;

- have adequate compensation arrangements for retail clients; and

- assist ASIC as required.

Technology will play an essential role in the ability of organisations to meet their compliance and reporting requirements. It will also be an important component in the delivery of competency-based training programs which will be needed for organisations with large numbers of employees (representatives) and intermediaries (licensee distributors and authorised representatives) and carrying on business in rural and regional areas.

In the lead-up to the introduction of the financial reforms, many insurers are assessing their traditional distribution channels to determine how they will be affected by the reforms. Even at this early stage there is evidence to indicate that there will be innovative strategies introduced into the market by insurers looking for new ways of encouraging licensees to recommend their products. They are also concerned with the issue of how to reduce their compliance and training costs.

The new regulatory framework will apply to the activities of all existing financial services intermediaries including securities advisers, dealers, agents and brokers. Each intermediary will be required to make a decision either to become a licensee or an authorised representative of a licensee. These are the only two options available under the proposed reforms.

Because the insurers (licensee manufacturers) will be responsible and legally accountable for the actions of their appointed authorised representatives, the insurers are also looking at ways ‘to limit their potential liability’. The Internet provides them with an opportunity to control the product advice provided to the customer. A financial product such as travel insurance, which is sold through travel agents, is clearly a product that may move to being sold only through an Internet facility on a non advice or limited advice basis.

(3) Disclosure

The retail disclosure regime will require disclosure of all remuneration, benefits and shareholding arrangements between the intermediary (authorised representative) and the insurer (licensee). The disclosure operates on a cumulative basis so that the person interacting with the customer will have to disclose all the specific relationships in a chain directly back to the insurer. The more layers of relationships, the more complex the disclosure and the more questioning the retail client is likely to become of the level of remuneration received.

In a recent address the Minister said: "I remain committed to introducing a comprehensive commission disclosure regime. Put simply, commission disclosure is all about making transactions transparent and giving consumers enough information to make informed decisions. Of course, some will think always that disclosure has not gone far enough while others argue it has gone way too far. But I think we've got it right by ensuring consumers have before them information that helps them understand any possible bias in the advice and recommendations being made to them".

E-commerce based sales eliminate a number of communication and advice layers between the client and the licensee and so reduces the number of disclosure obligations. The Minister has recognised the role technology will play; " it would position the Australian financial services industry to take advantage of innovation, technological development and the continuing globalisation of the financial services sector".

The disclosure regime under the Bill will require additional disclosure to retail clients when there is a recommendation that the individual should replace one financial product with another. There are requirements to disclose exit and entry fees and any other significant consequences of the client taking the recommended action. In an Internet sales transaction the customer has greater control over the transaction in terms of selection of the choices. The insurer also has greater control over the consistency of the product advice delivered to the customer.

A licensee’s authorised representatives will be responsible for the conduct of the company and its employees. This liability extends to any loss or damage suffered by a client as a result of any conduct of the authorised representative.

Authorised representatives will be required to attend training to acquire the level of knowledge set out in ASIC Interim Policy Statement 146 which deals with competencies. The competencies will be tiered so that the level of education or competency required for a Tier 1 licence will be Diploma of Financial Services or equivalent while a Tier 3 will be limited to competencies in respect of disclosure and a Tier 4 may have "no advice" provisions.

As licensees are legally responsible for their authorised representatives, it is likely that they will impose strict compliance and training requirements. How they monitor the delivery of the services from a compliance perspective is one of the challenges which may have a technology based solution.

The new regime requires disclosure of :

- commission, fee, benefit or advantage that the providing entity (PE) will receive in connection with the advice;

- any other interests, pecuniary or not and direct or indirect of the PE or any associate of the PE;

- any relationships or associations between the PE and the issuers of the financial products.

The wording for the disclosure regime has been made broad with the intention of capturing all forms of benefit or association.

If the adviser provides personal advice to a retail client, then the new disclosure regime will also require the consumer to be provided with a written Statement of Advice that provides the basis for the adviser’s recommendations of a specific product. The adviser will be required by law to have a reasonable basis for the advice provided. The advice must also be based on the consideration of client’s objectives, financial situation and needs. The licensees are already considering how best to use technology to ensure consistency and accuracy in the delivery of all the compliance documents including the Statement of Advice.

Treasury is currently completing the fine-tuning of the Bill. In the interim, ASIC is involved in extensive industry consultation to identify the areas where policy statements need to be developed or existing ones amended.

There is no doubt that the reforms will have a significant impact on the way the financial services industry operates and that there will be increasing reliance on technology as a means of controlling compliance risk and in the delivery of compliance training.

(F) REPORT INTO EMPLOYEE SHARE OWNERSHIP IN AUSTRALIAN ENTERPRISES

In September 2000 the House of Representatives Standing Committee on Employment, Education and Workplace Relations released a Report on share ownership in Australian enterprises. The following is an extract from the Executive Summary of that Report.

(1) Overview

The Report has two aims:

- to foster the spread of employee share plans amongst general employees, for all employees in the small, medium and unlisted sector, and in enterprises in the sunrise industries, especially the biotechnology, high technology and IT sectors; and

- to curtail the inappropriate use of employee share plans for aggressive tax planning.

These aims are complementary, in that together they deliver to the community substantial benefits. Specifically, the benefits are to:

- better align the interests of general employees and employers, leading to more productive enterprises;

- increase national savings, translating to improved individual provision for retirement planning;

- facilitate the development of the small, medium and unlisted sector, and enterprises in the sunrise industries, especially the biotechnology, high technology and IT sectors; and

- facilitate employee buyouts and succession planning in small business.

(2) ESOPs: nature and rationale

It emerged in the course of the inquiry that very little is known about the nature, size and extent of employee share plans. The reason is that information is not systematically collected by any single department or agency of the Executive Government. The Committee made a number of recommendations designed to remedy this.

The rationale for employee share plans was not uniform between the public and private sector. The Committee examined this issue and determined that from a public policy perspective the rationale that had formed the basis of public policy (improving enterprise performance by better aligning employee and employer interests) should be expanded to include promoting national savings especially for retirement purposes. As a result, the Committee recommends that employee share plans should not be considered as alternatives to compulsory superannuation and that a study of retirement planning options should be undertaken.

(3) Aligning interests: employee share plans and public policy

The development of employee share plans will occur only within an appropriate public policy environment that not only promotes plans but also strengthens the integrity of the tax base. Among the most significant recommendations are those which:

(a) advocate the enactment of a single piece of legislation, drawing together in the one piece of legislation the various laws that apply to employee share plans while clearly specifying parliamentary intent; and

(b) advocate the creation of an employee share plan regulatory agency.

The Committee was concerned that policy in one area did not undermine the effectiveness of that in others. For this reason, a number of other measures are recommended that will foster the development of employee share plans, including:

(a) clarifying their status within the Workplace Relations Act 1996;

(b) providing for qualifying plans clearly guaranteeing freedom of choice for employees in respect of employee share plan participation; and

(c) proscribing the unilateral employer-directed trading of employee share plan participation for salary reductions or future salary increases.

(4) Administration and taxation arrangements

The Committee received a considerable amount of evidence concerning the present arrangements for the taxation treatment of employee share plans. The major difficulties in this area were anomalous treatment, unclear and unsympathetic legislation. The recommendations address those matters that most impede the development of employee share plans. Among these recommendations are:

(a) that explicit and clear taxation policies be developed and existing legislation clarified;

(b) that existing arrangements for the taxation of equities acquired under a tax deferred scheme be modified to allow the income portion of a discounted equity to be taxed as income and the capital gain portion to be taxed as a capital gain;

(c) the removal of disincentives in the current arrangements;

(d) relaxation, on certain conditions, of various conditions within the existing legislation. These include the cessation rules, an increase in the amount exempt from income tax in Division 13A plans, the limit on the number of equities that a single employee may hold, and the use of equities other than ordinary shares; and

(e) the waiving of the restriction on the sale of employee share plan equities in cases of genuine hardship, the waiving of tax grouping rules, under certain circumstances, and the elimination of double taxation on equities acquired under an employee share plan by a resident of the Commonwealth while abroad.

(5) Further initiatives to facilitate the growth of employee share plans

Taxation was not the only area that needed to be addressed if the goal was to be attained of increasing the number of employee share plans, their value and the number of general employees participating in them. Disincentives in the Corporations Law also had to be addressed, in particular the prospectus conditions.

It also came to the attention of the Committee that there is a case for disclosing the value and extent of employee share plans in annual reports. The Committee recommends that enterprises operating plans should be required to disclose fully the extent, nature and value of employee share plans, how they are operated, and that this information be readily available. This represents a simple fact: markets operate more efficiently and effectively if investors know the complete financial position of the enterprises in which they invest.

Apart from modifying existing arrangements so as to facilitate employee share plans, the Committee considered it important to identify various potential innovations that could promote still further the spread of plans.

A full copy of the report is available at:

"<http://www.aph.gov.au/house/committee/eewr/ESO/report/index.htm#index>".

(G) CORPORATE LIABILITY FOR INDUSTRIAL MANSLAUGHTER: LAW REFORM

The following is a summary of paper given by Ross Ray QC to the Australian Institute of Company Directors Corporations Law Committee on 5 October 2000

There has been some publicity regarding changes in this area in Australia. The traditional way in which the law dealt with the individual in this area was to prove gross criminal negligence.

(1) Basis of corporate liability for manslaughter – The Tesco principle and its development

The legal position in Australia is that the law does not recognise vicarious liability for criminal acts. English law developed what is called the ‘identification’ theory of corporate liability. Pursuant to this theory, the court seeks a natural person ‘who is… the directing mind and will’ of the corporation. This theory was adopted in the Tesco Supermarkets case in the United Kingdom. The concept of ‘directing mind or will’ has been approved in Australia and adopted in a number of cases.

There are obvious difficulties in establishing that a person or persons making up the ‘directing mind or will’ of the company have the necessary mens rea so as to give rise to a manslaughter conviction. Effectively, top-level decision-makers must be shown to be directly responsible for the harm. Further, these top decision-makers cannot be found to be criminally liable for actions of lower level employees who are not part of the directing mind of the company. The question being how does one attribute intent and conduct to a company?

There have been four companies in Victoria charged with manslaughter, the first being Civil & Civic in 1989 (this prosecution was withdrawn). The first contested manslaughter case was a prosecution of a Petrochemical company (Hatrick Chemicals) The Victorian Workcover authority has been very proactive in this area.

The Tesco principle disadvantages small companies in that it is much harder with a large company to demonstrate that a person who caused the death was acting as the ‘directing mind and will’ of the company.

(2) Recent legislation: The Commonwealth Criminal Code Act and the proposed Victorian Industrial Manslaughter Bill

There have been two recent legislative developments: the Commonwealth Criminal Code Act 1995 and the proposed Victorian Industrial Manslaughter Bill.

The Commonwealth Act states that the law applies to bodies corporate in the same way as it applies to individuals with any necessary modifications. Physical elements of offences committed by employees, agents or officers of a body corporate within the actual or apparent scope of their employment or within their actual or apparent authority must also be attributed to the body corporate. ‘Intention’, ‘knowledge’ and ‘recklessness’ must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

Such authorisation or permission may be established in a number of ways, including proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence. Alternatively it can be established by proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.

Where negligence is an element of the offence, the Act allows for the aggregation of the conduct of any number of the corporation’s employees, agents or officers to amount to negligence.

The Victorian Government’s Preliminary Discussion Paper states that the Victorian Government proposes three new offences be inserted in the Victorian Crimes Act:

- corporate manslaughter by gross negligence;

- corporate liability for negligently causing serious injury; and

- offences for senior officers (eg directors, secretaries and executive officers).

In determining a corporation’s liability, key issues to consider will be whether:

- the corporation’s conduct caused the death or serious injury;

- the corporation owed a duty of care to the deceased or injured person; and

- the corporation breached the standard of care owed to the deceased or injured person.

(3) Liability of directors and officers of the company

The conduct of all employees, agents and officers acting within the actual or apparent scope of their employment or authority will be attributed to the corporation. Their conduct will be treated as the corporation’s conduct. ‘Agents’ will include independent contractors and their employees where the corporation retains the power to control the activities of the independent contractor.

The relevant conduct of one, some or all of the corporation’s employees, agents and officers acting within the actual or apparent scope of their employment or authority may be aggregated to determine if the corporation has breached the standard of care.

One area of difficulty is the new proposed offence of manslaughter in the case of a director or senior officer of a corporation in circumstances where currently there is no such offence. This new offence creates personal liability on a basis that is unknown to the law in the area of accessory liability.

There is also a proposal to amend the Victorian Occupational Health and Safety Act in ways which may make it easier to secure convictions against company officers and there are changes to the penalties under that Act (including the introduction of custodial sentences).

The proposed Victorian Industrial Manslaughter Bill is framed in accordance with the existing provisions of the criminal law in relation to corporations except for the introduction of aggregation. However it moves away from traditional criminal law principles in the way it deals with individuals. The important message to convey about the proposals is that they do not just attack the person at the top of the corporate tree but also the middle manager.

The Victorian proposals have now been released as a draft Bill and are available at: "<http://www.vic.gov.au/treasury/statutory.html#workcover>" or "<http://www.justice.vic.gov.au>".

The Queensland government is also looking at introducing an offence of industrial manslaughter into its Crimes Act and has released a Discussion Paper.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC SUMMER SCHOOL - 2001

18-23 February 2001
Melbourne Business School
The University of Melbourne

The 2001 ASIC Summer School theme will focus on retail financial product distribution and the challenges for financial services firms, consumers and regulators in the 21st century. Keynote overseas speakers include:

Ms Deirdre Hutton, CBE, Vice-Chairman, National Consumer Council, United Kingdom and non-executive director of the Financial Services Authority;

Dr Gunther Sattelhak, Senior Lawyer, Deutsche Bank Head Office, Legal Department, Frankfurt.

The ASIC Summer School is supported by the Centre for Corporate Law and Securities Regulation at The University of Melbourne.

The number of participants at the 2001 ASIC Summer School is strictly limited. Applications close on 15 December 2000.

If you would like to receive information, a registration form and draft program, please contact:

Wendy Weymouth
2001 ASIC Summer School Project Team
Tel: +61 3 9280 3379
Fax +61 3 9280 3306
Email: wendy.weymouth@asic.gov.au

(B) ASIC ACTS ON RELATED PARTY UNDERWRITING

On 23 October 2000 ASIC issued a warning to listed companies that wish to enter into underwriting arrangements with their directors or controlling shareholders. ASIC considers that, if shareholder approval is not first obtained, this can give rise to a related party benefit in contravention of the Corporations Law.

ASIC referred to the Institute of Drug Technology Australia Limited (IDTA) which has just withdrawn the underwriting by its directors of a rights issue offered under its prospectus. IDTA specialises in the area of development and production of anticancer drugs. IDTA is offering a one for 40 non-renounceable rights issue at a price of $2 per share, with an additional bonus share for each share subscribed.

The prospectus for the issue stated that:

- the directors of IDTA were underwriting the issue; and

- the entitlements of shareholders resident outside Australia will be allowed to lapse and the shares will revert to the directors as underwriters.

ASIC was concerned that shareholders had not been asked to approve the underwriting arrangements. These arrangements gave IDTA's directors a financial benefit. The rights issue exercise price of $2 for two shares compares favourably with IDTA's share price, which has been above $3 since July this year.

While IDTA was of the view that its directors in their capacity as underwriters would probably only acquire around 10,000 shares, following discussions with ASIC, IDTA decided to underwrite the issue by an independent party rather than the directors.

IDTA has a lodged a supplementary prospectus detailing the changes to the underwriting arrangements.

For further information contact:

Debra Russell
Director - Commercial Operations
ASIC
Tel: (03) 9280 3242
Mobile:0412 806 976

(C) ASIC TO ALLOW FULLY ELECTRONIC DISTRIBUTION OF LIFE AND SUPERANNUATION PRODUCTS

On 5 October 2000 ASIC released a policy proposal paper (PPP) seeking public comment on proposals to remove barriers to fully electronic distribution of life insurance and superannuation products.

ASIC proposes to allow life companies and superannuation trustees to receive and process applications electronically. They can already use electronic disclosure documents, but in many cases existing rules mean they can only accept paper-based applications. The proposals are also designed to remove uncertainties about whether a fully electronic application process complies with regulatory rules.

ASIC's proposals are in line with the approach it has already taken to electronic applications for securities such as shares and debentures.

In framing its proposals, ASIC has been careful to make sure consumers who apply for life insurance and superannuation products electronically have full access to disclosure documents, and are fully alerted to their rights and obligations.

The PPP seeks public comments on three sets of issues:

(1) the direct distribution of life insurance and superannuation products using electronic applications;

(2) electronic distribution where agents and brokers are involved; and

(3) mixed-media distribution.

The PPP is available from the ASIC website at "<http://www.asic.gov.au>" and from the ASIC Infoline on 1300 300 630.

Public comments on the proposals should be sent to ASIC by 16 November 2000.

Comments should be sent to:

Angela Longo, Project Team, Regulatory Policy Branch
ASIC National Office Melbourne
Fax: (03) 9280 3339
email: angela.longo@asic.gov.au

3. RECENT TAKEOVERS PANEL MATTERS

(A) APPLICATION IN RELATION TO TAIPAN RESOURCES NL

On 12 October 2000 the Takeovers Panel announced that it had decided not to make an interim order that the meeting of the shareholders of Taipan Resources NL be adjourned. The meeting of Taipan concerned a proposed merger between Taipan and St Barbara Mines Limited by way of scheme of arrangement. The Panel’s decision was made in response to an application by Troy Resources NL received on 11 October 2000 for an interim order under section 657E of the Corporations Law that the meeting be adjourned. Troy had announced that it proposes to make a takeover bid for Taipan.

Troy alleged in its application that Taipan’s directors had misled Taipan shareholders by:

(1) suggesting in a letter to its members on 5 October 2000 that Troy might waive a condition that Troy’s proposed bid will not be made if the merger with St Barbara is approved;

(2) failing to properly disclose in the notice for the meeting the impact of a legal claim by Westgold Resources NL against St Barbara on the accounts of St Barbara; and

(3) making statements in a chairman’s letter which contradict statements by the independent experts in the Information Memorandum concerning the forecast gold production of St Barbara.

The Panel decided that the balance of convenience favoured the meeting going ahead because of the prejudice which may be caused by a further delay. While the Panel was concerned that the application raised serious issues in relation to some of the information given to Taipan shareholders, the Panel was not satisfied that this was an appropriate case for the grant of an interim order. The Panel concluded that there was now sufficient information available to shareholders to alert a typical shareholder to the issues in contention.

The Panel also considered the decision of Justice Scott of the Supreme Court of Western Australia in the application by Robert Catto and Batoka Pty Ltd for an injunction to stop the meeting from proceeding in which the Court also considered two of the issues raised by Troy’s application to the Panel. The Court held that the balance of convenience in relation to those issues did not favour adjourning the meeting. The Panel agreed with this conclusion.

However, the Panel said that shareholders at the meeting should be properly appraised of the issues raised in the application and that the issues should be handled in an objective and balanced manner. The Panel noted that the decision not to grant the interim order would not prevent the business at the meeting from coming under subsequent scrutiny.

The sitting Panel was constituted by Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/october/taipan.html>".

(B) APPLICATION IN RELATION TO ST BARBARA MINES LIMITED

On 11 October 2000 theTakeovers Panel announced that it had decided not to conduct proceedings in relation to the application it received on 27 September 2000 from shareholders of St Barbara Mines Ltd for a declaration of unacceptable circumstances in relation to the proposed merger of St Barbara and Taipan Resources NL which was announced on 13 June 2000.

The merger was proposed to be implemented under a scheme of arrangement where St Barbara shareholders and optionholders would receive shares and options in Taipan.

A scheme of arrangement is overseen and approved by the relevant Supreme Court. The court has wide powers to ensure the interests of shareholders are safeguarded and, like the Panel, is not confined to black letter law considerations in deciding whether or not to confirm a scheme of arrangement. The Panel considered that the matters raised in this application can quite properly be dealt with by the applicants as part of the scheme approval process. It also considered that it would not be in the public interest for two proceedings to be considering the same transaction and issues simultaneously. Accordingly the Panel decided not to conduct proceedings.

The applicants also sought interim and final orders in relation to the proposed merger and the shareholdings of Strata Mining Corporation NL and Larue Investments Inc. They also sought declarations from the Panel that various statements contained in the Explanatory Statement were misleading. These issues may also properly be dealt with by the Court.

The President of the Panel, Mr Simon McKeon, said that the Panel would generally be reluctant to initiate proceedings where a Court had already commenced its scrutiny of a scheme of arrangement. However, if there were issues which the Court considered should be examined by the Panel, the Panel was quite prepared to consider those issues in any application that was made to supplement the Court’s proceedings.

The sitting Panel was Mr Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Mr Denis Byrne.

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/october/st_barbara.html>".

(C) APPLICATION IN RELATION TO ASHTON MINING

On 3 October 2000 the Takeovers Panel announced that it would not make a declaration of unacceptable circumstances in relation to the affairs of Ashton Mining Limited in response to an application made by De Beers Australia Holdings Pty Ltd on Friday 29 September.

The Panel also declined to make any interim order under section 657E of the Corporations Law restraining Rio Tinto from dispatching its bidder’s statement to Ashton shareholders.

The Panel’s decision followed an undertaking by Rio Tinto to issue, within a week, a supplementary bidder’s statement making one change to its current bidder’s statement.

The change is the deletion of a reference in the bidder’s statement to the Western Australian Department of Resources Development agreeing with Rio Tinto’s view on an aspect of the process for gaining approval of modified marketing arrangements for Argyle diamonds. Rio Tinto had not stated in its bidder’s statement that it made the reference with the consent of the Department of Resources Development.

The Panel did not agree with any other concerns raised by De Beers in relation to Rio Tinto’s bidder’s statement.

The sitting panel was Mr Brett Heading (sitting President), Mr Denis Byrne (sitting Deputy President) and Ms Karen Wood.

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/october/ashton.html>".

(D) APPLICATION IN RELATION TO ADVANCE PROPERTY FUND

On 28 September 2000 the Takeovers Panel announced that it had decided not to make a declaration of unacceptable circumstances in relation to the affairs of Advance Property Fund (Advance). This follows an application by Mirvac Funds Limited (Mirvac) on 18 September 2000 for such a declaration.

The sitting Panel was Professor Ian Ramsay (sitting President), Alice McCleary (Sitting Deputy President) and Jennifer Seabrook.

Mirvac applied for declarations that unacceptable circumstances existed in relation to the affairs of Advance and for orders to remedy those unacceptable circumstances.

The events to which the application related were an on-market purchase of units in Advance (the "bookbuild") by St George Bank Limited ("St George") on 26 June 2000 and entry into two agreements between St George and Stockland Property Management Limited ("Stockland") on 1 September 2000. St George is the holding company of the responsible entity of Advance. Stockland and Mirvac are rival bidders for Advance.

Mirvac submitted that other unitholders in Advance did not have the same opportunities to benefit from Stockland’s and Mirvac’s bids for Advance as did St George, because St George was aware that Mirvac would bid for Advance at the time of the bookbuild and because St George stood to benefit under the agreements with Stockland.

The Panel examined the background of the transactions and the content of the agreements, with the assistance of detailed submissions from the parties. It is satisfied they did not give rise to unacceptable circumstances. St George did not have enough information about Mirvac’s intentions to justify the Panel in linking the bookbuild with Mirvac’s bid. The agreements between St George and Stockland do not give St George a premium for agreeing to accept Stockland’s bid.

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/october/mirvac.html>".

(E) APPLICATION IN RELATION TO BRICKWORKS

On 28 September 2000 the Takeovers Panel announced that it had decided not to make a declaration of unacceptable circumstances or remedial orders in relation to the bid by GPG (No 4) Pty Ltd ("GPG") for Brickworks Limited ("Brickworks"), on the application of Brickworks.

The sitting Panel was Les Taylor (sitting President), Marian Micalizzi (sitting Deputy President) and Louise McBride.

Under the bid GPG offered a combination of cash and shares in Washington H Soul Pattinson & Company Limited ("Soul Pattinson"), with which Brickworks has extensive cross-shareholdings. GPG proposed to purchase the necessary Soul Pattinson shares from Brickworks at the close of the bid.

The Panel’s decision reflected the fact that GPG’s bid failed, for reasons unrelated to the issues raised by the application, and the lateness of the application.

Several issues of concern were, however, raised by the Panel’s consideration of the application, including GPG’s failure to:

(a) offer to provide offerees with copies of releases by Soul Pattinson to the market since the issue of its annual report, including the half-yearly report at 31 December 1999, as well as the annual report for 1998-1999;

(b) discuss the effect on Soul Pattinson of disposing of its holding in Brickworks;

(c) discuss the overall tax implications of the bid, so as to enable offerees to obtain meaningful advice about its effect on them;

(d) disclose the source of funding to purchase the Soul Pattinson shares it offered as part of the consideration; and

(e) procure a meeting of Guinness Peat Group plc to be convened to approve the bid.

If the bid is renewed, without these matters being attended to, the Panel would be minded to order GPG to attend to them.

Similarly, if the bid were to be renewed, the Panel would expect Brickworks target’s statement to contain sufficient information to enable shareholders to be in a reasonable position to make an informed decision.

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/october/brickworks_no2.html>".

4. RECENT CORPORATE LAW DECISIONS

(A) REMOVAL OF RESPONSIBLE ENTITY OF MANAGED INVESTMENT SCHEME
(By By James Paterson, [Phillips Fox](http://www.phillipsfox.com.au))

MTM Funds Management v Cavalane [2000] NSWSC 922, Supreme Court of New South Wales, Austin J, 22 September 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/september/2000nswsc922.html>"

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

This matter concerned an application for judicial advice by the responsible entity, MTM Funds Management Limited ("the plaintiff") of a listed registered managed investment trust, MTM Office Trust ("the Trust").

Cavalane Holdings Pty Ltd ("Cavalane"), a unit holder in the Trust (which represented approximately 23.26% of the total units in the Trust) opposed this application and was joined as a defendant.

The constitution of the Trust permitted the Unit Holders of the Trust to remove the Manager by ordinary resolution (clause 24.1(g)).

The removal of responsible entities is addressed in section 601 FM(1) of the Corporations Law, which states that:

"If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members’ meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. The resolutions must be extraordinary if the scheme is not listed."

On 16 August 2000 the plaintiff received documents from Cavalane which requested the plaintiff convene a meeting of members of the Trust to consider resolutions to remove the plaintiff as the responsible entity of the Trust and to appoint James Fielding Investments Ltd ("JFI") as the new responsible entity. Cavalane also provided a draft notice of meeting ("the Draft Notice") which they requested be used as the basis of the notice of meeting to the members.

Although the request from Cavalane referred to "resolutions" without any further specification, the draft notice provided by Cavalane specified that both the resolution for removal of the plaintiff and the resolution for the appointment of JFI were to be ordinary resolutions. When all the documents were read together, Justice Austin stated that it was plain that Cavalane’s intention was that the resolutions be put to the members of the Trust as ordinary resolutions.

On 6 September 2000 the plaintiff convened a meeting of members of the Trust to consider resolutions to remove it and appoint JFI as responsible entity. However, contrary to Cavalane’s intention, this notice put the resolutions as special resolutions.

The plaintiff sought the opinion of the Court as to whether it would be justified as the responsible entity to put the resolutions to the unit holders of the Trust as special resolutions. The plaintiff sought this relief under section 63 of the Trustee Act 1925 (NSW) ("the Act").

Justice Austin determined that the question of whether a responsible entity should give notice that the resolutions are to be put as special or ordinary resolutions was a question that arose in the management or administration of the affairs of the managed investment scheme. Further, since the scheme property was held in trust for scheme members, the question also arose in the management or administration of the trust property of the scheme. Therefore, His Honour determined that the questions raised by the plaintiff fell within section 63(1) of the Act.

Justice Austin stated that judicial advice is generally an inappropriate mechanism for determining substantive rights in a contested proceeding, especially where there is a basic controversy between trustees (see Harrison v Mills [1976] 1 NSWLR 42). However, the Court nevertheless had a discretion which would permit it to entertain an application for judicial advice even in controversial circumstances (see Re GB Nathan & Co Pty Ltd ((1991) ACSR 73). Therefore, his Honour determined that where, as in this matter, the contention is confined to an issue of law and there are no disputed questions of fact, it was open to the Court to conclude that judicial advice is appropriate.

Justice Austin was mindful that a decision to provide judicial advice might affect the rights of third parties, as the voting rights of members of the scheme under provisions of the Corporations Law and the scheme’s constitution were affected. However, his Honour determined that the absence of representation of an affected party was not a jurisdictional bar, and therefore determined that this was an appropriate case for him to give judicial advice under section 63 of the Act. Justice Austin then made the following determinations:

(1) Is Division 2 of Part 5C.2 an exclusive code for changing the responsible entity?

The first issue for determination was whether section 601FJ(2) meant that Division 2 of Part 5C.2 was an exclusive code for changes of the responsible entity of the scheme, or merely prescribed some requirements without purporting to be comprehensive. Section 601FJ(2) states: "A purported change of the scheme’s responsible entity is ineffective unless it is in accordance with this Division (Division 2)". His Honour found that Division 2 of Part 5C.2 did not necessarily extinguish a constitutional right of removal and replacement of responsible entity. Therefore, it had the effect of preventing any constitutional provision for removal of a responsible entity of a registered scheme from having any operative effect.

As a result the unit holders of the Trust were entitled notwithstanding Division 2 of Part 5C.2 to exercise their contractual rights under the constitution of the Trust to remove the responsible entity by ordinary resolution and to requisition a meeting for the purpose, if those rights exist as a matter of interpretation of the constitution.

Justice Austin stated that:

(a) In accordance with the decision of Walker v Wilson ((1991) 172 CLR 195) the words "in accordance with" do not necessarily impose an exclusive code.

(b) As section 601 FM(1) uses the word "may", in the absence of any contrary legislative intention the word "may" is to be read as conferring a discretion.

(c) As section 601 FM(2) applied whenever "the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity", he saw no good reason to limit those words to a vote at a meeting requisitioned under section 252B.

(d) He saw nothing in Division 2 of Part 5C.2 that would entitle him to conclude that the provisions of the constitution which give the members the right to remove and replace the responsible entity are wholly displaced by Division 2 of Part 5C.2.

(2) Is an ordinary resolution sufficient, where members requisition a meeting for removal and replacement of a responsible entity under the Corporations Law?

Cavalane submitted that the power conferred by section 601FM(1) to remove and replace a responsible entity is a power to do so by ordinary resolution. They argued that the subject of removal and replacement of the responsible entity was dealt with by section 601FM(1) and the subject of requisitioning a meeting to deal with any proposal was dealt with by section 252B. Cavalane submitted that the plaintiff had, by concluding that section 252B limits the resolution referred to in section 601FM to a special or extraordinary resolution allowed the "tail to wag the dog". His Honour agreed with this contention. Further, Justice Austin mentioned that the word "resolution" is commonly used in the Corporations Law to refer to an ordinary resolution, as opposed to an extraordinary or special resolution.

(3) Are the constitutional rights of removal and replacement extinguished by the Corporations Law?

Clause 41.1 of the Constitution of the Trust stated that "a provision of this Deed which is inconsistent with a provision of the Corporations Law does not operate to the extent of the inconsistency."

His Honour determined that a constitutional provision which required a higher voting threshold would be inconsistent with section 601FM(1) for the purposes of clause 41.1, and not in accordance with it or the purposes of section 601FJ(2).

His Honour concluded that the plaintiff was wrong to respond to Cavalane’s request by giving notice that the resolutions to remove it and appoint JFI would be moved as special resolutions. This is because nothing in the Corporations Law excluded Cavalane’s constitutional right to seek the removal and replacement of the responsible entity by ordinary resolution, and because of the existence of the statutory right of removal and replacement in section 601FM(1), which even when read with section 252B, requires only an ordinary resolution.

(B) ACCESS BY MEDIA TO PLEADINGS IN CORPORATE LITIGATION
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com.au))

eisa Limited v Damien Brady [2000] NSWSC 929, Supreme Court of New South Wales, Santow J, 28 September 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/september/2000nswsc929.html>"

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

An application was made by the Australian Financial Review (‘AFR’), pursuant to Pt 65 r7 of the Supreme Court Rules and Practice Note 97, for access to the pleadings filed by the plaintiff and defendant in this proceeding. The proceedings themselves commenced with an ex parte interlocutory application by the corporate plaintiff, eisa Limited, for mareva orders against the defendant, Damien Brady. On 3 August 2000 Justice Santow delivered a judgement in which mareva orders were granted. On 28 September 2000 consent orders were made whereby the mareva injunctions were dissolved. They were replaced by undertakings between the parties in order to provide appropriate safeguards in relation to the defendant’s assets. No final hearing of the proceedings had taken place at the time of the AFR application.

The Supreme Court Rules provide that a person ‘may not search in the Registry for or inspect any document or thing in any proceedings except with the leave of the Court’: Pt 65 r7. The discretionary basis upon which that leave is granted or withheld has been stated in Practice Note No 97, dated 9 March 1998. The Practice Note states that ‘if access to material is given prior to the conclusion of the proceedings to which it relates, material that is ultimately not read in open court or admitted into evidence would be seen. Thus, access will not normally be allowed prior to the conclusion of the proceedings’. Justice Santow stated that the Practice Note reflects the underlying principles and the distinctions made in case law which has developed over the last 10 to 12 years in both Australia and the UK. His Honour added that it ‘is by recourse to those underlying principles that the Practice Note provides guidance though without preordaining the outcome’.

The AFR sought access to the pleadings on the grounds that it was in the public interest for the financial press to publish fair and accurate reports about legal actions involving eisa Limited. The AFR argued that the public interest grounds were strong because eisa Limited was in the process of being purchased by a publicly listed company, Austar Limited. In considering the application, His Honour stated that there is tension between the media’s desire to have access to documents which help explain what may otherwise be uninformative in court proceedings and the concern of parties and witnesses that such access not occur at a premature stage so as to put at risk a fair trial or be unfairly prejudicial in that context. However, Justice Santow stated that access to pleadings should be allowed to the media where the media can show that the public interest in proper reporting of court proceedings requires access and that access would not be such as to jeopardise a fair trial or give rise to unfair prejudice to a party in that context. His Honour stated that the following factors are relevant in assessing an application by the media for access to pleadings:

- the nature of the proceedings (ie civil or criminal);

- the stage reached in the proceedings;

- the state of the evidence;

- the nature and seriousness of the allegations pleaded;

- whether the pleadings are sworn;

- the likelihood of the pleadings changing;

- the relationship of the pleadings to admitted evidence or evidence yet to be admitted;

- the extent to which the pleadings have been read or outlined in open court or otherwise described in a judgment in the public domain;

- whether the proceedings are comprehensible without the pleadings; and

- unfair prejudice to either party or a witness in the overall context.

In applying these factors to the case at hand, Justice Santow held that fairness to the parties and the interests of justice dictated that, at that premature stage, access to the pleadings be denied to the AFR. His Honour stated that the public interest, if any, in the reporting of the prospective purchase of eisa Limited by Austar Limited did not outweigh the unfair prejudice to the parties. The prejudice was said to lie ‘in the prematurity of release, when the pleadings have not been tested in any court proceedings beyond the limited purpose of interlocutory relief and then only on an ex parte basis with final determination on the merits still awaited’.

It was also of importance to Justice Santow that allegations of a very serious nature (breach of director’s duties) had been made and were vigorously opposed. His Honour noted that even if that fact of opposition was scrupulously reported, it by no means follows that all of the allegations in the statement of claim would be pressed in a final proceeding. Further consideration of matters in discovery or at the hearing may lead to a different view of the proceedings. This may affect not only their eventual shape in terms of what is pressed and what is defended, but also indeed whether the matter is earlier settled.

Justice Santow also placed some significance on the fact all parties were opposed to granting the AFR access to the pleadings prematurely, and that there was already in the public domain a broad summary of the allegations and the quantum involved. While industrial action prevented a transcript from being taken at the ex parte interlocutory application, the judgment delivered on 3 August 2000 enabled reporting of those proceedings on a reasonably informed basis.

(C) MARKET RIGGING
(By Kristy Duane, [Clayton Utz](http://www.claytonutz.com.au))

Donald v Australian Securities Investment and Commission [2000] FCA 1142, Federal Court of Australia, Heerey J, 10 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/october/2000fca1142.html>"

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

Donald was a representative of a securities dealer. He received instructions from a client to buy up to 500,000 shares at market price. The client already had a large holding in the relevant company.

Donald decided that the shares were undervalued, and so used the trade to, in his own words, give the shares "a bit of a nudge upwards". He placed a bid at 95 cents, when the current range was 86-89 cents.

ASIC concluded that Donald had breached section 998(1) of the Corporations Law concerning market rigging, and pursuant to section 829(d) banned him from acting as a representative of a securities dealer for 4 years. On review the Administrative Appeals Tribunal ("AAT") upheld the banning order but reduced the period to 2 years.

Donald appealed to the Federal Court on a number of grounds.

The first issue considered by the Court was whether contravention of section 998(1) requires mens rea. The relevant components of section 998(1) alleged were "doing anything that is likely to create...a false or misleading appearance with respect to the price of securities."

The Court adopted the obiter of Sackville J in Australian Securities Commission v Nomura International plc: it concluded that the only necessary mental element was the intention to perform the relevant actions. His Honour found that it was not necessary to prove that the alleged contravener was aware that those actions would be likely to create a false or misleading appearance.

The Court also dismissed Donald's second ground of appeal that there must be a finding that the contravener would repeat the conduct before a banning order could be made. Rejecting this argument, his Honour held that as the section gives express power to make a banning order if a person "contravenes a securities law", obviously Parliament contemplated that a single contravention could be sufficient.

The final question on appeal was whether the Tribunal's finding that Donald had acted contrary to instructions was relevant to the banning order. It appeared that the Tribunal had taken this lack of authority into account when deciding not to reduce the banning order to less than two years. The Court held that a lack of authority was not a relevant matter for the purposes of section 998. It remitted the matter back to the AAT for rehearing.

(D) COMPANY REINSTATEMENT APPLICATIONS
(By Adam Brooks, Herbert Geer & Rundle)

Jason Newham v Australian Securities and Investments Commission [2000] ACTSC 77, Supreme Court of the Australian Capital Territory, Higgins J, 1 September 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/act/2000/september/2000actsc77.html>"

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

Ensign Performance Tyre and Wheels (ACT) Pty Ltd ("the Company") was deregistered on 21 September 1999. On 7 August 1997, the Company terminated the employment of Mr Jason Newham ("Newham").

Newham issued proceedings against the Company in the Canberra Magistrates Court on 9 August 1999 claiming unpaid remuneration as an employee of the Company. Newham’s claim against the Company had been outlined in a series of correspondence dating back to January 1999. In an application to ASIC for deregistration of the Company, a director of the Company declared that the Company had no outstanding liabilities and was not a party to any legal proceedings.

Higgins J assumed that ASIC granted the application for deregistration in ignorance of Newham’s claim and if it had been so informed, ASIC would have been unlikely to order deregistration. Higgins J held that the original deregistration was achieved by conduct that was "at the least, misleading, if not down right deceitful".

Newham’s original application to the Supreme Court was heard by a Deputy Registrar who refused to grant a reinstatement order. Higgins J set aside the Deputy Registrar’s decision for want of jurisdiction on the grounds that:

(a) A Registrar does not have any powers in relation to Chapter 5A of the Corporations Law because no such powers are enumerated in Schedule 2 of the Rules; and

(b) The Deputy Registrar incorrectly ordered that the Company (which at the relevant time was not in existence) be added as a second defendant to the application.

Accordingly, Higgins J treated the current application as if it was Newham’s original application for reinstatement of the Company.

(1) Reinstatement powers

Section 601AH(1) of the Corporations Law provides that ASIC may reinstate a company’s registration if ASIC is satisfied that the company should not have been deregistered.

Section 601AH(2) provides that a Court may order that ASIC reinstate the registration of a company if:

(a) an application for reinstatement is made to the Court by:

(i) a person aggrieved by the deregistration; or

(ii) a former liquidator of the company; and

(b) the Court is satisfied that it is just that the company’s registration be reinstated.

Higgins J held that the Court’s power under section 601AH(2) should be exercised judicially and in conformity with the purposes of the relevant legislation. Higgins J identified two considerations that should make a court reluctant to revive a defunct company. First, to do so revives obligations and liabilities previously considered to be ended thus prejudicing the rights and legitimate expectations of the members and officers of the defunct company. Secondly, public confusion is created by a company "blinking out of and into existence".

In reviewing the reinstatement cases, Higgins J noted that where reinstatement is sought to pursue a claim, it must appear that the claim has reasonable prospects of success.

(2) The trustee issue

At all relevant times, the Company had acted as the trustee of a trust.

Higgins J referred to the decision of Finkelstein J in Holli Managed Investments Pty Ltd v Australian Securities Commission (1998) 160 ALR 409. In that case, it was sought to reinstate a trustee company so that the company could be placed in liquidation and the liquidator could pursue enquiries as to whether the trustee company could obtain an indemnity from the beneficiaries of a trust. Finkelstein J held that because ASIC has the power to carry out the obligations of a deregistered company (section 601AF) and ASIC can carry out an examination of any person in order to determine whether any claims the deregistered company might have had are worth pursuing (section 596B), all remedies against ASIC should first have been exhausted before an application to the court is made.

For similar reasons to those of Finkelstein J, Higgins J held that Newham’s application was premature and that Newham should have first tried to obtain relief from ASIC. Higgins J noted that given ASIC’s powers, it was technically possible for Newham to pursue his claim against the former directors of the Company or even the beneficiaries of the trust (if the Company was entitled to be indemnified from the beneficiaries) without reinstatement of the Company.

It appears that courts are increasingly unwilling to order reinstatement of a company in circumstances where appropriate relief has not been sought from ASIC.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

K Svoboda, ‘Corporate Governance Issues arising from the 1998-1999 AMP-GIO Takeover’ (2000) 18 Company and Securities Law Journal 395

AMP’s takeover pursuit of GIO during 1998-2000 provides examples of various corporate governance issues in a commercial setting. Takeovers are usually considered to provide a positive contribution to corporate profitability, however AMP’s takeover of GIO provides a lesson in how not to conduct a takeover situation. This article examines the issues associated with the AMP-GIO takeover, such as the duties and responsibilities of the board of directors for both companies, activities that promoted and impeded various takeover bids, the role of institutional investors, as well as the impact of the takeover on the minority shareholders. Many of these issues are examined in the light of the recently passed Corporate Law Economic Reform Program Act 1999. This article proceeds through the history of this highly publicised takeover to its most recent events in order to assess how principles of corporate governance play out in a "real corporate" example.

E Carson, ‘The Development of Board Sub-Committees’ (2000) 18 Company and Securities Law Journal 415

Corporate governance has attracted a great deal of public attention in the 1990s. Board sub-committees have been proposed as one way of improving corporate governance standards. This article reviews the research literature on sub-committee structures and examines the extent to which a sample of the Top 500 listed Australian companies has instituted board sub-committees as a corporate governance mechanism. The results suggest that the key board sub-committees are audit, remuneration and nomination committees. They were found to be at varying stages of development: audit committees were found to be highly developed, while remuneration committees and nomination committees were found to be less well developed. This study – which covers the Top 500 companies – also extends previous corporate governance research in Australia which has focussed primarily on the Top 100 companies.

R Mokal, ‘An Agency Cost Analysis of the Wrongful Trading Provisions: Redistribution, Perverse Incentives and the Creditors’ Bargain’ (2000) 59 No 2 Cambridge Law Journal

L Lee, ‘Taiwan’s Current Banking Development Strategy: Preparing for Internationalization by Preventing Insider Lending’ (2000) 17 UCLA Pacific Basin Law Journal 166

C Donald, ‘Civil Remedies for Breach of Continuous Disclosure Obligations Under Ontario’s Securities Act’ (2000) 45 McGill Law Journal 609

C Allegaert and D Tinkelman, ‘Reconsidering the "Lack of Duty" Defense to State Auditor Negligence Claims’ (2000) 25 Journal of Corporation Law 489

Y Stern, ‘The Private Sale of Corporate Control: A Myth Dethroned’ (2000) 25 Journal of Corporation Law 511

M Graham, ‘Delaware Post-Merger Derivative Suit Standing and Demand Requirements: Professional Management Associates Inc v Coss’ (2000) 25 Journal of Corporation Law 631

R Shaw, ‘Hostile Takeover Bids: Defensive Strategies’ (2000) 38 No 1 Alberta Law Review

B McDonnell, ‘ESOPs’ Failures: Fiduciary Duties When Managers of Employee-owned Companies Vote to Entrench Themselves’ (2000) Columbia Business Law Review 199

Company, Financial and Insolvency Law Review, July 2000. Articles include:

- A Keay, ‘The Recovery of Voidable Preferences: Aspects of Restoration’

- R Grantham, ‘Restitution and Insolvent Companies: Honing in on the Shareholder’

- K Anderson, ‘Statutory Cooperation Mechanisms for Cross-Border Insolvencies in England and America’

- P Morris and K Campbell, ‘Regulatory Reform in British Offshore Finance Centres’

- P Devonshire, ‘Freezing Injunctions as Security’

- S Griffin, ‘The Characteristics and Identification of a De Facto Director’

L Lowenfels and A Bromberg, ‘US Securities Fraud Across the Border: Unpredictable Jurisdiction’ (2000) Vol 55 No 3 Business Lawyer

A Horwich, ‘The Neglected Relationship of Materiality and Recklessness in Actions Under Rule 10b-5’ (2000) Vol 55 No 3 Business Lawyer

The International Lawyer, Spring 2000, Vol 34 No 1, Symposium on the New International Financial Infrastructure. Articles include:

- Liquidity Crises

- Reform of the International Monetary Fund

- Ten Years of Economic Reforms in Russia

- Reflections on the Asian Financial Crisis

- Interconnection of Legal/Constitutional Reform and Economic Reform

- Systemic Corporate and Bank Restructuring in Financial Crisis

- Challenges for the Japanese Financial System

T Tao, ‘The Burgeoning Securities Investment Fund Industry in China: Its Development and Regulation’ (1999) 13 Columbia Journal of Asian Law 203

N Alam, ‘Company Reporting on Social Issues: The Case for Greater Disclosure’ (2000) Vol 3 No 1 Corporate Governance International

J Neyers, ‘Is There an Oppression Remedy Showstopper? O’Neill v Phillips’ (2000) 33 Canadian Business Law Journal 447

J Marson, ‘Surfing the Web for Capital: The Regulation of Internet Securities Offerings’ (2000) Vol 16 No 2 Santa Clara Computer and Technology Law Journal

International Business Lawyer, July/August 2000, Vol 28 No 7. Special Issue on Insolvency. Articles include:

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- Recent Insolvency Legislative Action in the Republic of South Africa

J Blanchard, ‘CLERP Information Reforms – Tinkering at the Edges’ (2000) 4 Flinders Journal of Law Reform 157

R Buckley, ‘The Role of Capital Controls in Financial Crises’ (1999) 11 Bond Law Review 231

J Farrar, ‘A Brief Thematic History of Corporate Governance’ (1999) 11 Bond Law Review 259

J Lessing, ‘Overview of the CLERP Reforms Regarding Fundraising and Takeovers’ (1999) 11 Bond Law Review 287

J Mayanja, ‘The Equal Opportunity Principle in Australian Takeover Law and Practice: Time for Review’ (2000) 12 Australian Journal of Corporate Law 1

R Walton, ‘Gambotto v WCP Ltd: A Justified Reassertion of Minority Shareholder Rights or Unwelcome Step Back in Time’ (2000) 12 Australian Journal of Corporate Law 20

S Stern, ‘Establishment of Interests in Money’ (2000) 12 Australian Journal of Corporate Law 45

D Anderson, ‘Taking Stock in China: Company Disclosure and Information in China’s Stock Markets’ (2000) Vol 88 No 6 Georgetown Law Journal

A Boyle, ‘The Shareholder’s Derivative Action in the English Conflict of Laws’ (2000) 11 European Business Law Review 130

A Masa’deh, ‘International Rules for Investment and Investors: Light at the End of the Tunnel?’ (2000) 11 European Business Law Review 157

E Chiappinelli, ‘The Moral Basis of State Corporate Law Disclosure’ (2000) Vol 49 No 3 Catholic University Law Review

T Howard, ‘Liability of Directors for Environmental Crime: The Anything But Level Playing Field in Australia’ (2000) Vol 17 No 4 Environmental and Planning Law Journal

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