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Faculty of Law, The University of Melbourne

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**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#1.RecentCorporateLaw)   
(A) [CLERP Fundraising proposals](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28A%29CLERPfundraising)   
(B) [CLERP proposals regarding directors’ duties](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28B%29CLERPproposals)   
(C) [Resolution of Director’s Conflicts](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28C%29Resolution)

2. [RECENT ASC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#2.RecentASC)   
(A) [AAT Endorses Southcorp Decision](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28A%29AAT)   
(B) [New Small Business Watchdog Established](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28B%29Newsmallbusiness)   
(C) [Victorian Enforcement Program](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28C%29Victorian)   
(D) [Consumer Affairs Adviser Appointed](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28D%29Consumer)   
(E) [ASC Co-operates with Liquidators](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28E%29ASCco-operates)   
(F) [Court rejects BIL challenge](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28F%29Courtrejects)   
(G) [Disclosure Requirements for Schemes of Arrangement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28G%29Disclosure)   
(H) [Joint Venture with ACA](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%28H%29Jointventure)

3. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#%283%29RecentCorporateLawJournal)

4. [CORPORATE LAW CONFERENCES AND SEMINARS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#4.CorporateLawConferences)

5. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#5.Archives)

6. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#6.Contributions)

7. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#7.Membership)   
  
  
8. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0002.htm#8.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CLERP FUNDRAISING PROPOSALS

As part of the Government’s Corporate Law Economic Reform Program (CLERP), the Treasurer has announced proposals for reform of fundraising by Australian companies. Key aspects of the proposed reforms include:

(i) reforms designed to assist fundraising by small to medium enterprises, including:

companies will be able to raise up to $2m each year from up to 20 persons without issuing a prospectus or other disclosure document provided the offer is not made to the public at large; once during their life, companies will be able to raise up to $5m based on an offer information statement rather than a full prospectus; companies will be able to raise funds below the current $500,000 threshold from persons whose gross income in the previous 2 years was at least $250,000 per annum or who have net assets of $2.5m without issuing a prospectus or other disclosure document;

(ii) removing the overlapping strict liability of the Trade Practices Act and the Fair Trading Acts, so that these Acts will not apply to dealings in securities;

(iii) facilitating the use of shorter prospectuses and, where appropriate, profile statements providing basic information;

(iv) changing the categories of persons liable for a defective prospectus, so that:

- the corporation, its directors and underwriters of an issue will be liable to investors for misleading statements in a prospectus (subject to a uniform defence);

- professional advisers and experts will be liable only for statements attributed to them in the prospectus with their consent (again subject to the uniform defence);

- promoters and persons who ‘authorise or cause the issue of’ a prospectus will be excluded from liability unless they are liable in some other capacity;

- a defence will be available to the corporation, directors, underwriters, experts and advisers where they prove that they made such inquiries (if any) as were reasonable, took reasonable care and it was reasonable for them to have believed that the prospectus was not misleading;

- governmental immunity will be removed from the fundraising provisions, except in relation to offers of government guaranteed debt securities.

The CLERP paper also deals with a number of the recommendations of the Financial System Inquiry concerning market conduct and disclosure. Copies of the paper are available from the AGPS or the Treasury website (http://www.treasury.gov.au). Comments on the paper should be forwarded to the Department by 20 November 1997.

(B) CLERP PROPOSALS REGARDING DIRECTORS' DUTIES

The third of the CLERP papers, ‘Director’s Duties and Corporate Governance’, has been released. The key proposals in the paper include:

(i) a statutory business judgment rule which would offer directors a ‘safe harbour’ from personal liability in relation to honest, informed and rational business judgments;

(ii) a statutory derivative action to enable shareholders or directors of a company to bring an action on the company’s behalf, where the company is unwilling or unable to do so;

(iii) clarifying a number of existing rights and obligations of directors and other company officers to provide them with greater certain regarding those rights and obligations;

(iv) encouraging continuous monitoring of corporate governance practices by the ASX, investors, relevant industry and professional bodies who promote best practices, and by the government in order to maintain investor confidence in Australia’s capital markets.

The proposals in the paper were developed in consultation with the Business Regulation Advisory Group, the wider business community and its advisers.

Comments on the paper are being sought by 20 November 1997. Comments received will be taken into account in developing legislative proposals to implement reforms of the Corporations Law. After further consultation on the draft legislative proposals developed, the Government aims to introduce the necessary legislation into Parliament in 1998.

Copies of the paper are available from the AGPS or the Treasury website: "http://www.treasury.gov.au".

(C) RESOLUTION OF DIRECTOR’S CONFLICTS

In "Corporate Governance in the Top 100" (Centre for Corporate Law and Securities Regulation, The University of Melbourne, June 1996), Stapledon and Lawrence reported findings of marked overlaps in membership of the boards of Australian listed companies. In particular, 132 (19 per cent) of the 690 directors of the 100 largest listed companies in 1995 held two or more directorships. The number of multiple directorships is no doubt significantly greater when companies beyond the top 100 are taken into account. Identification of the correct approaches to resolution of directors’ conflicting duties is therefore of practical importance.

Company articles commonly say that a director who is interested in a proposed transaction may take the benefit of the transaction if the director discloses the interest to the other members of the board and takes no part in the board’s decision on the transaction. If such a director makes the required disclosure and refrains from participating in the decision, the validity of the transaction is not impaired: R v Byrnes (1995) 183 CLR 501. But that is not necessarily the end of the matter. Disclosure and abstention may not be enough to discharge the director’s duty.

In both Darvall v North Sydney Brick & Tile Co Ltd (1989) 16 NSWLR 260 and Re Southern Resources Ltd (1989) 15 ACLR 770, there was reference to the fact that a director who, in an informal but real way, seeks to advance within the company a cause which affords precedence to some interest other than the company’s may not escape accountability by formally abstaining when a vote is taken. That reasoning was taken a step further in Permanent Building Society v Wheeler (1994) 11 WAR 187 which involved a building society director who was also on the board of a potential borrower. He knew, but others within the society did not, that the potential borrower was in financial difficulties. The director stood silently by and allowed the society to make the relevant loan. The Full Court of the Supreme Court of Western Australia held that he had failed in his "responsibility ... to ensure that the other directors appreciated the potential harm inherent in the transaction, and to point out steps that could be taken to reduce the possibility of harm". He could not "avoid that duty by, metaphorically speaking, burying his head in the sand".

A similar situation was recently considered by the Western Australia Full Court in Fitzsimmons v The Queen (1997) 23 ACSR 355. The appellant had been for some time an employee and director of Duke. He must have known that the financial position of that company was precarious. A transaction was proposed by which, in essence, cash was to pass from another company, Kia Ora, to Duke and Kia Ora was to acquire a parcel of shares in Duke. In anticipation of the closer association that would result, the appellant was appointed a director of Kia Ora and, in that capacity, participated in the decision of the Kia Ora board to enter into the transaction. He said nothing to his co-directors of the prospect of loss that the transaction necessarily entailed for Kia Ora. He was convicted on charges under the predecessor to s 232(2) of the Corporations Law that he had failed to act honestly as a directly of Kia Ora.

On appeal, the director noted that his duties to Duke included a duty of confidentiality as to matters concerning its financial state which had come to his knowledge through the positions he occupied within that company. That proposition is uncontroversial. The director then argued that his duty to act honestly in the affairs of Kia Ora necessarily "rolled back" to allow compliance with the obligation of confidentiality owed to Duke. That contention was rejected by the court. The position was one of classic conflict, with neither duty being of a higher order than the other. In such a case, the correct course is one which involves breach of neither duty. It is not the existence of conflicting duties but an act or omission in pursuit of one at the expense of the other which must be avoided. The conviction for failing to act honestly as a director of Kia Ora was upheld as the appellant had put himself into breach of his duty to that company.

How should the appellant have resolved the conflict? The court was not called upon to answer that question and declined to address it expressly. The judgments do, however, contain references to the Permanent Building Society case and to the possibility that, at least, some appropriate warning might have been issued to Kia Ora without breach of the duty of confidentiality owed to Duke. A similar course was suggest in South Australia v Marcus Clark (1996) 19 ACSR 606 as the minimum that might have been appropriate in analogous circumstances. A duty to put knowledge, as well as skill, actively to work in the interests of a principal is implicit in certain fiduciary relationships. In the case of a solicitor, for example, the frequently cited judgment of Megarry J in Spector v Agenda [1973] Ch 30 refers to a duty to "put at his client’s disposal not only his skill but also his knowledge so far as it is relevant", so that a solicitor cannot "act for the client and at the same time withhold from him any relevant knowledge he has". Various agency relationships import a duty for the agent to inform the principal of relevant matters within the agent’s knowledge: see, for example, Howell v Bennett & Fisher Ltd [1966] SASR 188 as to land agents and Mitor Investments Pty Ltd v General Accident Fire & Life[1984] WAR 365 as to insurance brokers.

Gummow J pointed out in National Mutual Holdings Pty Ltd v Sentry Corporation(1989) 22 FCR 209 that "even among fiduciaries, solicitors stand in a special position", while in Hospital Products Ltd v United States Surgical Corporation(1984) 156 CLR 41, Mason J emphasised that "categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship". Courts, nevertheless, appear increasingly willing to apply to company directors the same kind of fiduciary expectations concerning active use of knowledge as have been identified as incidents of the duties of solicitors.

Should the appellant in Fitzsimmons have resigned? The question of possible resignation from the Kia Ora board was mentioned but the court took care to avoid any impression that an obligation to resign had arisen or, more precisely, that resignation would have solved the appellant’s problem. Owen J said that resignation "may, in particular circumstances, be the only course open but it would not necessarily follow". Parker J, with whom Murray J agreed, noted that the appellant’s difficulty arose when he was appointed a director of Kia Ora shortly before the transaction was entered into and that he "could have avoided it entirely by refusing appointment when it must have been obvious that the conflict of interest loomed".

The court’s refusal to identify resignation as a clear-cut solution is understandable. The duty of confidentiality owed to Duke would not have suddenly evaporated upon resignation from the Duke board. In the Kia Ora context, once a clear apprehension had arisen that the company was about to commit itself unwittingly to a transaction known to the director alone to be disadvantageous, resignation would have involved the same failure to protect Kia Ora’s interests as continuing silently in office. A prudent and perceptive director would presumably heed the warning of Parker J to act in advance when it was clear "that the conflict of interest loomed". But that, of course, may be more easily said than done, given that impending conflicts are not in the habit of announcing themselves.

Legal principle of long standing countenances membership of several boards, even where the companies concerned are competitors: London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd [1891] WN 165. More recent developments emphasising that it is not safe for a director always to deal with conflict by the simple combination of silence and abstention may mean that the freedom to hold several directorships will be more sparingly exercised.

By R I Barrett (Mallesons Stephen Jaques)

Note: This case note originally appeared in (1997) 71 ALJ 677 and has been reproduced with the permission of LBC Information Sevices.

2. RECENT ASC DEVELOPMENTS

(A) AAT ENDORSES SOUTHCORP DECISION

The AAT has upheld the ASC’s decision of 9 October 1996 to grant Southcorp Wines P/L relief to compulsorily acquire shares in Coldstream Australasia Ltd which would be issued on exercise of options issued by Coldstream. The AAT fully supported both the ASC’s decision in the Southcorp application, and the policy which the ASC developed following the Southcorp application and public consultation (see ASC Policy Statement 126 - Compulsory Acquisition of Shares Issued after the Close of a Takeover Bid, released on 14/4/97). Deputy President of the AAT, B J McMahon, said that:

‘Modifications under s 730 are of fundamental importance to the scheme of Chapter 6. The power to declare them is frequently used. Quite possibly the takeover code would be unworkable without them. The present modification is in the mainstream of those created to facilitate the completion of a takeover and is entirely appropriate.’

(B) NEW SMALL BUSINESS WATCHDOG ESTABLISHED

The ASC believes small business owners are most at risk of losing money when dealing with unscrupulous operators or working with insufficient information about their duties, rights and responsibilities. To counter this, the ASC has established its Small Business Unit with officers, dedicated to helping small business, based in each ASC capital city office.

The Small Business Unit will provide on the ground support for small business; it will take complaints, give advice and provide educational resources and seminars. For further information on the Unit, contact Barrie Adams, ASC Small Business Unit on (07) 3867 4704.

(C) VICTORIAN ENFORCEMENT PROGRAM

The ASC has released the results of its enforcement program which has focussed on improper conduct in the Victorian small business sector resulting in more than $226 million in unpaid debts during the past year. Other small business people are usually among the creditors owed when improperly run companies fail to meet their debts.

The ASC in Victoria has spent time and resources concentrating on problems experienced in the small business sector across Australia, focussing on insolvent trading, phoenix activity and assistance to liquidators.

During the past year, the ASC’s Victorian Regional Office has banned 94 people from being involved in the management of companies. Those people were directors of companies which failed, leaving more than $226 million in unpaid debts. More than 100 people were issued with notices to show cause why they should not be banned after the ASC had assessed about 200 failed companies.

Victorian Regional Commissioner Bernie Mithen said the ASC used the banning order power as a back stop to its small business program. It catches directors of two or more companies which fail in such a way that they pay less than 50c in the dollar to unsecured creditors.

In 1996 the Victorian Regional Office set up a Quick Response Team to deal with complaints about small companies. That team seeks to respond quickly to complaints and usually means the directors of those small companies receive a visit from the team, including an investigative accountant and Federal Police officer. Directors are reminded of their obligations under the Corporations Law and if a satisfactory solution is not found, civil or criminal action is usually initiated.

(D) CONSUMER AFFAIRS ADVISER APPOINTED

Steps have been taken by the ASC towards implementation of the Wallis Inquiry recommendations with the appointment of John Fox as the ASC’s Special Adviser - Consumer Affairs.

(E) ASC CO-OPERATES WITH LIQUIDATORS

In the 1994/95 financial year, the ASC Queensland Regional Office (QRO) took action in 129 cases for failure to lodge statutory reports, 54% of these cases resulted in prosecutions against company officers for failing to lodge these reports. In the 1996/97 financial year, this has been reduced to 9% of the 76 cases considered.

The QRO’s pro-active approach in liaising with liquidators and carrying out prompt follow up action when reports are not lodged, has resulted in substantial savings in terms of court filing fees, Magistrates Court costs, and ASC legal and administrative costs. Company creditors and shareholders have also gained financially as liquidators and receivers spend less time in pursuing directors for these reports, and information about companies’ financial affairs is available promptly. Timely lodgement of these reports often enables assets to be readily identified and secured for the benefit of creditors of failed companies.

(F) COURT REJECTS BIL CHALLENGE

The Federal Court recently found in the ASC’s favour in an application by Brierly Investments Ltd (BIL) to prevent an ASC referral to the Corporations & Securities Panel.

The ASC had applied to the Panel for a declaration that certain share trading of John Fairfax Holdings Ltd by Merrill Lynch (Australia) Futures Ltd and BIL was unacceptable conduct.

BIL and Merrill Lynch had argued that the ASC’s referral was not in compliance with the requirements of the Corporations Law or with the rules of natural justice.

The Federal Court awarded costs to the ASC and also ordered that the time in which the Panel may make declarations be extended. BIL has lodged an appeal to the Full Federal Court.

(G) DISCLOSURE REQUIREMENTS FOR SCHEMES OF ARRANGEMENT

The ASC is seeking public comment on its draft policy which recommends that schemes of arrangement should have a similar level of disclosure and investor protection to takeovers.

The draft policy also details when the ASC will advise the court that it does not object to an acquisition of one company by another being achieved by a scheme rather than a takeover. The ASC will require reassurance from companies that the Australian Taxation Office has been adequately advised of schemes that appear to have material taxation effects. If the ASC is not satisfied with the reassurance it receives, it will consider advising the ATO itself. The ASC also continues its stance against share splitting.

Copies of the draft policy are available from the ASC Infoline on 1300 300 630 or from the ASC Website at http://www.asc.gov.au. Written submissions are due by 15 December 1997.

(H) JOINT VENTURE WITH ACA

The ASC and Australian Consumers’ Association (ACA) have formed a joint venture which aims to test the level of compliance amongst investment advisers with the ASC’s new, higher standards. The project will allow the ASC to better focus its enforcement programs and work with industry groups to improve consumer protection.

For the project, volunteer investors will randomly visit investment advisers to get an investment plan specifically tailored to their needs and situations. Volunteers will include both young investors and retirees, some with small amounts and some with several hundred thousand dollars. The volunteers will be genuinely seeking investments for their money. The ASC and ACA will pay for the consultation costs with the advisers. The advisers will not be told that the volunteer investors are taking part in the project.

The results of the project will be judged by an independent expert panel, made up of industry, consumer and regulatory representatives. The results will be published in the ACA’s Choice magazine and used by the ASC for research and surveillance purposes. The results will also be used by the ASC and ACA to determine what work needs to be done with the investment advice industry bodies to improve service to investors.

This joint project is one area where the ASC is implementing the recommendations of the Wallis inquiry, and researching the impact of its ‘Good Advice Handbook for Investment Advisers’ which was released in March this year.

3. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Dr Belinda Fehlberg, ‘Women in "Family" Companies: English and Australian Experiences’ (1997) 15 C&SLJ 348

In this article, the depiction of women in corporations law cases as non-participating beneficiaries of family businesses is first considered. This analysis is then tested against two recent empirical studies concerning women and family businesses conducted in England and Australia respectively. In contrast to the case law, empirical research suggest that many women are highly involved in the day to day running of family businesses. Consistent with the case law, however, empirical research suggests that women are unequal partners with their male counterparts when it comes to decision making within family businesses, and accessing benefit from the business. The tendency in the case law to serve the interests of commerce by allocating legal responsibility to women for events beyond their practical control is thus scrutinised and questioned.

(B) Judith Freedman and Vanessa Finch, ‘Limited Liability Partnerships: Have Accountants Sewn up the "Deep Pockets" Debate?’ September 1997 Journal of Business Law 387

The authors examine the new form of business association being proposed for professional partnerships in the UK, the limited liability partnership. The authors question why the proposal is being limited to professional partnerships, and whether the proposal is sufficient or even necessary to meet perceived problems.

(C) David Morrison, ‘Recent Company Law Developments - the Indoor Management Rule’ (1997) 18 Qld Lawyer 11

The author discusses the indoor management rule in light of two recent decisions, *Sixty-Fourth Throne Pty Ltd v Macquarie Bank* (1996) 14 ACLC 670 and *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* (1996) 136 ALR 166.

(D) John Lambrick, ‘Corporate Benefit in Financial Transactions: A Policy Perspective’ (1997) 8 Journal of Banking and Finance Law and Practice 212

There is a increasing tendency for courts to set aside transactions entered into between a company and a lender where the company derives no benefit from the transaction. The author analyses cases where transactions involving a lack of corporate benefit have been challenged. As a result, the author suggests guidelines for a financier to follow so as to better protect its transactions with corporations.

(E) Edward F Greene, Andrew Curran and David A Christman, ‘Toward a Cohesive International Approach to Cross-Border Takeover Regulation’ (1997) 51 University of Miami Law Review 823

One effect of economic globalisation is that parties involved in transnational merger and acquisition transactions are increasingly subject to the disclosure and procedural requirements of multiple regulatory systems. The authors examine the problems presented by transnational takeovers and propose an appropriate international regulatory regime.

(F) George Forrai, ‘Hong Kong Shadow Directors: Patchwork Provisions or Blanket Protection?’ (1997) 18 Company Lawyer 202

The author asks why the Hong Kong Companies Ordinances allow shadow directors to escape liability when they offend against the protections afforded to shareholders and creditors. The author looks at the provisions, or inadequacy thereof, in the Companies Ordinances, and compares those with the provisions regulating the behaviour of shadow directors under UK and Australian law.

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4. CORPORATE LAW CONFERENCES AND SEMINARS

The Centre for Corporate Law and Securities Regulation, in association with the Australian Institute of Company Directors, will be holding an evening seminar, ‘Do Independent Directors Matter?’ at the Melbourne office of Clayton Utz on November 20 1997 from 5.15 pm - 6.45 pm. The seminar speaker is Professor Bernard Black of the Columbia University Law School, with commentary from Henry Bosch AO, former Chairman of the NCSC and a leading commentator on matters of corporate governance, Jeffrey Lawrence of J P Morgan, and Geof Stapledon of the Centre for Corporate Law and Securities Regulation. The session will be chaired by Catherine Walter, recently appointed Chair of the Federal Government’s Business Regulation Advisory Group. The registration fee is $65. Further details and registration forms are available from:

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The Australian National University’s Centre for Law and Economics, in association with the Centre for Corporate and Securities Regulation, will be holding a one day conference at the ANU in Canberra on November 21 1997. The topic is ‘The Corporate Law Economic Reform Program’. Speakers will be:

Jim Murphy, Head of the Corporate Law Economic Reform Program within the Department of The Treasury;

Claire Grose, Chairperson of the Corporations Law Committee, Business Law Section, Law Council of Australia and Partner of Freehill Hollingdale & Page;

Professor Robert Baxt, Chairman of the Corporations Law Committee of the Australian Institute of Company Directors;

David Goddard, Partner of New Zealand law firm Chapman Tripp Sheffield Young;

Professor Bernard Black, Columbia University Law School, New York;

Senator the Hon Ian Campbell, Parliamentary Secretary to the Treasurer.

The registration fee is $200, or $150 for full time academics. Further details and registration forms are available from:

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ph: (02) 6249 5421   
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The ASC will be holding a free investor forum at the Duxton Hotel in Perth on November 13 at 6 pm. ASC Chair, Alan Cameron, and Business Review Weekly Editor, Ross Greenwood, will discuss the pitfalls of investment advice and give examples of how people have lost their money through shonky investment advisers. People wishing to attend should reserve a place by calling the ASC’s Infoline on 1300 300 630.

If you have a conference or seminar you would like to publicise through the Corporate Law Electronic Network, please forward details by fax: 03 9344 5285 or e-mail: corplaw@unimelb.edu.au

5. ARCHIVES

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