**CORPORATE LAW ELECTRONIC BULLETIN**   
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Centre for Corporate Law and Securities Regulation   
Faculty of Law, The University of Melbourne

with the support of

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1. READER SURVEY

The editors are keen to ensure that the bulletin is meeting the needs of its subscribers, and would therefore be grateful if you would take the time to answer the following questions, and forward your response to Ms Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation by email: "cclsr@law.unimelb.edu.au" or fax: +61 3 9344 5285.

(1) How would you describe your occupation?

* 1. Academic
  2. Accountant
  3. Banker
  4. Barrister
  5. In-house solicitor
  6. Regulator
  7. Solicitor in private practice
  8. Other (please specify)

(2) Which items of the Bulletin do you find most useful?

(3) Which items of the Bulletin do you find least useful?

(4) Do you have direct access to the World Wide Web?

(5) Do you have any suggestions for improving the bulletin?

2. NEW CENTRE FOR CORPORATE LAW PUBLICATIONS

The Centre for Corporate Law has released two new publications dealing with (1) Stock Market Manipulation and Short Selling and (2) Enforcement of Directors’ Duties and Civil Penalties. For details see Item 9 of this Bulletin.

3. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) HIGH COURT STRIKES DOWN CROSS-VESTING

On 17 June 1999 the High Court of Australia, by a 6-1 majority, struck down as being unconstitutional the cross-vesting laws under which the Commonwealth and each State and Territory vested in each other’s courts jurisdiction in civil litigation. These laws have operated since 1988.

The decision of the High Court has major implications for practitioners. The decision is the subject of detailed discussion later in this Bulletin (see Item 6). All disputes relating to companies which arise in the States will now have to be heard in State Supreme Courts whereas previously they could be heard in the Federal Court.

On 17 June the Federal Attorney-General announced that the Commonwealth Government and the State Governments will act quickly to minimise any adverse consequences from the High Court decision. Draft legislation has been prepared which, when enacted by the States, will ensure that any affected decisions of the Federal Court will continue to have effect and can be enforced as if they were decisions of State Supreme Courts. The State legislation will also enable cases currently before the Federal Court to be transferred to State Supreme Courts and treated as though they had been commenced there. The Attorney-General has also stated that the Commonwealth is considering the early introduction of legislation to ensure that the Federal Court can continue to review the lawfulness of decisions made by Commonwealth bodies and officers exercising powers under State laws. The Shadow Attorney-General has stated that the Federal Labor Party will assist to ensure the speedy passage of any legislation necessary to validate judgments affected by the High Court decision.

The Chairman of the Australian Securities and Investments Commission, Mr Alan Cameron, has stated that the High Court decision on cross-vesting does not pose any risk to the national scheme under which Australian corporate law operates. Neither does it affect ASIC’s powers in relation to consumer protection, insurance or superannuation.

The impact of this decision is already being felt. See Super John Pty Ltd v Futuris Rural Pty Limited, noted in Item 6(F) of this Bulletin.

(B) REPORT ENDORSES CLERP BILL REFORMS

On 2 June 1999 the Minister for Financial Services and Regulation, the Hon Joe Hockey, said the parliamentary report into the Corporate Law Economic Reform Program Bill 1998 would help achieve the Government’s objectives under CLERP.

The report recommended that, subject to only a few changes, the Bill should be passed in its current form. "These CLERP reforms are a major overhaul of Australia’s corporate law system. They are at the heart of boosting our international competitiveness, and are a-key part of our plans to make Australia a centre for global financial services. CLERP will contribute to the efficiency of the economy, while maintaining investor protection and market integrity."

The Minister said the Government had carefully considered the Committee’s recommendations and would be implementing all but one of the report’s recommendations. "The recommendation on the impact of capital gains tax on takeovers will be considered by the Ralph Review of Business Taxation in the context of a global review of business taxes. The Government will also be implementing a number of the recommendations in the supplementary reports of the Committee."

The Minister said he would proceed with passage of the Bill as soon as possible.

Key aspects of the Bill’s reforms are:

- streamlining fundraising regulation to allow shorter, more useful prospectuses and liberalizing prospectus rules for small fundraisings;

- facilitating a more competitive market for corporate control by giving potential bidders an alternative takeover method and allowing takeover disputes to be resolved more efficiently;

- clarifying directors’ duties through the introduction of a business judgment rule and expanding shareholders’ rights to take action on behalf of companies; and

- providing a greater commercial and international focus to the accounting standard setting process and ensuring that accounting standards are responsive to the needs of both business and investors.

Copies of the Parliamentary Joint Committee’s report are available on the Parliament House web site (http://www.aph.gov.au). Copies of the Corporate Law Economic Reform Program publications are available on the Treasury web site (http://www.treasury.gov. au) and from AusInfo Bookshops.

(C) GOVERNMENT TO TALK TO INDUSTRY ON EMPLOYEE ENTITLEMENTS ISSUE

On 16 June it was announced that the Minister for Employment, Workplace Relations and Small Business, the Hon Peter Reith MP, and the Minister for Industry, Science and Resources, the Hon Nick Minchin will meet with industry associations to address issues related to cases where employee entitlements are not being paid due to employer insolvency.

There have been a number of cases in the mining and meat processing industries, in particular, where there is a continuing concern that employee entitlements may not be paid. The Oakdale Colliery in New South Wales is a case in point.

The Government has moved on a number of fronts to address this issue. Where an insolvency occurs, such as at Oakdale, the Department of Employment, Workplace Relations and Small Business maintains close contact with the owners of businesses and the employees and their representatives.

In addition, and consistently with what occurred in relation to the Cobar and Austral Pacific insolvencies last year, the Government will ask the Australian Securities and Investments Commission to consider whether an investigation into the closure is necessary.

Further, after the Cobar mine problems during 1998, the Treasurer referred a number of reforms to the Commonwealth-State Ministerial Council for Corporations (MINCO). MINCO is progressing proposals aimed at preventing misuse of company structures to avoid payment of employee entitlements, and strengthening existing related party and insolvent trading provisions.

The Commonwealth-State Workplace Relations Ministerial Council, chaired by Peter Reith, is also currently examining the workplace relations aspects of the problems.

While submissions on this issue have been received from business, the Government believes further discussions at a Ministerial level directly with business organisations are needed. In addressing this important issue it is vitally important that any response strikes an appropriate balance between protecting employee entitlements and maximizing opportunities for job creation.

Contact:   
Ian Hanke   
Peter Reith’s Office (02) 62777320   
Kate Schulze   
Senator Minchin’s office (02) 62777580

(D) JOINT STATUTORY COMMITTEE INQUIRES INTO MATTERS ARISING FROM THE COMPANY LAW REVIEW ACT 1998

The Joint Statutory Committee on Corporations and Securities has re-opened its inquiry into matters arising from the Company Law Review Act 1998. The Committee has identified the following areas as matters of interest, namely whether:

- directors of a listed company should be elected by a proportional voting system;

- companies should be required by the Corporations Law to report on compliance with environmental regulation;

- listed companies should disclose information, which is disclosed to, or required by, foreign exchanges;

- companies should be obliged to report any proceedings instituted against the company for any material breach by the company of the Corporations Law, or trade practices law, and, if so, a summary of the alleged breach and the company’s positions in relation to it;

- an application to register a proprietary company should include a copy of its constitution;

- listed companies must give at least 28 days notice of a general meeting;

- listed companies should be required to disclose more information relating to proxy votes;

- listed companies should be required by law to establish a corporate governance board and an audit committee;

- the directors and executive officers of a company should be obliged to report to the auditor any suspicion they might have about any fraud or improper conduct involving the company;

- a director of a listed company should have the power to call a meeting of members;

- listed companies must specify a place, fax number and electronic address for the purpose of receiving proxy appointments;

- listed companies’ annual reports should include:

(a) discussion of broad policy for determining the nature and amount of emoluments of board members and senior executives of the company;

- discussion of the relationship between such policy and the company’s performance; and

(b) details of the nature and amount of each of the emolument of each director and each of the five named officers of the company receiving the highest emolument.

Submissions received during the previous parliament will be considered as part of this inquiry. Further submissions should be sent to:

The Secretary   
Parliamentary Joint Committee on Corporations and Securities   
Parliament House   
CANBERRA ACT 2600

For further details, contact the Committee Secretary on (02) 6277 3580

4. RECENT ASIC DEVELOPMENTS

(A) TRANSITION OF MANAGED INVESTMENT SCHEMES

On 21 June 1999 ASIC issued an Information Release which provides guidance in relation to the facilitation of changes of prescribed interest undertakings to registered managed investment schemes under the Corporations Law. The Information Release deals in particular with difficulties encountered with the conduct of meetings of members.

The Information Release is available on the ASIC website (http://www.asic.gov.au/).

For further information contact:   
Darren McShane   
Director, Managed Investments NSW   
Tel: (02) 9911 2181

(B) ASIC RESPONDS TO INDUSTRY CONCERNS ABOUT DRAFT PROPOSAL FOR MANDATORY Y2K DISCLOSURE BY SUPERANNUATION ENTITIES

On 7 June 1999 ASIC announced that, following comments received from industry participants, it does not intend to make it mandatory for superannuation trustees to disclose their Y2K readiness to superannuation fund members.

Instead, it believes trustees should consider voluntary disclosure and ensure that they are well placed to reassure their members about their Y2K readiness in the lead up to 1 January 2000.

ASIC Information Release 99/015 of 10 May 1999 asked for comments on a proposal to require Y2K disclosure by superannuation trustees by way of a modification to the significant event reporting requirements set out in Division 2.5 of the Superannuation Industry (Supervision) Regulations(S1S). In this release ASIC sought comments from trustees of superannuation entities, and service providers to the superannuation industry generally, up until 30 June 1999.

ASIC has been alerted to a range of practical, administrative and cost issues which may flow from the imposition of this additional regulatory requirement at this stage. In particular the comments pointed out to ASIC the difficulties of imposing extra regulatory and system burdens at a time when attention and resources should not be distracted from Y2K preparations in the period leading up to 1 January 2000.

As a result, ASIC will not proceed with its proposal to require positive disclosure of Y2K readiness by modifying the significant event reporting requirements of the S1S legislation. Instead, ASIC encourages trustees of superannuation entities to consider voluntary disclosure of their Y2K readiness, as appropriate.

For further information contact:

Louise du Pre   
ASIC Regulatory Policy Branch   
(03) 92803304   
Email: louise.dupre@asic.gov.au

(C) ASIC RESPONDS TO MANAGED INVESTMENT INDUSTRY COMMENTS

On 3 June 1999 ASIC announced amendments to seven of its Managed Investment policy statements following feedback from industry groups.

The changes to the Managed Investments policy statements essentially fall into four areas:

(1) changes to the financial requirements which the responsible entity of a managed investments scheme must meet;

(2) changes in the financial requirements which a custodian of assets of a registered scheme must meet;

(3) the insertion of a new licence condition for primary production schemes to protect the land on which scheme activity is conducted; and

(4) a series of miscellaneous amendments.

The amended policy statements are available on the ASIC website (http://www.asic.gov.au/).

(D) MANAGED INVESTMENTS ISSUES PAPERS

ASIC has issued an Issues Paper titled "Managed Investments: Change of Responsible Entity - Effect on Contracts". This paper invites comment on a proposal to adopt a policy that will modify the Corporations Law to clarify that when a new responsible entity of a registered managed investments scheme takes office, it is not bound by contracts that the former responsible entity entered with agents of the former responsible entity.

ASIC has also issued an Issues Paper titled "Primary production schemes - Protection of land - regulatory issues". This paper invites comment on ASIC’s interim policy that licences for responsible entities of primary production schemes will ordinarily include a condition that the interests of scheme members over land on which the scheme activity will occur, must be protected by a registered legal interest.

ASIC is seeking comments on both of these Issues Papers by Monday 19 July 1999. To obtain a copy of the Issues Papers contact the ASIC Infoline on 1300 300 630.

For further information contact:

Darren McShane   
Director Managed Investments NSW   
Tel: (02) 9911 2181   
Mobile: 0411 549 266

(E) ASIC TO GRANT RELIEF TO FACILITATE USA ‘MUTUAL FUND’ OFFERINGS IN AUSTRALIA

On 1 June 1999 ASIC advised that it had recently received an increased level of inquiries regarding its policy in ASIC PolicyStatement 65: Foreign collective investment schemes(PS 65) in relation to USA mutual funds. A USA mutual fund means a managed investment scheme that is registered as an "investment company" under the Investment Company Act1940 (USA).

ASIC understands that the current proposed amendments to the Australian "foreign income fund" taxation provisions for certain USA entities to take effect from 2 July 1998, has led to the increased interest in the policy in PS 65.

PS 65 was issued in September 1993 following an ASC public hearing in February 1992 relating to the offer of foreign securities in Australia. To date, there have been few applications for relief relying on PS 65. The few applications to date have mainly involved "unit trusts" established in New Zealand.

Generally under PS 65, ASIC is prepared to grant case by case conditional relief to the operator of a foreign managed investment scheme from procedural aspects of the prospectus provisions and from the managed investment provisions. Otherwise, the operator must comply with the content requirements of the prospectus provisions. This relief is provided when ASIC considers the regulatory regime under which the foreign managed investment scheme operates provides a comparable level of investor protection. For instance, this includes a USA mutual fund.

In ASIC Policy Statement 136 ‘Managed Investments: Discretionary Powers and Closely Related Schemes’, ASIC stated that it intended to undertake a review of PS 65 in light of the commencement of the managed investment provisions of the Corporations Law from 1 July 1998 (see paras [PS 136.34] and [PS 136.52]). This review will reconsider the regulatory comparisons relied upon in PS 65 taking into account the key regulatory features of the managed investment provisions. Pending the completion of the review, ASIC has indicated it is prepared to grant relief under PS 65 on a case by case basis until 1 July 2000 (see para [PS 136.34]).

As a result of the recent inquiries in relation to the retail offer of USA mutual funds, ASIC has decided to clarify its current position in relation to the offer of interests in USA mutual funds in Australia. In clarifying its position, ASIC notes the general review of PS 65 may result in some of the conditions of relief under PS 65 being amended (in the case of USA mutual funds or other kinds of recognised schemes).

ASIC confirms that it will grant relief to applicants in accordance with its policy in PS 65 in relation to the offer of interests in USA mutual funds. ASIC recognises the significance of likely retail offerings of USA mutual funds in Australia.

ASIC seeks comment on its intended policy approach to USA mutual funds under PS 65. Further, ASIC invites comment as to whether there are any important new issues (ie, since the ASC’s review in 1992 and 1993) in relation to the operation and regulation of overseas managed investment schemes which ASIC should take into account in any more general review of policy under PS 65. At this stage, ASIC is only seeking initial views to help it scope any broader review of its policy under PS 65.

ASIC asks interested persons not to comment on the broader market implications of the proposed taxation amendments.

Comments should be sent to Ian Domecillo, ASIC Managed Investments, GPO Box 9827, Sydney NSW 2001; Facsimile (02) 9911 2369; or email ian.domecillo@asic.gov.au.

5. RECENT ASX DEVELOPMENTS

(A) ASX JOINS NASDAQ IN STRATEGIC ALLIANCE

On 17 June 1999 the Australian Stock Exchange (ASX) and The Nasdaq Stock Market, Inc (Nasdaq) announced a strategic alliance which will provide new co-listing services and begin the process of developing the technology infrastructure to support future co-trading services to investors, enterprises, and market participants.

While secondary listing on one market of the shares and products which have their primary listing on the other market is already in common use, the two exchanges have agreed to work towards a new approach called co-listing.

They will encourage more effective use of secondary listing by focusing, with the assistance of market participants, on ways to bring greater liquidity to the securities they trade. Nasdaq intends, for example, to license its Nasdaq 100 Tracking Index Stock for listing on ASX. This will allow Australians to invest through ASX in Nasdaq’s premier benchmark technology sector through a single vehicle. Conversely, Nasdaq will entertain listing appropriate ASX index-based products in the United States.

Under the co-listing approach, enterprises planning to raise capital, in the form of IPOs or add-on offerings, can choose to bring the new listing to both markets and further capitalise on the joint marketing effort of the two exchanges.

These co-listings could cover two situations. The first is where an enterprise wishes to raise capital on one market only, but wishes to list and trade on both markets from the time of the capital raising. The second is where an enterprise wishes to raise capital on both markets. In either situation, the two exchanges will work together to minimise the cost and complexity of co-listing on the two markets.

In addition to the development of co-listings, ASX and Nasdaq in a new approach to co-operation, have agreed to move towards development of the regulatory and operational infrastructure needed for the co-trading of selected major products.

Under this concept, Australian investors who wish to buy major Nasdaq products could do so through their Australian broker on ASX’s Stock Exchange Automated Trading System (SEATS) as though they were buying an Australian stock on ASX. The reverse would apply to American investors. To provide this co-trading facility to investors will require the establishment of a new electronic linkage between the two markets.

6. RECENT CORPORATE LAW DECISIONS

(A) RE WAKIM: A BLOW TO THE FEDERAL COURT AND TO COOPERATIVE FEDERALISM   
By Oren Bigos, Dispute Resolution Group, Mallesons Stephen Jaques, Melbourne

Re Wakim; Ex parte McNally, Re Wakim; Ex parte Darvall, Re Brown; Ex parte Amann [1999] HCA 27, 17 June 1999

(1) Introduction

In Re Wakim; Ex parte McNally and Re Wakim; Ex parte Darvall, the applicants challenged the constitutional validity of the cross-vesting scheme which purports to confer state jurisdiction on the Federal Court and the Family Court. This scheme was established with the enactment of a Jurisdiction of Courts (Cross-Vesting) Act 1987 by the Commonwealth, each State and each Territory.

The applicants applied to the High Court for prohibition directed to the Federal Court arising out of bankruptcy proceedings.

(2) Corporations Law

In the third case, Re Brown; Ex parte Amann, the applicants challenged the constitutional validity of provisions in the Corporations Act 1989 which vested power in the Federal Court to hear Corporations Law matters.

The applicants applied to the High Court for certiorari and prohibition with regard to certain Federal Court orders for winding-up a company.

The Corporations Law is not a wholly national scheme, but rather a modified cooperative scheme. This is because the High Court has decided that the Commonwealth Parliament has no legislative competence under s 51(xx) of the Constitution to regulate the incorporation and winding-up of companies (NSW v Commonwealth (1990) 169 CLR 482). At the core of the scheme lies the Corporations Act 1989 (C’th) by which the Corporations Law extends only to the Australian Capital Territory. This law is constitutionally valid by virtue of the Territories Power of the Commonwealth (s 122 of the Constitution). The ACT legislation was then applied by each State and the Northern Territory (eg Corporations (Victoria) Act 1990 (Vic)), so that the Corporations Law is actually a series of uniform State and Territory Acts which have been ‘federalised’.

The Federal Court was given power by each State and Territory to hear Corporations Law matters. One reason for this was to promote uniformity in company law decisions.

(3) Decision

A majority of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) held that the aspects of the cross-vesting scheme which purport to vest state judicial power in the Federal Court are invalid. The same majority also held that the provisions in the Corporations Acts which purport to vest power to hear matters arising under the Corporations Law in the Federal Court are invalid. Gummow and Hayne JJ wrote the leading judgment with which the other four majority judges agreed.

Kirby J, in dissent, was the only judge who upheld the validity of the provisions.

Although the applicants in Re Brown; Ex parte Amann succeeded, the applicants in the two Re Wakim cases were unsuccessful, as the majority judges other than Callinan J held that the Federal Court nevertheless had accrued jurisdiction in these matters.

(4) Gould v Brown

In Gould v Brown (1998) 193 CLR 346 the High Court was equally divided (3:3) on the validity of the cross-vesting provisions. Therefore the court made its decision pursuant to s 23(2)(a) of the Judiciary Act, which states that where the court is equally divided in opinion, the decision appealed against is affirmed. A statutory majority (Brennan CJ, Toohey and Kirby JJ) upheld the validity of the cross-vesting provisions.

The High Court in Re Wakim considered itself not bound by that decision as this was a constitutional matter which overrode common law doctrines such as res judicata and issue estoppel and the statutory majority decision in Gould "established no principle or precedent having authority" in the High Court.

(5) Majority’s Reasons

The majority took a ‘black letter’ approach to interpreting the Constitution. The clearest example is Callinan J’s statement:

"I can find nothing in Chapter III of the Constitution even to suggest that the States might, whether with or without the concurrence of the Commonwealth, invest federal courts with State jurisdiction."

McHugh J took a conservative view about the role of the courts:

"The function of the judiciary…is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society."

Section 71 of the Constitution reads:

"The judicial power of the Commonwealth shall be vested in…the High Court, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction…"

This, combined with s 77(iii), expressly gives power to the Commonwealth Parliament to vest Commonwealth judicial power in the Federal Court, the Family Court, and in State and Territory Supreme Courts. However it says nothing about the reverse. According to Gummow and Hayne JJ, "the fact that there is a power to invest State courts with federal jurisdiction does not mean that there must be some capacity to make a reciprocal arrangement." According to McHugh J, "Not only does the Constitution contain no express powers supporting the legislation, it contains negative implications prohibiting such legislation."

Section 75 of the Constitution gives the High Court entrenched original jurisdiction in certain matters. S 76 authorises the Commonwealth Parliament to confer original jurisdiction on the High Court in certain matters. In the earlier case of In re Judiciary and Navigation Acts (1921) 29 CLR 257, the High Court held s 76 to be the exclusive source of power to confer original jurisdiction on the High Court.

Section 77 of the Constitution states:

"With respect to any of the matters mentioned in the last two s s the Parliament may make laws -

Defining the jurisdiction of any federal court other than the High Court;

Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

Investing any court of a State with federal jurisdiction."

The High Court in Re Wakim held that because the Commonwealth Parliament cannot confer powers on the High Court which are not included in s 76, the jurisdiction which may be conferred by the Commonwealth Parliament on the Federal Court and Family Court under s 77 is similarly limited to the heads in ss 75 and 76. From this it followed that no other legislature can confer jurisdiction on the Federal Court and Family Court. In the leading judgment, Gummow and Hayne JJ said:

"If…s 76 is the exclusive source of power to confer original jurisdiction on [the High Court] it follows, first that the jurisdiction that may be conferred on a federal court under s 77 is similarly limited to the heads identified in ss 75 and 76 and, secondly, that no other polity can confer jurisdiction on a federal court."

Their Honours read s 77 of the Constitution subject to s s 75 and 76, and implied a restriction on the powers which can be conferred on federal courts. The legislation that was in question sought to "supplement the power that the Commonwealth is given by the Constitution with respect to the federal judicature, not to complement it." The Court said that only the Commonwealth Parliament can make laws defining the jurisdiction of the Federal Court and only with respect to any matters mentioned in s s 75 and 76 of the Constitution.

According to McHugh J, Chapter III of the Constitution authorises the Commonwealth Parliament to create federal courts, "but only for the purpose of exercising jurisdiction with respect to the matters specified in ss 75 and 76 of the Constitution." McHugh J considered that the presence of s 77(iii) indicates that "the absence of any express power in the States to invest State jurisdiction in federal courts is itself enough to indicate that the States lack the power to do so."

The Court said that although the State legislatures have plenary powers, only Commonwealth law can confer jurisdiction on the Federal Court, not some attempted conferral of jurisdiction by State legislatures. In the leading judgment, Gummow and Hayne JJ said:

"What gives the courts the authority to decide a matter is the law of the polity of the courts concerned, not some attempted conferral of jurisdiction on those courts by the legislature of another polity."

The doctrine of separation of powers, implied from Chapter III of the Constitution by the High Court in the landmark decision, R v Kirby; Ex parte Boilermakers’ Society of Australia (the "Boilermakers’ Case") (1956) 94 CLR 254, was further elevated in status. Previously it was held that only judicial power may be vested in federal courts. Now the High Court has said that only the judicial power of the Commonwealth may be vested in federal courts. A law will not be upheld by the High Court simply for its ‘convenience’ or ‘efficiency’ - it must be constitutionally valid.

The respondents had argued that the Commonwealth Parliament has power to ‘consent’ to the conferral of jurisdiction on federal courts from other legislatures. They argued that such consent is necessary to avoid the operation of s 109 of the Constitution. In response, the majority said that the Commonwealth Parliament does not have a power to ‘consent’. The express incidental power in s 51(xxxix) of the Constitution does not supply the Commonwealth Parliament with power to ‘consent’ because, according to Gummow and Hayne JJ, "the laws now in question cannot be described as being laws with respect to matters incidental to the execution of power vested by the Constitution in the federal judicature." The implied incidental power associated with s 71 of the Constitution cannot be relied upon either, because "it cannot be said that these laws are necessary or proper to render effective the judicial power that is given by Chapter III." And although the Commonwealth has "power to protect its own existence and the unhindered play of its legitimate activities…that power does not authorise the Parliament to consent to the vesting of State jurisdiction in federal courts."

McHugh J said that if the States had the requisite power, then consent by the Commonwealth would not be required, and that the Commonwealth Parliament had no power to give it anyway.

(6) Impact of the Decision

The decision highlights the limitations of ‘cooperative federalism’. Cooperative federalism became a popular means of overcoming constitutional deficiencies whereby all the States and the Commonwealth enacted uniform legislation, in the belief that if each side cannot do it alone, surely when all the participants in the federal system cooperate, the power exists to overcome constitutional limitations. Although the High Court acknowledged that "the cross-vesting legislation has been commended as an example of cooperation between the Parliaments of the Federation", the majority concluded that such cooperation does not overcome deficiencies in the constitutional power of each participant. Gummow and Hayne JJ said:

"…no amount of cooperation can supply power where none exists."

Gleeson CJ said:

"The Parliaments of the Commonwealth, the States, and the Territories cannot, by cooperation, amend the Constitution."

McHugh J added:

"Cooperative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power."

Kirby J, in dissent, lamented the decision, recognising its enormous negative impact:

"The collective voice [of the nine governments and Parliaments of the Australian federation] was heard in this Court, in unique harmony, to urge the constitutional status quo…to be maintained."

The decision means that proceedings can no longer be transferred from the State Supreme Courts to the Federal Court under s 5(1) of the Cross-Vesting legislation. However, transfers from the Federal Court to the State Supreme Courts, or from one State Supreme Court to another remain valid.

The decision also means that Corporations Law disputes must now be heard in the State Supreme Courts, not in the Federal Court. This is exactly what the Commonwealth, States and Territories enacting the Corporations Law tried to avoid - it may result in inconsistent decisions from the various Supreme Courts. The Federal Court still has jurisdiction in relation to companies incorporated in the Australian Capital Territory or in the Northern Territory.

The decision prima facie means that many Federal Court decisions from the past decade may be invalid. This is likely to be rectified by prompt legislation.

(7) The Federal Court’s Accrued Jurisdiction and Associated Jurisdiction

Some Federal Court proceedings may still be saved, if they fall within the Federal Court’s accrued jurisdiction or its associated jurisdiction.

The Federal Court is invested with accrued jurisdiction to determine any non-federal aspects of a controversy involving the exercise of its federal jurisdiction, provided the non-federal aspects form an integral part of the federal issue.

The Federal Court’s accrued jurisdiction derives from a general law doctrine which was developed in Philip Morris v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457 and considered in Fencott v Muller (1983) 152 CLR 570. The jurisdiction "depends on whether it is part of a ‘matter’ arising under s s 75 or 76 of the Constitution" according to McHugh J. Where the Federal Court’s jurisdiction is invoked in a matter arising under a Commonwealth Act, the Court’s jurisdiction is "not restricted to the determination of the federal claim or cause of action in the proceeding, but extends beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part", according to Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261, per Mason, Brennan and Deane JJ.

In Re Wakim, the High Court took a wide interpretation of the Federal Court’s accrued jurisdiction. The majority said that if there is a "single justiciable controversy" which has some federal elements and some state elements, then the Federal Court has jurisdiction in the whole matter. The identification of the justiciable controversy requires close attention to the pleadings and to the factual basis of each claim. It is a "matter of impression and practical judgment."

Gummow and Hayne JJ pointed out that:

- There is a single justiciable controversy if different claims arise out of common transactions and facts or a common substratum of facts, notwithstanding that the facts upon which the claims depend do not wholly coincide.

- There is a single justiciable controversy if different claims are so related that the determination of one is essential to the determination of the other (eg. third party proceedings, or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination).

- There is no single justiciable controversy if there are claims which are completely disparate, completely separate and distinct, or distinct and unrelated.

- Often the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter.

- If the several proceedings could not have been joined in the one proceeding, it is difficult to see that they could be said to constitute a single matter.

It is important to consider:

- Who are the parties?

- Are any new parties joined?

- Do the issues arise from the same set of events?

- Is there a single claim for a remedy?

- Are there any cross-claims?

The Federal Court has a statutory associated jurisdiction under s 32(1) of the Federal Court of Australia Act 1976:

"To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked."

This provision has been held to invest jurisdiction only in respect of associated matters that arise under a Commonwealth Act which does not itself invest the court with jurisdiction. However, s 32(1) does not invest the Federal Court with jurisdiction in associated matters which arise under state law.

(8) What was the position before the Cross-Vesting Scheme?

Between the time when the Federal Court was created (1977) and the enactment of the Cross-Vesting legislation (July 1988) there were situations of overlap between the Federal Court’s and the Supreme Courts’ jurisdictions.

The Federal Court’s jurisdiction was restricted to matters arising under Commonwealth legislation, while the Supreme Courts’ jurisdiction covered everything other than Commonwealth legislation. This led to absurd situations, for example in Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261, where under the same set of facts two actions had to commence - one in the Supreme Court (seeking to avoid a contract) and the other in the Federal Court (seeking to establish misleading and deceptive conduct under s 52, Trade Practices Act 1974). One way of overcoming this was where the Federal Court’s accrued jurisdiction could be invoked, but this was not always available. This duplication resulted in a waste of both courts’ time and resources. It could also result in an embarrassing situation if on the same facts, each court made a contrary decision. A court which was not the appropriate court was forced to stay the proceedings, on the grounds of lack of jurisdiction (as determined by private international law). It could not continue with the proceedings, nor could it transfer the case to a more appropriate court.

The State Supreme Courts may now order stays of proceedings which do not belong there but may no longer order transfers to the Federal Court. It remains possible to transfer proceedings from the Federal Court to the State Supreme Courts, or from one State Supreme Court to another.

(9) Ways to Overcome the Decision

The following are some potential methods of overcoming the effect of the Re Wakim decision:

- Each of the States and the Commonwealth are proposing to enact emergency legislation which would declare that any decisions transferred to, and decided by, the Federal Court or the Family Court between 1988 and 1999 are deemed to have been decisions of the various State Supreme Courts. This is a short-term solution which may solve the problem of invalidity of previous decisions (although there are serious doubts as to the constitutional validity of this legislation), however it does not deal with future problems of jurisdiction. The Victorian Department of Justice has circulated a draft Federal Courts (State Jurisdiction) Bill which no doubt will be closely scrutinised by constitutional lawyers over the next month. Whether this solution will work remains to be seen.

- Amendment to the Constitution to allow state judicial power to be vested in federal courts created by the Commonwealth Parliament. Amendments to the Constitution are historically difficult, as they must follow the onerous referendum procedure set down in s 128.

- A request by each State Parliament for the Commonwealth Parliament to exercise power, which would give the Commonwealth Parliament legislative competence under s 51(xxxviii) of the Constitution. Alternatively, a referral by each State Parliament of its power to the Commonwealth Parliament under s 51(xxxvii) of the Constitution. However this would involve the States ceding their power to the Commonwealth, which they have always been reluctant to do.

- One immediate consequence is the need to appoint more State Supreme Court judges. A novel solution would be for several Federal Court judges to be declared "Supreme Court Acting Judges", and they could deal exclusively with Corporations Law matters. Alternatively, a new Corporations Law court could be set up by each State and Territory, with judges rotating from one jurisdiction to another in order to maintain uniformity of decisions.

(10) Conclusion

The High Court’s decision in Re Wakim has dire implications for the Federal Court, the Family Court, the Corporations Law and the cross-vesting scheme. The community awaits a swift and effective response from the state and federal governments.

(B) OPPRESSIVE CONDUCT IN A HOME UNIT COMPANY   
By Dr Elizabeth Boros, Centre for Corporate Law and Securities Regulation

Fedorovitch v St Aubins Pty Ltd [1999] NSWSC 506, No 5152 of 1997, Supreme Court of New South Wales, Young J, 14 May 1999.

This case concerned a company title block of home units. The shares in the company entitled the holders to occupation rights of units in the block.

In 1994, one of the units (Unit 4) was occupied by Sydney Tour Services Pty Ltd. Part of the business of that company was to supply Korean prostitutes to Asian tourists. On 7 July 1994, the tenant of Unit 1, Mr Prestele, was assaulted by two gentlemen who appeared to be minders of the prostitutes, and his glasses were smashed. During the same period police were called on more than one occasion, and a gun was seized by the police. These incidents upset Mr King who was the owner and occupier of Unit 3, and the controlling director of a company which owned Unit 1. In October of that year the managing agents took action and the troublesome tenants moved out of the building. However, Mr King formed the view that not enough was being done. He purported to hold a number of procedurally irregular meetings, and various resolutions were recorded as having been passed at those meetings. These resolutions involved the retention of the services of a Mr Beatty as solicitor for the company. Mr Beatty rendered bills to the total of $1,700 to the company. In addition Mr King claimed various expenses in connection with the occupants of Unit 4, including photocopying and use of time, totalling $129. Another of the purported resolutions related to an attempt to levy the amount of $1,829 for expenses incurred in relation to the tenants in Unit 4 from the owners of that Unit.

Young J held that these activities showed that the affairs of the company were being conducted in a manner which was oppressive or unfairly prejudicial to the plaintiffs (the owners of Unit 4). It was easier to come to the view that oppression existed in light of the close emotional attachment to the shareholders’ place of residence that went with their shares. However, this also made determination of the appropriate remedy difficult.

Young J held that the appropriate order in a home unit case where the owners could not get on together was to order that the whole building be sold, or that the oppressor be ordered to buy out the oppressed on the basis, since there were four shareholders, of one-quarter of the value of the building and land, rather than the value of the shares which gave the occupancy of that Unit. His Honour noted that this might give rise to capital gains tax problems or other problems. Young J also noted the difficulty that the owner of the remaining Unit was not a participant to the proceedings. Another way of dealing with the matter identified by Young J was to order that the capital in the company be reduced by transferring the whole of the property to the four owners as tenants in common so that they could then proceed under s 66G of the Conveyancing Act 1919.

His Honour adjourned the matter to 19 July for the purpose of considering what order needed to be made, but directed that the parties exchange valuations of (a) the shares entitling occupation of Unit 4; and (b) the whole parcel of land and building.   
 

(C) PAYMENT OF CHARTERED ACCOUNTANTS’ FEES FROM MONEYS HELD ON TRUST WAS NOT AN UNFAIR PREFERENCE

By Dr Elizabeth Boros, Centre for Corporate Law and Securities Regulation

V R Dye and Co (a firm) v Peninsula Hotels Pty Ltd (in liq) [1999] VSCA 60, Supreme Court of Victoria, Court of Appeal, No 7040 of 1997, Winneke P, Tadgell and Ormiston JJA, 20 May 1999.

The company was placed in liquidation on 26 August 1996. On 18 June 1996, the company’s board of directors had approached Mr Dye, a chartered accountant, seeking to engage his services to assist the directors in the lead-up to and the conduct of the creditors’ voluntary winding up of the company, which by then the board saw as inevitable. Mr Dye agreed to be appointed on the basis that the company pay the following fees:

(1) professional costs to be incurred up to the date of the liquidation of the company - $4,000;

(2) professional costs to be incurred after the date of liquidation of the company - $4,000; and

(3) disbursements of $500.

Mr Dye required the company to deposit the sum of $8,500 in his trust account on account of those fees and disbursements. This was done and payment was formally approved by the board. From approximately 19 June to 2 July 1996 Mr Dye provided the agreed professional services to the company. On 1 July 1996 he issued an invoice and memorandum of professional fees in relation to those professional services and disbursements for $4,154.90 of which $4,000 was attributed "to our fee as fixed by board of directors" and the balance related to disbursements. On 2 July 1996, Mr Dye drew an amount of $4,154.90 from the trust account and applied it in payment of the invoice.

The liquidator asserted that the withdrawal of $4,154.90 by the appellant from the trust account was an "unfair preference" within the meaning of s 588FA of Corporations Law (the Law) and so in turn an "insolvent transaction" within s 588FC of the Law. Consequently, a "voidable transaction" within the meaning of s 588FE was said to have been "entered into…during the six months ending on the relation back-day" applicable to the company. Thus by reason of s 588FF(1)(a) of the Law and s 42B of the Corporations (Victoria) Act 1990, the Magistrates’ Court had power to make the orders it made on 1 September 1997 whereby it ordered repayment of moneys to the respondents. This was on the basis that until the moneys were drawn down on 2 July 1996 the only beneficial owner of the moneys in the trust account was the company. Consequently, when drawn down, the moneys were applied to the payment of an existing debt and that payment was not otherwise protected from the operation of the Law.

The appellant argued that the drawing down of the moneys on 2 July was not the relevant "transaction" for the purpose of Part 5.7B, and that the true "transaction" was the payment of $8,500 to the appellant’s trust account on 19 June 1996 or, alternatively, that payment taken in combination with the agreed drawing down on 2 July.

Ormiston JA (with whom the other members of the court agreed) found in favour of Mr Dye (the appellant). His Honour held that the totality of the transaction did not involve the receipt of a payment in respect of an existing debt, but merely the setting up of what was a sufficient and appropriate mechanism for the payment of a new obligation, to be incurred for services yet to be provided but of what were assumed to be equivalent value.

His Honour undertook an extensive examination of the interpretation of s 588FA of the Law, comparing it with previous legislative provisions relating to preferences. He concluded that s 588FA should be construed in the same way as the former provision (s 122 of the Bankruptcy Act 1966), except the extent of the language of s 588FA clearly pointed to a contrary conclusion. The effect of the decision of the High Court in Richardson v Commercial Banking Co of Sydney Limited (1952) 85 CLR 110, as adopted by that Court in Airservices Australia v Ferrier (1996) 185 CLR 483 and applied by the Full Federal Court in Re Emanuel (No 14) Pty Ltd (in liq) (1997) 147 ALR 281 was that the court should look at the "ultimate effect" of the "entire transaction" in order to determine whether it had worked unfair preference within the meaning of s 588FA.

Here the relevant transaction or dealing involved at least three stages. The first was the engagement upon condition that $8,500 was paid into the appellant’s trust account; the second was the giving of the cheque in that sum by the company to the appellant; and the third was the drawing down of $4,154.90 from that account by Mr Dye on 2 July after he had completed the first stage of the work. If one looked only at the latter stage (as did the magistrate and the judge at first instance) it was not difficult to say that the final payment, look at in isolation, was a preference. However, his Honour considered that each stage was essential to the whole transaction and neither should be looked at on its own. This was not a case where the moneys came into Mr Dye’s trust account by chance, nor was it a case where the use of the moneys in that trust account was left entirely to implication. The parties specifically contemplated that fees should be paid into a trust account and that they would be drawn down without any further authorisation from the company.

His Honour drew an analogy with a person receiving a prepayment or obtaining payment in a c.o.d. transaction.

Ormiston JA distinguished the decision of the Federal Court in Higgins v G S Enterprises Pty Ltd (in liq) (1989) 7 ACLC 410. In that case there had been no explicit agreement between the appellant firm and the company as to the way in which the firm was to be paid for services relating to the director’s trial, and arrangements were left to the director to put in train which he did in a clearly unauthorised manner.

Ormiston JA emphasised that his conclusion in this case did not permit parties to avoid s 588FA by agreeing to provide goods or services in the future merely upon the basis of an agreed payment by an insolvent company at a later date. The transaction in question in each case is not the agreement for the supply of the goods and services (with or without an arrangement for payment) but is the transaction whereby the company in fact pays for the goods or services.

(D) BREACH OF TAKEOVERS PROVISIONS BY REASON OF PRE-ACQUISITION AGREEMENT   
By Scott Hirst and Larelle Law, Faculty of Business, Economics and Law, The University of Queensland

Australian Securities and Investments Commission v Yandal Gold Pty Ltd [1999] FCA 799, No V 3094 of 1999, Federal Court of Australia, Merkel J, 16 June 1999.

The Australian Securities and Investments Commission (ASIC) applied for a vesting order pursuant to s 737 or s 739 Corporations Law arising from the takeover activity by the first respondent Yandal Gold Pty Ltd (Yandal Gold) as bidder for the shares in Great Central Mines Ltd (the target). On 12 January 1999, Yandal Gold served on the target a Part A Statement for offers of all of the shares on issue in the target, for $1.50 per share.

Joined in the action as respondents were the following firms:

- Yandal Gold Holdings Pty Ltd (Yandal Holdings, the second respondent)

- Edensor Nominees Pty Ltd (Edensor, the third respondent)

- Normandy Mining Ltd (Normandy Mining, the fourth respondent)

- Normandy Mining Finance Ltd (NMF, the fifth respondent)

- Normandy Consolidated Gold Holdings Ltd (Normandy Consolidated Gold, the sixth respondent)

- Normandy Mining Holdings Ltd (Normandy Holdings, the seventh respondent).

The relationship between the respondents reflected the alliance formed to gain control of the target. This alliance, between two gold mining enterprises referred to as the Gutnick interests and the Normandy group, may be simplified as follows:

Yandal Gold and Yandal Holdings represented the joint interests (Yandal Gold was wholly owned by Yandal Holdings, which in turn was jointly owned by Edensor (50.1%) and Normandy Consolidated Gold (49.9%)); Edensor represented the Gutnick interests; and the fourth, fifth, sixth and seventh respondents represented the interests of the Normandy group. Normandy Mining was the parent company of the group.

Prior to the takeover, Edensor directly held 12.56% of the target and Normandy Holdings directly held 27.81%. Neither Yandal Gold nor Yandal Holdings had a direct shareholding in the target.

ASIC's main concern regarding the conduct of the takeover was that it breached s 615 Corporations Law. The Part A Statement failed to make adequate disclosure regarding relevant interests and acquisitions of shares in the target by Yandal Gold, Edensor, and the Normandy group ASIC alleged. ASIC also alleged that it was misleading or deceptive in contravention of either s 52 Trade Practices Act 1974, or alternatively, s 12DA Australian Securities and Investment Commission Act and s 995 Corporations Law.

The joint enterprise between the two interests was instituted by a "bid structure agreement". ASIC's claim of misleading disclosure lay in the degree to which the bid structure agreement created "relevant interests" between any and all of the respondents. The overall joint enterprise comprised four elements:

- the incorporation of Yandal Gold and Yandal Holdings as the vehicles through which the takeover was conducted;

- the Shareholders Agreement, dated 11 January 1999, entered into by all of the respondents;

- the "carried interest" received by Edensor as the price the Normandy group was prepared to pay for the support of the Gutnick interests; and

- the informal "non-acceptance and retention" agreement entered into by Yandal Gold, Edensor and Normandy Holdings.

The Shareholders Agreement was a complicated document that recorded the joint intentions of the Gutnick interests and the Normandy group regarding the conduct of the takeover and matters of structure and policy in the management of the target if the takeover was successful.

The "carried interest" received by Edensor arose from the finance arrangement between Edensor, Normandy Mining and Chase. Funds of $285 million were lent to Yandal Holdings to finance the bid. Although Normandy Mining and Edensor were each liable to service Yandal Holding's liability to Chase, Normandy Mining was to have recourse only to Edensor's Yandal Holdings shares. To minimise Edensor's loss, it was further agreed that if Edensor defaulted on the loan, Edensor was still entitled to receive 90% of the value of its shareholding in Yandal Holdings. This benefit was "unprecedented" and was valued by ASIC's expert at $27-30 million.

The "non-acceptance and retention" agreement was controversial, as the parties denied its existence. ASIC alleged that Yandal Gold, Edensor and Normandy Holdings entered into an informal arrangement. On the facts, Merkel J held that the following two arrangements were entered into as part of the bid structure agreement:

(i) the non acceptance agreement, the effect of which was that neither Edensor nor Normandy Holdings would accept the Yandal Gold offer over their existing parcel of shares; and

(ii) the retention agreement, the effect of which was that both Edensor and Normandy Holdings would retain their existing parcel of shares to enable Yandal Gold to reach the 90% threshhold to trigger the compulsory acquisition power.

Merkel J identified three main issues arising from ASIC's application:

(i) Whether Yandal Gold, Edensor and Normandy Holdings entered into the "non-acceptance and retention" agreement and if so, whether it contravened s 615.

(ii) Whether any of the respondents, by entering into the Shareholders Agreement, contravened s 615.

(iii) In the event of a contravention of s 615, what would be the appropriate order.

(1) The effect of the "non-acceptance and retention" agreement.

Merkel J found that an informal, unenforceable arrangement or understanding existed. He primarily based this finding on inferences of evidence before the Court. Despite their availability, neither Mr de Crespigny (for the Normandy group), nor Mr Gutnick (for Edensor) gave evidence on the matter, justifying the drawing of inferences by Merkel J as to the existence of the arrangement.

The "non-acceptance and retention" agreement was entered into between 16 December 1998 and 11 January 1999. Its effect was to confer on each of Yandal Gold, Edensor and Normandy Holdings, a power to exercise control over the disposal of shares in the target, pursuant to s 31 Corporations Law. Although Merkel J acknowledged that it may be controversial whether the non-acceptance element alone constituted control over disposal of shares, it plainly did when considered in combination with the retention component. Accordingly, the "non-acceptance and retention" agreement meant that each of the parties made an "acquisition" pursuant to s 51 Corporations Law, which was in contravention of the 20% threshold in s 615 Corporations Law.

- Yandal Gold: acquired a relevant interest of 40.37% in the target, (being the aggregation of Edensor's 12.56% and Normandy Holdings' 27.81%);

- Edensor: acquired a relevant interest in a further 27.81%; and Normandy Holdings acquired a relevant interest in a further 12.56%.

(2) The effect of the Shareholders Agreement

It was not disputed that the effect of the Shareholders Agreement resulted in all of the respondents becoming associated with each other, pursuant to s 12(1)(b), (c) and (e) Corporations Law. The immediate effect of the association was merely to establish an entitlement to shares, it did not trigger an acquisition of a relevant interest in those shares in contravention of s 615.

More significantly, the association triggered s 33 Corporations Law, that operates in respect of indirect holdings. S 33 deems a relevant interest where there is a chain of interposed companies, linked by more than 20% control in the voting power of the body corporate. So, for example, Edensor had a relevant interest in shares in the target, and was an associate of a body corporate - Yandal Holdings. A person - Yandal Gold - was associated with Normandy Consolidated Gold, and Normandy Consolidated Gold had the power to vote in respect of more than 20% of the shares of Yandal Holdings.

Therefore Yandal Gold was deemed to have a relevant interest in the shares of any associate of Yandal Holdings - ie, Edensor.

Applying the network of associations to the circumstances in s 33 resulted in Edensor, Normandy Consolidated Gold, Yandal Gold and Yandal Holdings all being deemed to have a relevant interest in the target that increased to 40.37%.

The difficult issue of interpretation was whether the deemed increase in relevant interests of shares in the target via s 33 amounted to an "acquisition". If so, where an application of s 33 (or the other deeming provisions in ss 32, 34 and 35) resulted in an increase in relevant interests beyond the thresholds, s 615 would be contravened. After reviewing the authorities, Merkel J held that it was consistent with legislative intention and objectives to hold that there is no distinction in s 615 between actual or deemed acquisitions of relevant interests.

Accordingly, in addition to the Shareholders Agreement creating the association between each of the parties to it, it also effected an acquisition by the parties linked by the 20% control test.

Inadvertence: Merkel J rejected the respondents' claims that the breach of s 615 occurred through inadvertence, and therefore ought to be excused according to the court's discretion conferred in s 743.

Misleading and Deceptive Conduct: As a result of the contraventions of s 615, the disclosures made in the Part A Statement as to the existing relevant interests and acquisitions were misleading, particularly as the Part A Statement incorrectly stated that Yandal Gold had no relevant interest in the target's shares.

Although cl 14 of s 750 required dislosure of these matters, Merkel J also commented on the significance of that information to the target shareholders' decision to accept the offer. His Honour made two points about the consequences of the misleading disclosure:

(i) shareholders may have acted differently if they were aware that Yandal Gold had already acquired 40.37% and enjoyed the support of Normandy Holdings and Edensor through the non-acceptance and retention agreement. Those undisclosed circumstances reduced the expectation of a rival bid or a higher control premium.

(ii) More accurate disclosure would have alerted ASIC to take more timely enforcement action rather than disrupt the takeover in process.

(3) Appropriate Relief

Merkel J stated that the question of relief in this case was one of some difficulty. His Honour balanced the accepted view that those who contravene the Corporations Law ought not enjoy advantages or benefits flowing from the breach, against the public interest that orders for relief are remedial rather than punitive. Accordingly, Merkel J's orders included:

(i) Yandal Gold was restrained from proceeding with any compulsory acquisition.

(ii) Shareholders who accepted the offer were entitled to avoid their contracts.

(iii) The remaining shares acquired by Yandal Gold were vested in ASIC (with appropriate directions as to the manner of sale and the dispersal of any profits from sale to the non-avoiding shareholders).

(iv) A "disgorgement" order requiring Edensor to distribute to shareholders who accepted the Yandal Gold offer a share in the "carried interest" valued at $27-30 million. The justification for this controversial order was to redirect the value of the "carried interest" received by Edensor as a result of the s 615 contravention to compensate the other target shareholders.

In making these orders, Merkel J dismissed the respondents' arguments relating to unfair prejudice (s 744(2)) and undue delay by ASIC in bringing the application.

(E) ADEQUACY OF OFFEROR’S DISCLOSURE OF INTENTIONS AND OTHER MATERIAL INFORMATION, IN PART A STATEMENT   
By Mary Sowa, Research Assistant, Centre for Corporate Law and Securities Regulation

AAPT v Cable & Wireless Optus Ltd [1999] NSWSC 509, No 2298 of 1999, Supreme Court of New South Wales, Austin J, 4 June 1999.

The plaintiff AAPT was the target of a contested cash takeover bid made by the first defendant Cable & Wireless Optus Limited through its wholly owned subsidiary CWOI, the second defendant. AAPT commenced proceedings seeking various orders which would either enjoin the defendants from sending the Part A Statement and Offers to shareholders, or require dispatch of supplementary disclosure material.

AAPT contended that the Part A Statement failed to comply with s 750 of the Corporations Law in four respects:

- it did not adequately or accurately state the intentions of CWOI for the purposes of clause 20 of Part A of s 750;

- it did not disclose material information with respect to negotiations with the Australian Competition and Consumer Commission (ACCC) as required by clause 17; and

- it did not disclose certain aspects of funding arrangements for the bid as required by clause 17.

- AAPT also contended that the dispatch of the Part A Statement would be misleading or deceptive conduct or conduct likely to mislead or deceive for the purposes of s 995 of the Corporations Law.

(1) Adequacy of the defendants’ disclosure of intentions in the Part A Statement

Austin J examined the legal principles governing the disclosure obligation in clause 20 of Part A of s 750. He stated that clause 20 confined the disclosure obligation to: particulars of the offeror’s intentions regarding stated matters; and possible courses of action which the offeror was considering.

The defendants contended that this disclosure of intentions and considerations should be confined to the intentions and considerations of the offferor’s board of directors, and should not extend to the intentions and considerations of individuals and working groups within the offeror’s management structure.

Austin J rejected this contention and stated that if an individual or working group was given the board’s authority to plan the takeover bid as a whole, or to develop an integration plan for the takeover target, the intentions and considerations of that individual or working group in regard to the matters they were given authority over, could be taken as evidence of the intentions of the offeror, even if those intentions had not been placed before the board. Austin J also stated that if a management intention or consideration held by officer(s) with such authority, was incorporated into a draft Part A Statement put before the board, and the board expressly rejected that part of the draft, then that management intention or consideration would not be part of the offeror’s intentions or considerations. However, if the board merely omitted from the Part A Statement a management intention or consideration in the draft, which the board’s attention was not drawn to, then (depending on the facts) that managment intention or consideration could still be the intention or consideration of the offeror.

The plaintiff alleged that the defendants’ disclosure of intention in the Part A Statement was inadequate. After making a thorough assessment of the disclosure of intention s of CWOI’s Part A Statement, against: the documentary evidence of CWOI’s intentions and considerations; and the oral evidence of the intentions and considerations of the two officers given responsibility for planning the acquisition and integration of AAPT, Austin J held that: the defendants’ disclosure of intention did not contain patent deficiencies in its drafting; and that it was an accurate and complete account of the particulars of the offeror’s intentions and the possible courses of action being considered by the offeror.

(2) Synergies and benefits

The plaintiff contended that information about the benefits and synergies which might flow from the success of the takeover bid, was contained in CWO’s documents, and that the defendants failed to include this information in their Part A Statement, as required by clause 17 of Part A of s 750.

Austin J rejected this contention and held that the greater specificity for which the plaintiff contended would not have had any real bearing on the decision by the offeree shareholders whether or not to accept the offer, and thus was not required to be disclosed under clause 17.

(3) ACCC negotiations

Clause 8.1(e) of the defendants’ offer made the offer subject to CWO gaining the ACCC’s approval or acquiescence for the defendants’ takeover bid, by the end of the offer period. The plaintiff contended that as a consequence of this condition, information about the defendants’ negotiations with the ACCC was material information required to be disclosed by clause 17 of Part A of s 750.

Austin J rejected this contention on the basis that there would be a real risk that disclosure of such information would be misleading to the offeree shareholders and thus it was not required to be disclosed under clause 17.

(4) Funding arrangements

The plaintiff also raised a number of specific criticisms in relation to the defendants’ disclosure of funding in the Part A Statement, alleging that the defendant was again failing to disclose material information which was required to be disclosed under clause 17. Austin J rejected these criticisms and held that the greater specificity for which the plaintiff contended would not have had any real bearing on the decision by the offeree shareholders whether or not to accept the offer, and thus was not required to be disclosed under clause 17.

(5) Misleading and deceptive conduct

On the basis of the allegations described above, the plaintiffs contended that the dispatch of the defendants’ Part A Statement would be misleading or deceptive conduct or conduct likely to mislead or deceive for the purposes of s 995 of the Corporations Law.

Having dismissed the plaintiff’s allegations that the defendants’ Part A Statement failed to comply with the content requirements of s 750 of the Corporations Law, Austin J concluded that the dispatch of the defendants’ Part A Statement would not contravene s 995.

(F) DISPENSATION FOR LATE FILING OF APPLICATION BY DISSENTING SHAREHOLDERS IN NEW SOUTH WALES SUPREME COURT IN WAKE OF RE WAKIM   
By Dr Elizabeth Boros, Centre for Corporate Law and Securities Regulation

Super John Pty Limited v Futuris Rural Pty Limited [1999] NSWSC 627, No 2746 of 1999, New South Wales Supreme Court, Santow J, 24 June 1999.

The plaintiffs are the sole outside shareholders of Elders Australia Limited. They had made an application, within time, to the Federal Court under s 701(6) of the Law. Under that section, the court may relieve a dissenting offeree from having their shares compulsorily acquired by the takeover offeror. The original application was rendered nugatory by the High Court’s decision in Re Wakim (noted in Item 6(A) of this Bulletin).

As a result, the plaintiffs applied to the New South Wales Supreme Court under s 1322(4) of the Law for dispensation for late filing of an application by a dissenting shareholder under s 701(6). Under s 1322(4)(d) a court may, on the application of an interested person, make an order extending the period for instituting any proceeding under the Law. Under s 1322(6) the court must not make an order unless it is satisfied that no substantial injustice has been or is likely to be caused to any person.

Santow J dismissed the defendant’s preliminary arguments that ch 6 of the Law provides exhaustively, and to the exclusion of s 1322, for ASIC modifications and variations of ch 6 by s 730 and for court dispensation for contraventions of ch 6 by s 743. His Honour also granted the plaintiffs’ application, on condition that they pursue the proceedings expeditiously. This was on the basis that the delay which the defendant would suffer in deferring its capacity to compulsorily acquire the balance of the shares in Elders while the application was dealt with did not amount to "substantial injustice" within the terms of s 1322(6)(c) of the Law. It certainly did not outweigh the irremediable injustice of depriving the plaintiffs of the opportunity to resist compulsory acquisition of their shares.

7. RECENT ACCOUNTING DEVELOPMENTS

(A) AUSTRALIAN ACCOUNTING RESEARCH FOUNDATION

At its meeting on 16-17 June 1999 the Australian Accounting Standards Board considered the following matters:

Acquisition of assets; Accounting interpretations; Amortisation of identifiable intangible assets; Converting financial instruments; Director and executive disclosures; Discontinuing operations; Exchanges of property, plant and equipment; Interim financial reporting; Revaluation of non-current assets; and Recoverable amount test.

For further information contact the Australian Accounting Research Foundation at the following address:

211 Hawthorn Road   
Caulfield Vic 3162   
DX 37068 Caulfield   
Tel: +61 3 9524 3600   
Fax: +61 3 9523 5499   
Email: standard@aarf.asn.au

(B) URGENT ISSUES GROUP

The UIG is a committee established by the Australian Society of Certified Practising Accountants (ASCPA), The Institute of Chartered Accountants in Australia (ICAA), the Australian Accounting Standards Board (AASB) and the Public Sector Accounting

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

The major items discussed at the UIG meeting on 24 June 1999 are outlined below.

(1) Designation of sold (written) options as hedges – consensus agreed

The UIG agreed a Consensus that specifies that a sold option itself would not qualify for designation as a hedge and outlines the conditions that must be satisfied for arrangements involving sold and bought options to qualify for hedge accounting. The Consensus specifies that "synthetic forwards" and "collars" will qualify for designation as a hedge and that "ratio" or "leverage" options should be considered effective as a hedge only to the extent that the principal amount of the sold option is not in excess of the principal amount of the bought option.

The Abstract does not specify how sold options which no longer qualify as hedges should be accounted for. The UIG noted that the AASB and PSASB are expected to issue in the near future amended Accounting Standards AASB 1012/AAS 20 "Foreign Currency Translation" which will include guidance on accounting for sold foreign currency options that are not hedges. Members noted their intention to revisit the issue of whether or not to prescribe requirements for accounting for commodity options that are not hedges after the issue of the foreign currency standards.

Provided the Consensus is not vetoed by the AASB and PSASB, it will apply to all reporting entities for reporting periods ending on or after31 December 1999.

(2) Consolidation of special purpose entities – consensus agreed

The UIG has the responsibility of reviewing the Interpretations (Consensus decisions) of the Standing Interpretations Committee (SIC) of the International Accounting Standards Committee (IASC). The SIC is the IASC’s equivalent of the UIG.

The SIC has issued an interpretation identifying circumstances in which "special purpose entities" (SPEs), such as those established to facilitate a securitisation of assets or a leverage lease, should be consolidated with another entity. The UIG Considered a draft Abstract that replicated the SIC Consensus amended only to link to the relevant Australian, rather than International, Accounting Standards and to adopt Australian terminology. The UIG agreed the Consensus.

Provided the Consensus is not vetoed by the AASB and PSASB it will apply to all reporting entities from 24 June 1999, the date on which it was agreed.

(3) Share issues – cost to company – background discussion

The UIG considered a background paper which outlined different views on how to account for shares issued in lieu of cash dividends, shares issued as part of a share election plan and shares issued to employees as compensation for past or expected future service. These are amongst the most contentious issues facing accounting standard-setters today. The purpose of the UIG’s preliminary discussion was to determine whether or not there was a common view amongst UIG members before investing significant time and resources in the development of Issue Summaries and draft Abstracts.

Members indicated support for the view that shares issued to employees for past or future employee services give rise to an expense or an asset, but expressed differing views about whether shares to be issued in lieu of cash dividends or to be issued under the terms of a share election plan would give rise to a liability.

(4) Rollover of hedges and hedges of forecasted transactions

The UIG did not consider this Issue Summary at the meeting but will consider it at its next meeting in Melbourne on 12 August 1999.

(5) Issue proposals

The UIG considered an Issue Proposal dealing with the amortisation of lease premiums that have arisen in airport leases. The UIG was briefed on the issue by a representative of the airport operators. The UIG decided that it should consider the broader issue of factors to be considered in determining the pattern of consumption of the future economic benefits, or service potential, of identifiable intangible assets with finite lives. An Issue Proposal will be prepared for consideration at the next meeting.

8. RECENT CORPORATE LAW JOURNAL ARTICLES

R Robertson, ‘In Search of the Perfect Mutual Fund Prospectus’ (1999) 54 The Business Lawyer 461

R Cieri, L Ganske and H Lennox, ‘Breaking Up Is Hard To Do: Avoiding the Solvency-Related Pitfalls in Spinoff Transactions’ (1999) 54 The Business Lawyer 533

C Richards and R Stearn, ‘Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law’ (1999) 54 The Business Lawyer 607

J Fanto, ‘We’re All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education’ (1998) 49 Case Western Reserve Law Review 105

C Svernlov, ‘The Role of Deputies in the Swedish Limited Liability Company’ (1999) 10 International Company and Commercial Law Review 90

P Poch, ‘Takeover Rules in Austria’ (1999) 10 International Company and Commercial Law Review 93

E Raymond, G Reinbold, R Cole and M Uhrynuk, ‘Proposed Changes to US Securities Offering and Business Combination Regulations’ (1999) 10 International Company and Commercial Law Review 105

K Arjunan, ‘Companies Winding Up: Commencement and Disposition of Property Under Companies Legislation in Malaysia, Singapore and Hong Kong’ (1999) Malayan Law Journal 1

S Sironi, ‘Securities Regulation: Information Initiative on the Internet’ (1998) 50 Administrative Law Review 255

J Savirimuthu and A Scott, ‘Corporate Nullification: A Health Warning for Company Directors (1998) 49 Northern Ireland Legal Quarterly 94.

Federal Law Review Special Issue on Salomon v Salomon. Articles include:

- R McQueen, ‘Life Without Salomon’ (1999) 27 Federal Law Review 181

- S Ville, ‘Judging Salomon: Corporate Personality and the Growth of British Capitalism in a Comparative Perspective’ (1999) 27 Federal Law Review 203

- P Spender, ‘Resurrecting Mrs Salomon’ (1999) 27 Federal Law Review 217

- S Bottomley, ‘The Birds, The Beasts, and The Bat: Developing a Constitutionalist Theory of Corporate Regulation’ (1999) 27 Federal Law Review 243

- S Corcoran, ‘Living on the Edge: Utopia University Ltd’ (1999) 27 Federal Law Review 265

- C Mantziaris, ‘The Dual View Theory of the Corporation and the Aboriginal Corporation’ (1999) 27 Federal Law Review 283

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9. NEW CENTRE FOR CORPORATE LAW PUBLICATIONS

(A) STOCK MARKET MANIPULATION AND SHORT SELLING (published in association with CCH Australia Limited)

Author: Dr Vivien Goldwasser

The recent Federal Court judgment in *Australian Securities Commission v Nomura International plc* has highlighted the importance of the regulation of stock market manipulation. In this judgment, Justice Sackville held that Nomura had engaged in trading which constituted stock market manipulation. Securities Commission Chairman Mr Alan Cameron has described the judgment as a "landmark decision…that helps establish the boundaries of acceptable trading strategies".

The regulation of stock market manipulation and short selling is fundamental to the integrity of the securities markets. In this new book Dr Goldwasser identifies the various techniques of stock market manipulation and short selling; outlines the history and rationale of regulation in this area; provides detailed analysis of the statutory regulation of short selling and stock market manipulation; and outlines the regulation of stock market manipulation not only in Australia but also in the United States, the United Kingdom, Canada and New Zealand.

This book is of relevance to those in the securities industry (brokers, analysts, bankers) and their advisers (legal, financial and accounting) as well as to regulators and academics.

(B) REGULATING DIRECTORS’ DUTIES - HOW EFFECTIVE ARE THE CIVIL PENALTY SANCTIONS IN THE AUSTRALIAN CORPORATIONS LAW?

Authors: Dr George Gilligan, Ms Helen Bird and Professor Ian Ramsay

The regulation of directors’ duties in Australia was fundamentally reformed in 1993 with the introduction of civil penalties which substantially reduced the role of criminal law. The civil penalty provisions in the Corporations Law include the basic duties of directors and other officers of companies such as the duty to:

- act honestly;

- exercise reasonable care and diligence;

- not make improper use of information or position; and

- not have the officers’ company trade while it is insolvent.

This Research Report examines how the Australian Securities and Investments Commission uses civil penalties as an enforcement tool against company directors. It identifies and critically evaluates the factors which impact upon ASIC enforcement decisions regarding civil penalties.

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