**CORPORATE LAW ELECTRONIC BULLETIN**   
**Bulletin No 7, March 1998**

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

with the support of

The Australian Securities Commission,   
the Australian Stock Exchange   
and the leading national law firms:

Allens Arthur Robinson Group   
Blake Dawson Waldron   
Clayton Utz   
Corrs Chambers Westgarth   
Freehill Hollingdale & Page   
Mallesons Stephen Jaques

Editors: Kenneth Fong, Dr Elizabeth Boros and Professor Ian Ramsay

ACCESS TO BULLETIN

If you have difficulty receiving the complete bulletin, you may view and print the latest Bulletin immediately from the archive site on the Internet at:

http://www.law.unimelb.edu.au/corporat/email/aindex.htm

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#1.RecentCorporateLaw)   
(A) [Implementation of Financial System Reforms](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28A%29Implementation)   
(B) [Reforms to Business Law](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28B%29Reforms)   
(C) [AMP and Rothschild Group Banking Authorities](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28C%29AMPANDROTHSCHILD)   
(D) [Taxation of distributions disguised as loans from private companies](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28D%29Taxation)

2. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#2.RecentCLDecisions)   
(A) [G M & A M Pearce and Co Pty Ltd v R G M Australia Pty Ltd](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28A%29GM&AMPearce)   
(B) [In the Matter of Australian Company Number 007 764 249 Pty Ltd (in liquidation)](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28B%29Inthematterof)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#3.RecentASX)   
(A) [T+3 Settlement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28A%29T+3)   
(B) [Enterprise Market](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28B%29EnterpriseMarket)   
(C) [New Capital Adequacy Framework](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28C%29NewCapital)   
(D) [Mandatory Disclosure of Exposure to Year 2000 Problem](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28D%29MandatoryDisclosure)

4. [RECENT ASC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#4.RecentASC)   
(A) [Financial Complaints Referral Centre](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28A%29FinancialComplaints)   
(B) [Relief from Accounts and Audit Requirements - Late Forms](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28B%29RelieffromAccounts)   
(C) [New South Australian Regional Commissioner](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28C%29NewSouthAustralian)   
(D) [Securities Agreement with German Securities Regulatory Authority](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28D%29SecuritiesAgreement)   
(E) [Consultative Papers - Supervision of Financial Conglomerates](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28E%29ConsultativePapers)   
(F) [Additional Investments in Managed Investment Schemes](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28F%29AdditionalInvestments)   
(G) [Acting Victorian Regional Commissioner Appointed](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28G%29ActingVictorian)   
(H) [ASC Summer School](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#%28H%29ASCSummerSchool)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#5.RecentCLJournals)

6. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#6.Archives)

7. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#7.Contributions)

8. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#8.Membership)   
  
  
9. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0007.htm#9.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) IMPLEMENTATION OF FINANCIAL SYSTEM REFORMS

The Federal Government announced on 17 March 1998 the implementation of its new system of financial regulation with the establishment of a new agency, the Australian Prudential Regulation Authority (APRA) and a new market regulator and consumer protection body, the Australian Securities and Investments Commission (ASIC). A new high level Financial Sector Advisory Council will report directly to the Treasurer on regulatory and other changes required to make Australia a leading financial centre in the Asia Pacific region.

The Government also intends to establish a Council of Financial Regulators comprising the Reserve Bank of Australia (RBA), APRA and ASIC to replace the present Council of Financial Supervisors and to extend co-operation across the full range of regulatory functions. The Council will provide a forum for:

- sharing information and views amongst its members, and liaison with other regulators and agencies;

- harmonising regulatory and reporting requirements, paying close attention to the need to keep regulatory costs to the minimum;

- identifying important issues and trends in the financial system, including the impact of technological developments;

- co-ordinating regulatory responses to actual or potential instances of financial instability, and helping to resolve any issues where

members' responsibilities overlap.

(a) Establishment of the Commonwealth Regulatory Framework

The Government's aim is to establish the new regime for financial system regulation at the Commonwealth level on 1 July 1998, or as soon as possible thereafter, subject to the passage of legislation. Legislation to establish the new regulatory authorities and to give effect to the main measures announced on 2 September 1997 will be introduced in the Autumn Sittings of Parliament. The legislation to be introduced in the present sittings covers:

(i) the establishment of the APRA to undertake the prudential supervision of deposit taking institutions, life and general insurance companies and superannuation funds;

(ii) arrangements for the establishment of the ASIC;

(iii) the industry levies necessary to fund the new supervision of deposit taking institutions, life and general insurance companies and superannuation funds;

(iv) the establishment of a Payments System Board within the RBA with responsibility for implementing policies to improve payments system efficiency and to enhance competition in the market for payments systems, and additional powers for the RBA to regulate clearing and settlement systems;

(v) amendments to the Banking Act 1959 to establish a single licensing prudential regulatory regime for deposit taking institutions, facilitate the establishment of non-operating holding company structures and enhance the depositor protection arrangements;

(vi) a new Financial Sector (Shareholdings) Bill to implement a standardised regime that will promote widespread ownership in deposit taking institutions and insurance companies; and

(vii) allocation of the existing responsibilities for insurance and superannuation, currently carried out by the Insurance and Superannuation Commission, between APRA and ASIC.

In the first stage, steps will be taken to rename the Australian Securities Commission as the ASIC and to allow it to perform existing (or amended) consumer protection and market integrity functions in the financial sector currently performed by other Commonwealth agencies, such as the Insurance and Superannuation Commission.

Further legislation, covering a second stage of reforms, will be introduced later this year. This will:

(i) subject to the agreement of the States and Territories, deal with the transfer to the Commonwealth of regulatory responsibility for credit unions, building societies and friendly societies; and

(ii) create a consolidated law for market conduct and disclosure in the financial system to be administered by ASIC, including amendments to the Corporations Law flowing from the Corporate Law Economic Reform Program (CLERP).

(b) Discussions with State and Territory Governments

The Prime Minister wrote to the Premiers and Chief Ministers on 2 September 1997 seeking 'in principle' agreement, by the end of 1997, to the transfer of prudential and corporate regulatory responsibility for building societies, credit unions and friendly societies to the Commonwealth, and the establishment of the new regulator for market integrity and consumer protection. At the time of announcement of reforms, the Government proposed that the transfer of regulatory responsibility for financial entities presently regulated by the States and Territories would, if agreed, occur by 1 July 1999.

Industry remains enthusiastic about the reforms and is keen to progress the second stage, as are most of the States. In light of this support, the Federal Government would like to bring forward implementation of the second stage. To initiate the next phase of discussions, the Prime Minister has now written to the Premiers and Chief Ministers to propose that an arrangement be negotiated to achieve the transfer of the relevant regulatory responsibilities as soon as possible in 1998.

(B) REFORMS TO BUSINESS LAW

On 17 March 1998 the Treasurer, Mr Peter Costello, announced that the Federal Government will introduce legislation in the Budget session to implement wide ranging reform of Australia's corporate law in line with proposals made by CLERP.

Key reforms to be implemented include:

(a) Directors' Duties

(i) introduction of a business judgment rule which would offer a safe harbour from personal liability for breaches of duty of care and diligence in relation to honest, informed and rational business judgments; and

(ii) introduction of a statutory derivative action to enable shareholders or directors to bring an action on behalf of the company for a wrong done to the company where the company itself is unwilling to bring the action.

(b) Accounting Standards

(i) improving the institutional arrangements for the making of accounting standards by establishing a peak council of stakeholder organisations, the Financial Reporting Council (FRC), to oversee the accounting standard setting process and make the accounting standard setting body accountable to the FRC;

(ii) modernising and updating the development of accounting standards by giving priority to the harmonisation of Australian standards with International Accounting Standards Committee (IASC) standards with a view to their ultimate adoption in Australia. The timing of the adoption will be determined following a report from the FRC on the acceptance of international accounting standards in overseas markets, and on the progress that the International Organisation of Securities Commissions (IOSCO) is making on a core set of international standards; and

(iii) improving the funding for the making of accounting standards by providing greater certainty for future funding, a greater spread of the cost burden among users and increased stakeholder commitment. Funding will be provided by the accounting profession, the users of standards (corporations) and government.

(c) Fundraising

(i) removing impediments to efficient raising of capital by facilitating the use of shorter prospectuses for retail investors, allowing the use of profile or key features statements for certain investments, removing the legal uncertainty for persons engaged in fundraising as to their liability by allowing due diligence defences to apply to the exclusion of the strict liability provisions of the Trade Practices Act, and providing a uniform defence to the corporation and persons involved in fundraising where they made reasonable inquiries and took reasonable care in preparing the prospectus;

(ii) facilitating fundraising by small and medium sized enterprises (SMEs) by enabling an issuer to:

- raise up to $5m with an offer information statement without preparing a prospectus. The issuer would only disclose material information known to it and would not be required to undertake due diligence. Investors would be warned of the risks and the desirability of obtaining professional investment advice;

- raise up to $2m each year from up to 20 personal offers without issuing a prospectus;

- raise funds without a prospectus or other disclosure document from persons regarded as sophisticated investors ie those investing at least $500,000 or with net assets of $2.5m or gross income in previous 2 years of at least $250,000 or who a securities dealer considers to be an experienced and knowledgeable investor; and

(iii) improving competition in capital markets by ensuring that sales of Federal government business enterprises (GBEs) are subject to the fundraising provisions.

(d) Takeovers

(i) To facilitate a more competitive market for corporate control, a bidder will be able to exceed the takeover threshold (more than 20 per cent of the total voting rights in a company) before being obliged to make a general takeover offer. To take advantage of this rule, certain conditions that reflect the equal opportunity principle underlying the takeover provisions must be met. These conditions include:

- the bidder must start from below the 20 per cent threshold with only 1 acquisition being allowed before the mandatory bid requirement is triggered;

- the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered by an agreement to sell;

- a bid for all the outstanding shares in the target must be announced immediately following the pre-bid agreement;

- the bid must be for an amount at least equivalent to the highest price paid by the bidder in the last 4 months; and

- target shareholders must be provided with an independent expert's report.

In addition, a bidder must not exercise control of the target until the mandatory bid is made; the bidder must demonstrate in its statement that it has the capacity to pay for the full bid to minimise credit risk; the bid must be for cash only and be unconditional; and no shares may be issued for a certain period after the announcement of a takeover without shareholder approval.

(ii) modifying the compulsory acquisition rules for shareholders holding an overwhelming interest in a company, to allow the more efficient use of investment capital;

(iii) improving takeover dispute resolution by a reconstituted Corporations and Securities Panel replacing the courts as the primary forum for resolving takeover disputes under the Corporations Law, with the exception of civil claims after the takeover has occurred and criminal prosecutions. The courts would only be able to grant an injunction having the effect of delaying or stopping a bid on the application of the Australian Securities Commission (ASC); and

(iv) applying the takeovers code to listed managed funds schemes and Federal GBEs.

(e) Financial markets and investment products

The Government has approved in principle the following proposals and will undertake extensive consultation with business and industry in developing legislation to implement these proposals so as to provide efficiencies and greater competition for financial markets by:

(i) having uniform regulation of financial instruments ie securities, derivatives, futures, foreign exchange, general and life insurance, superannuation and deposit accounts;

(ii) introducing a new system of licensing for markets, financial dealers/advisers to protect investors and a consistent and comparable disclosure regime for all financial instruments including introducing due diligence defences for mandatory disclosures of information;

(iii) introducing revised accountability mechanisms for the regulation of financial markets. The Treasurer would be responsible for licensing markets, clearing and settlement facilities and considering amendments to market rules. The Treasurer will be empowered to delegate certain responsibilities for these matters to the ASC; and

(iv) updating regulation to take account of technological change by giving legislative recognition to close-out and market netting arrangements.

(C) AMP AND ROTHSCHILD GROUP BANKING ACTIVITIES

On 18 March 1998, Cabinet approved the grant of banking authorities to the AMP Group and the Rothschild Group. Both AMP and Rothschild will be adopting non-operating holding company structures for which new regulatory arrangements will make specific provision. Each Group will be supervised by the Reserve Bank under interim arrangements until the enactment of the new arrangements. In the past, non-operating holding company structures have generally not been permitted where financial conglomerates contain a bank. The authority for AMP is expected to take effect from 10 April 1998 and that for Rothschild from 1 April 1998.

(D) TAXATION OF DISTRIBUTIONS DISGUISED AS LOANS FROM PRIVATE COMPANIES

On 9 March 1998, the Government announced it will act to ensure that proposed legislation currently before Parliament will not apply to payments by private companies to shareholders in their capacity as employees. Such payments will continue to be subject to the fringe benefits tax law.

The legislation (proposed Division 7A contained in Taxation Laws Amendment Bill (No 7) 1997) implements measures announced in the 1997-98 Budget which are intended to ensure that payments, loans, or debts forgiven by a private company to shareholders and their associates are treated as assessable dividends if there are realised or unrealised profits in the company (unless they come within specified exclusions).

During the course of reviewing submissions from taxpayers and professional bodies on the proposed legislation, it has become apparent that the proposed legislation may have some unintended consequences. The Government will amend the propsoed legislation to ensure that payments to shareholders in their capacity as employees, including the provision of mobile phones and motor vehicles, will not be subject to the new provisions and will continue to be dealt with under the fringe benefits tax legislation. This amendment will also ensure that superannuation contributions by private companies on behalf of shareholders in their capacity as employees will not be treated as dividends under the proposed legislation.

2. RECENT CORPORATE LAW DECISIONS

(A) G M & A M Pearce and Co Pty Ltd v R G M Australia Pty Ltd, No 6403 of 1996, Court of Appeal (Victoria), Ormiston, Callaway and Batt, JJA, 22 December 1997

This was an appeal from an order of a judge dismissing an appeal on a question of law from a final order of the Magistrates' Court (reported in (1996) 22 ACSR 468). The magistrate had ordered that the respondent (R G M Australia Pty Ltd) recover payment of a debt plus interest from March 1993, when the debt was said to have become payable. The appellant admitted the debt, but pleaded as a set-off damages in excess of the amount of the respondent's claim arising from the failure of the respondent to accept delivery of goods in breach of contract for their sales in December 1993 and February 1994. The appellant asserted that the set-off arose by reason of section 533C of the Law as the respondent had become insolvent and entered into a deed of company arrangement under Part 5.3A of the Law. Thus, the appellant asserted that its debt to the respondent had been satisfied.

On May 10 1994, the respondent had issued a creditor's statutory demand for payment of the debt owed by the appellant. On 23 May 1994, the directors of the respondent had resolved to appoint an administrator of the company pursuant to section 463A of the Law. On 16 June 1994, the appellant's solicitor wrote to the administrator asserting both that the statutory demand did not comply with section 459E of the Law, and that the appellant had an off-setting claim. On 17 June 1994, a meeting was convened under section 439A whereby the creditors of the respondent resolved that a deed of arrangement be executed by the respondent. The appellant received no notice of this meeting, and the off-setting claim referred to in the letter of 16 June 1994 was never dealt with by the administrator.

The magistrate had held that the application of section 553C was limited to 'claims made under this deed' as provided by clause 8 of Schedule 8A of the Corporations Regulations. On appeal, the primary judge had held that by operation of section 444D(1), the deed bound all creditors, including the appellant, having claims of the nature specified in section 553. Clause 11.1 of the deed had stated: 'The claims of creditors must be proved as if Subdivision A, B, C and E of Division 5 [sic] of Part 5.6 of the Corporations Law applied.' Therefore the respondent's debt to the appellant was extinguished upon termination of the deed by virtue of clause 6 of Schedule 8A.

The Court of Appeal unanimously allowed the appeal, ordering that both the magistrate's and primary judge's decisions be set aside. The Court drew on the reasoning of the High Court in Gye v McIntyre (1991) 171 CLR 609, a case involving natural persons and dealing with section 86 of the Bankruptcy Act, a provision similar to section 553C of the Law. In the primary judgment, Justice Batt noted that if the respondent had been a natural person, there was no doubt that the appellant would have had a right of set-off even if it had not proved for its claim as section 86 of the Bankruptcy Act applies automatically as at the time the bankruptcy takes effect. Justice Batt noted that section 553C applies to all insolvent companies in liquidation, and considered it should not have a differential operation or interpretation according to whether the insolvent company was in liquidation, in which case set-off occurs automatically, or had executed a deed of company arrangement which did not exclude the effect of section 553C. Justice Batt held that provisions substantially equivalent to section 553C, which itself was drafted after Gye v McIntyre, have been part of the law of corporate and personal insolvency for many years, and it would require clear words to abrogate the principles embodied in them as expounded in Gye v McIntyre. Hence, section 553C operates, or is taken to operate, at the time the administration commences and its automatic operation does not last only during administration under the deed. The appellant's set-off was effectuated in the course of the administration, thus extinguishing the respondent's claim.

(B) In the Matter of Australian Company Number 007 764 249 Pty Ltd (in liquidation); Browne v Deputy Commissioner of Taxation (No SG 35 of 1997); Deputy Commissioner of Taxation v Smith (No SG 36 of 1997); Federal Court of Australia, 6 March 1998

These two appeals, heard together, concerned the operation of sections 588FGA and 588FGB of the Law. Section 588FE of the Law sets out what constitutes a voidable transaction. Under section 588FF, a court may, on application, order repayment to the company where a creditor has received payment under a voidable transaction. Section 588FGA places the Commissioner of Taxation in a special position; when an order has been made by a court under section 588FF, the directors of the company are liable to indemnify the Commissioner in respect of any loss or damage resulting from that order.

In this instance, in late 1994, the company owed $300,000 in unpaid tax. The company sold its business to another company with settlement taking place on 3 November. Before the settlement, the company negotiated a compromise whereby the Commissioner agreed to a lesser sum, thus relieving to some extent its indebtedness. On 5 April 1995, the company commenced winding up; hence the relevant period for voidable transactions under section 588FF was the six month period commencing 6 October 1994. The transactions or payments here in question had occurred on 3 November 1994 and 6 February 1995.

At first instance the payment of the tax was held to be an unfair preference and the court ordered the Commissioner, pursuant to section 588FF, to repay to the company the amount received from it. The company's directors were also held liable to indemnify the Commissioner in respect of the resulting loss; Justice Mansfield holding that they had not made out the defence available under section 588FGB(6) that they had taken all reasonable steps to prevent the payment, indeed they had procured it by the compromise of November 1994. Justice Mansfield held that to make out the defence, the payment must have had to have been made despite the actions of the directors, either because they tried to prevent it, or because it would not have been possible for them to prevent it. Nor was it relevant that the payment was of commercial benefit to the company by way of relieving its indebtedness. The directors appealed to the Full Federal Court.

The Full Court upheld the decision at first instance. It was held that the defence under section 588FGB(6) absolves directors from responsibility for the payment if they could not prevent it being made, having taken all reasonable steps available. If the directors could prevent the payment but do not believe it is commercially prudent to do so, they are responsible for the payment and the defence is not available. Further, it was held that the directors' liability to indemnify arises only at the time when the payment has been made by the Commissioner to the company or liquidator, as that constitutes the loss suffered by the Commissioner. Once those directors have satisfied the indemnity, then under section 588FGA(5), they are treated as if they were guarantors of the principal debt and stand in the shoes of the creditor by way of subrogation.

3. RECENT ASX DEVELOPMENTS

(A) T+3 SETTLEMENT

Transactions on the stock market operated by ASX are presently subject to an obligation to settle on T+5 (ie trade date plus five business days after trade date). In February 1999, this will change with the obligation to settle the transaction being reduced to T+3 (trade date plus three business days).

One of the steps in the move to T+3 involves convincing listed companies to close their certificated registers and to commence operating uncertificated registers. Shares held on a certificated register can only be moved by the use of a paper transfer form. The use of paper transfer forms is clearly inconsistent with the short time frame associated with T+3 settlement.

Most companies listed on ASX already operate at least one uncertificated sub-register, the CHESS sub-register. (The only companies which do not operate a CHESS sub-register are those companies whose place of incorporation does not recognise CHESS).

The Listing Rules presently impose an obligation on companies to operate at least a CHESS sub-register and either a certificated sub-register or an issuer sponsored sub-register. This listing rule will be modified in the future to oblige listed companies to operate an issuer sponsored sub-register (and not a certificated sub-register) in addition to the CHESS sub-register.

Companies whose place of incorporation does not recognise CHESS, cannot operate uncertificated registers of legal title, but can operate uncertificated registers of beneficial title. These holdings of beneficial title are known as CUFS and are becoming increasingly popular amongst foreign companies.

(B) ENTERPRISE MARKET

ASX recently presented the 'enterprise market' ('em') as part of a day long Enterprise Forum in conjunction with the de Bono Institute. More than 250 registrants attended the Forum to view presentations by twenty-three small and medium-size enterprises (SMEs) and their advisers. The plenary and educational/information sessions from the Forum are available on-line with presentations, audio and video on ASX ShareNet through the 'em' public pages.

(C) NEW CAPITAL ADEQUACY FRAMEWORK

Following the release of Public Consultation Documents in October 1996 and June 1997 which set out proposals to revise the capital liquidity requirements in Business Rule 1.1, ASX has finalised the revised framework for this Rule and is now seeking the appropriate regulatory approvals to enable it to become effective later this year.

The new Rule is designed to change the manner in which a stockbroker calculates liquid capital from a balance sheet approach to a risk based approach. ASX has based the new Rule on principles used in overseas jurisdictions, modifying them where necessary for Australian conditions. The new Rule will:

(a) adopt a methodology which is comprehensively risk based;   
(b) introduce a measure of core liquid capital and a limit on the use of approved subordinated debt to meet capital requirements;   
(c) recognise risk reduction techniques;   
(d) allow offsets between physical and derivative principal positions; and   
(e) allow limited use of internal options risk assessment models.

(D) MANDATORY DISCLOSURE OF EXPOSURE TO YEAR 2000 PROBLEM

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

ASX has recently sent a letter to all listed companies requiring disclosure of their plans and progress in ensuring their operations will not be affected by the Year 2000 Problem. The Year 2000 Problem (also known as the Millennium Bug) is the potential inability of computer systems to correctly process date references that occur after 1999. ASX is requiring companies to disclose the extent of their Year 2000 readiness by 30 June 1998.

The letter states that ASX is concerned to ensure that companies comply with listing rule 3.1 (the general disclosure rule) in the context of the Year 2000 Problem and is relying on listing rule 18.7 (which requires a company to give ASX any information that ASX asks for to enable it to be satisfied that the company is complying with the listing rules) to require companies to furnish the information. The need to consider disclosure of the Year 2000 Problem position was raised by ASX in its Guidance Note on Disclosure of Corporate Governance Practices released last month. ASX appears to have decided that the risks associated with the Year 2000 Problem are sufficiently material for all listed companies so as to require compulsory disclosure, as opposed to leaving it to the discretion of each company as is the usual case with listing rules 3.1 and 4.10.3.

ASX is requiring each company to provide the following information:

(a) details of its overall potential exposure to the year 2000 problem, including exposure arising from suppliers, operations, and customers; and   
(b) details of what it is doing to reduce its potential exposure to the year 2000 problem, including:   
(i) the scope and status of its Year 2000 activities;   
(ii) whether it intends to be Year 2000 compliant (and, if so, whether a standard definition of compliance is used);   
(iii) whether it intends to develop and implement contingency plans to ensure continued operation of its critical systems;   
(iv) whether it intends to obtain independent verification of its Year 2000 activities; and   
(v) the estimated total Year 2000 project costs and the relevant time periods involved.

To assist listed companies in preparing their disclosure statement, ASX has provided an example disclosure statement that it would make if it were currently a listed company. ASX's example is a detailed five page report of the policies and procedures it has adopted to counter the Year 2000 Problem. To a large extent it reflects the information requested of listed companies as noted above. Particular emphasis is given to the process and procedures ASX has adopted, including establishment of a Year 2000 Project Office and consequent lines of reporting within the organisation.

ASX's letter to listed companies notes that companies will need to monitor developments in their response to the Year 2000 Problem to ensure continued compliance with listing rule 3.1 and that ASX may seek further information about their progress between now and 31 December 1999. A copy of ASX's letter and the sample ASX disclosure statement can be found on ASX's web site (http://www.asx.com.au).

4. RECENT ASC DEVELOPMENTS

(A) FINANCIAL COMPLAINTS REFERRAL CENTRE

The ASC has launched its Financial Complaints Referral Centre, the first major project under the Wallis Inquiry recommendations.

The Centre offers disgruntled consumers of financial products and services a toll free number (1300 780 885); callers will be referred to the correct body to deal with their complaint.

The Centre will help to address two significant problems:

(a) it will make sure that consumers know who can help them with a complaint about financial services; and   
(b) it will help the ASC assess the gaps in the system that need filling.

The Centre will not handle the complaints itself, but it will identify which of the participating complaints services can provide the expert advice which a particular consumer needs.

(B) RELIEF FROM ACCOUNTS AND AUDIT REQUIREMENTS - LATE FORMS

The ASC has announced its approach to future requests for extension of time to lodge the forms required for relief under the following ASC class orders:

(a) Class Order 96/1850 - Audit relief for large proprietary companies - ASC Form 382;   
(b) Class Order 97/0567 - Audit relief for small proprietary companies controlled by foreign companies - ASC Form 383;   
(c) Class Order 97/2347 - Relief from the preparation, lodgement and audit requirements for small proprietary companies which are controlled by foreign companies but are not part of a large group - ASC Form 384.

Extensions of time will only be granted after 31 March 1998 in rare and exceptional circumstances. Examples may include the following:

(a) where a company is newly incorporated and is therefore unable to make the relevant resolutions for the purposes of obtaining audit relief (Class Orders 95/1850 and 97/0567) prior to the commencement of its financial year. In this case, the ASC would expect extensions to be sought in time for the relevant forms to be lodged within three months of incorporation;   
(b) where a small proprietary company which was not previously required to prepare or lodge accounts or to have those accounts audited acquires a significant new business late in the financial year and this causes the company to become a large proprietary company. If the acquisition was not planned and could not have been anticipated prior to the deadline for lodging Form 382, the ASC would consider providing an extension of time to lodge Form 382.

Copies of the relevant Policy Statements (numbers 115 'Audit relief for large proprietary companies and 58 ' Reporting requirements - registered foreign companies and Australian companies with foreign company shareholders') and Class Orders can be obtained from the ASC Digest or by contacting the ASC Infoline on 1 300 300 630.

(C) NEW SOUTH AUSTRALIAN REGIONAL COMMISSIONER

Karen Axford has been appointed as the new ASC Regional Commissioner of South Australia. Ms Axford brings a wealth of experience in business, bankruptcy and management to her new position. She joins the ASC after holding the position of Official Receiver in Bankruptcy of South Australia and the Northern Territory. She has also acted in a number of senior positions in the Sydney office of the Insolvency and Trustee Service during the past seven years. Ms Axford is currently a certified practising accountant and has an honours degree in Commerce from the University of Queensland.

(D) SECURITIES AGREEMENT WITH GERMAN SECURITIES REGULATORY AUTHORITY

The ASC has entered into a Memorandum of Understanding (MoU) with the Federal Securities Supervisory Agency (Bundesaufsichtsamt für den Wertpapierhandel (BAWe)) of Germany during a meeting of the International Organisation of Securities Commissions in Hong Kong held in early March.

The new MoU will provide a framework for the exchange of information and investigative assistance between the ASC and the BAWe in securities and futures matters, including securities fraud, insider trading, market manipulation and disclosure requirements for securities acquisitions and prospectuses.

The MoU aims to enhance investor protection in Australia and Germany by ensuring that the investigation of breaches of securities laws are not frustrated by jurisdictional difficulties associated with cross border enforcement activities. In this regard, the MoU will contribute towards the integrity and efficiency of the securities markets in Australia and Germany.

Memoranda of Understanding also exist between the ASC and the securities and futures regulators of the USA, UK, France, New Zealand, Hong Kong, China, Canada, Thailand, Brazil and Indonesia.

(E) CONSULTATIVE PAPERS - SUPERVISION OF FINANCIAL CONGLOMERATES

The Council of Financial Supervisors has released for consultation in Australia a package of papers dealing with significant supervisory issues concerned with the regulation of banks, securities firms and insurance companies which form part of financial conglomerates. The papers deal with:

(a) the assessment of capital adequacy;   
(b) fit and proper tests for managers, directors, and major shareholders;   
(c) supervisory information sharing; and (d) co-ordination arrangements among financial supervisors.

These papers, which were prepared by the Joint Forum on Financial Conglomerates, have been released as part of an international consultation process with supervisors and industry. The Joint Forum is a body established under the auspices of the International Organisation of Securities Commissions, the Basle Committee on Banking Supervision and the International Association of Insurance Supervisors to address supervisory issues arising from the emergence of complex financial groups active in offering financial services across traditional sectional boundaries and across national borders. The Joint Forum is chaired by Alan Cameron, Chair of the ASC. It includes representatives of financial services from 13 countries.

It is expected that the Joint Forum will finalise the papers in the light of comments made on them. The end product will be a set of internationally recognised principles and techniques which will be able to be applied by financial supervisors.

The ASC is making the papers available in Australia primarily to seek the views of those connected with the securities industry. The Reserve Bank of Australia and the Insurance and Superannuation Commission are also seeking comments.

Written comments are due by 31 July 1998. Unless otherwise requested, any comments received by the ASC will be provided to the International Organisation of Securities Commissions and through that organisation to the Joint Forum on Financial Conglomerates.

Copies of the papers are available from: "http://www.iosco.org/press/pressdnld\_980219.html".

Submissions should be forwarded to:

Stephen Yen   
Special Adviser   
Office of the Chairman   
ASC GPO Box 4866   
Sydney NSW 2001

or by e-mail: stephen.yen@asc.gov.au

(F) ADDITIONAL INVESTMENTS IN MANAGED INVESTMENT SCHEMES

Changes have been made to ASC Policy Statement 127 which deals with Additional Investments in Managed Investment Schemes. These changes have been made in consultation with a working party from the Investment and Financial Services Association.

Policy Statement 127 describes conditional relief which:

(a) allows a management company to accept investment applications from existing investors even though those applications are not made on an application form taken from a current prospectus ('the application form relief'); and   
(b) at the same time, ensures existing investors have current prospectus standard information when they make an investment application.

Changes

The conditions of that relief have now been modified to:

(a) replace the current requirement for a transaction confirmation to be sent to investors within 14 days of any ad hoc and regular savings plan investment with an 'at least quarterly' transaction statement requirement, improved disclosure, and the availability of a free transaction statement for the current reporting period on request;   
(b) remove the requirement that investors make a positive election as a pre-requisite to participation in an additional investment facility and replace it with improved disclosure;   
(c) in relation to the relief which facilitates the use of a discrete election form:   
(i) modify it so that a notice or a discrete election form can be sued;   
(ii) remove the positive requirement in this aspect of the relief to send a copy of the current prospectus to an existing investor; and   
(iii) modify the permissible content of a notice and discrete election form to allow an existing investor to indicate whether or not they have a copy of the current prospectus in their possession and reflect the strengthened disclosure in the prospectus.

The modified relief is available immediately and can be applied for at any ASC Regional Office.

(G) ACTING VICTORIAN REGIONAL COMMISSIONER APPOINTED

ASC National Director Executive Phil Khoury has been appointed to act as Victorian Regional Commissioner pending the appointment of a successor to outgoing Regional Commissioner Bernie Mithen.

Mr Khoury has held a number of executive positions with the ASC and as National Director has most recently overseen the projects which will implement the Government's post-Wallis Inquiry reforms.

(H) ASC SUMMER SCHOOL

The 1998 ASC Summer School was held Melbourne Business School. The theme of the School was 'Investors, Global Financial Markets and Regulation'. The School brought together corporate law and securities regulators from many countries, including Canada, USA, New Zealand, UK, Hong Kong, China, Singapore, Malaysia, Indonesia, Taiwan, Mauritius, Sri Lanka and Thailand. The Summer School was planned with the support of the Centre for Corporate Law and Securities Regulation.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Pamela A Hanrahan, '(Ir)responsible Entities: Reforming Manager Accountability in Public Unit Trusts' (1998) 16 Company and Securities Law Journal 76

The seven year project to amend the law regulating prescribed interests appears to be coming to a close, with the second reading in December 1997 of the Managed Investments Bill 1997. In this article, the author summarises the key features of the Bill and compares the regulatory structure proposed with that currently in place. She concludes that the reasons put forward by the proponents of the Bill for moving to a 'single responsible entity' structure for managed investments can be challenged, and that the proposed new regulatory structure may have some limitations.

(B) Celia Hammond, 'Section 164(4)(b) of the Corporations Law: "To Be Put Upon Inquiry or Not to Be Put Upon Inquiry: Is that the Question?" - A Problem of Statutory Interpretation' (1998) 16 Company and Securities Law Journal 93

Section 164(4)(b) of the Corporations Law states that a third party dealing with a company is not entitled to make the assumptions in section 164(3) if, because of their 'connection or relationship with the company' they 'ought to know' that there is some irregularity. Judicial consideration of this provision has focused on whether the section incorporates the common law 'put upon inquiry' exception to the rule in Turquand's case. This article examines those judicial considerations, and argues that section 164(4)(b) should not be interpreted with reference to the common law principle, but should instead be interpreted with reference to orthodox rules of statutory interpretation.

(C) Aaron Commerford & Larelle Law, 'Directors' Duty of Care and the Extent of "Reasonable" Reliance and Delegation' (1998) 16 Company and Securities Law Journal 103

Since the Court of Appeal handed down its decision in Daniels v Anderson, there is a conflict in the Australia case law regarding whether directors are in breach of their duty of care if they delegate matters or rely on information provided by third parties. The modern corporation requires delegation and reliance, as recognised by the recent Corporate Law Economic Reform Program (CLERP) paper on directors' duties. This article argues that, even without the CLERP reform proposals, reasonable delegation or reliance will not amount to a breach of duty. Recent cases are analysed and reconciled to present guidelines as to the parameters of 'reasonableness' in this context.

(D) Dr Andrew Keay, 'Finding a Way Through the Maze that is the law of Statutory Demands' (1998) 16 Company and Securities Law Journal 122

Where a creditor applies for the winding up of a company in insolvency, the most common way in which the company's insolvency is established is to serve a statutory demand on the company demanding what is owed, and indicating that if payment is not made within 21 days, the company is presumed to be insolvent. This article provides a synthesis of the judicial opinions delivered in the innumerable cases which have considered statutory demands since the introduction of the new regime to cover statutory demands in 1993, with emphasis on the cases considering the interpretation of section 459J of the Corporations Law and applications to set aside a demand on the basis that the amount claimed in the demand is the subject of a genuine dispute. The article concludes that the volume of cases dealing with demands indicates that the aims of the legislature in introducing the latest provisions regulating demands have not been successful and reform is warranted.

(E) Jason G Ellis, 'Solutions to Deadlock in UK Companies' [1998] International Company and Commercial Law Review 78

The author examines both legal and self-help solutions to situations of deadlock in companies, particularly in 'two person' or 'quasi-partnership' companies. The author highlights the fact that at the outset, participants see deadlock as the remotest of possibilities, but with the only effective statutory solution being to wind up the company, lawyers should advise promoters of new enterprises to make contractual provision for the resolution of deadlock situations.

(F) Gerard McCormack, 'Sexy But Not Sleazy: Trustee Investments and Ethical Considerations' (1998) 19 Company Lawyer 39

Fund managers have a fiduciary duty to produce maximum return on the funds in which they invest for the benefit of their clients. The author poses the question as to whether fund managers may deviate from this goal so as to allow 'social investment', thereby taking ethical considerations into account when making investment decisions.

(G) Tatsu Katayama and Richard Makov, 'Deregulation of Financial Markets in Japan' [1998] Journal of International Banking Law 129

The authors discuss those key areas of Japan's imminent deregulation of its financial markets which will have the most impact on international participants: foreign exchange; derivatives; asset securitisation; asset management; and regulation of banks, securities brokers and insurance underwriters.

(H) Eileen Grace and Ursula Earley, 'The Irish Takeover Panel' [1998] Journal of International Banking Law

The authors examine the operations of the Irish Takeover Panel which replaced the UK Panel on Takeovers and Mergers from 1 July 1997 for the regulation of takeovers of Irish publicly listed companies. Unlike its UK counterpart, the Irish Takeover Panel is statute based and may apply to the Irish High Court for and order enforcing its rulings or decisions. The authors also consider the Irish Takeover Panel Act 1997 Rules. These rules principally ensure that takeovers comply with the principles set out in the schedule to the Irish Takeover Act 1987. They also provide a framework for the orderly conduct of takeovers.

(I) Cardozo Law Review Volume 19 Nos 1 and 2 are devoted to issues of corporate law in the USA. The papers are drawn from a symposium re-examining the fundamental principles of corporate law and practice featuring Warren Buffet's annual letters to the shareholders of Berkshire Hathaway Inc. Page numbers, titles and authors of articles are as follows:

1: 'The Essays of Warren Buffet: Lessons for Corporate America' - Compiled and Introduced by Lawrence A Cunningham

221: 'Introduction to the Warren Buffet Symposium Papers' - Lawrence A Cunningham

237: 'The Board of Directors and Internal Control' - Melvin A Eisenberg

265: 'Taking Boards Seriously' - Jill E Fisch

291: 'Flexibility in Determining the Role of the Board of Directors in the Age of Information' - James P Holdcroft, Jr & Jonathon R Macey

321: 'Agency Principles and large Block Shareholders' - Deborah A Demott

341: 'The Human Corporation: Some Thoughts on Hume, Smith and Buffet

363: 'Warren E Buffet on Corporate Constituency Laws and Other Newfangled Ideas: An Imaginary Conversation' - Bevis Longstreth

379: 'Buffet, Corporate Objectives and the Nature of Sheep' - Henry T C Hu

409: 'Dividends, Noncontractibility, and Corporate Law' - William W Bratton

475: 'How Efficient Markets Undervalue Stocks: CAPM and ECMH Under Conditions of Uncertainty and Disagreement' - Lynn A Stout

493: 'Reflections on the Pricing of Shares' - Robert W Hamilton

505: 'High -Yield (Junk) Bonds As Investments and As Financial Tools' - William A Klein

511: '"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffet' - Jeffrey N Gordon

553: 'Corporate Culture in Takeovers' - Charles M Yablon

565: ' Revisiting the Anti-Takeover Fervor of the '80s Through the Letters of Warren Buffet: Current Acquisition Practice Is Clogged by Legal Flotsam from the Decade' - Dale Arthur Oesterle

615: 'Equal Treatment for Shareholders: An Essay' - James D Cox

637: 'Accounting in Favor of Investors' - Calvin H Johnson

669: 'Berkshire Hathaway's Uncommon Accounting' - Edmund W Kitch

679: 'Teaching Accounting and Valuation in the Basic Corporations Law Course' - Elliott J Weiss

697: 'The Misuse of Tax Incentives to Align Management-Shareholder Interests' - James R Repetti

6. ARCHIVES

The Corporate Law Electronic Network Bulletins are retained on an archive. You may review prior Bulletins by accessing the following website:

http://www.law.unimelb.edu.au/corporat/email/aindex.htm

7. CONTRIBUTIONS

If you would like to contribute an article or news item to the Bulletin, please post it to: "cclsr@law.unimelb.edu.au".

8. MEMBERSHIP AND SIGN-OFF

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an e-mail to: cclsr@law.unimelb.edu.au   
  
  
9. DISCLAIMER

No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is provided on the terms and understanding that (1) the authors, editors and endorsers are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, authors, editors and endorsers expressly disclaim all and any liability and responsibility to any person in respect of anything done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

 