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1. CENTRE FOR CORPORATE LAW SEMINAR

Hughes and Wakim: The Challenges for Corporate Regulation

Date: Thursday 22 June 2000

Time: 5.30-7.00 pm

Venue: Arthur Robinson & Hedderwicks, Level 34 Conference Room, 530 Collins Street, Melbourne, Vic 3000

Speakers:

The Hon Michael E J Black AC, Chief Justice, Federal Court of Australia; Alan Cameron AM, Chairman, Australian Securities and Investments Commission; Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks; Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation, The University of Melbourne; Professor Cheryl Saunders AO, Director, Centre for Comparative Constitutional Studies, The University of Melbourne

Please see Item 7 of this Bulletin for further details.

2. RECENT CORPORATE LAW DEVELOPMENTS

(A) THE HUGHES DECISION

On 3 May 2000, the High Court of Australia handed down its decision in The Queen v Hughes. The decision has received extensive media coverage, including editorials in national newspapers. The reason the decision is important is that it involved a challenge to the national regulation of companies. Although the challenge was unsuccessful, further challenges are likely to occur.

The decision is discussed in Item 5(A) of this Bulletin.

(B) HIGH COURT UPHOLDS STATE VALIDATION LAW

On 25 May 2000 the Attorney-General, the Hon Daryl Williams welcomed the decision by the High Court in Residual Assco Group Ltd v Spalvins to uphold provisions of South Australian legislation designed to overcome problems arising from the High Court’s decision last year in Re Wakim. In Re Wakim the Court decided that the conferral of State jurisdiction on federal courts under ‘cross-vesting’ arrangements was unconstitutional (see [Bulletin 22](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin/0022.htm) for a discussion of Re Wakim).

The South Australian Act, the Federal Courts (State Jurisdiction) Act 1999, provides that parties to ‘ineffective’ judgments of federal courts have the same rights as if those judgments were judgments of the State Supreme Court. It also provides for State matters commenced in a federal court and part-heard to be, in effect, transferred to the State Supreme Court. All States have passed legislation in essentially the same form.

The Residual Assco case arose out of proceedings under the Corporations Law which began in the Federal Court in South Australia in 1994. These proceedings were stayed in 1999, following the Re Wakim decision. The plaintiff, Residual Assco Group Limited, sought to have the proceedings transferred to the South Australian Supreme Court under the South Australian Act. Provisions of that Act were subsequently challenged on the basis that they were inconsistent with provisions of the Commonwealth Constitution dealing with federal judicial power. This challenge was removed to the High Court and heard on 10 -11 May.

The High Court upheld those provisions of the South Australian Act which provide, in effect, for the transfer of part-heard matters, and rejected arguments that they were unconstitutional. The Court did not rule on the validity of provisions which deal with "ineffective judgments" of federal courts.

These laws are an important part of the response to the Re Wakim decision. Legislation reinstating Federal Court jurisdiction to review the decisions of Commonwealth officers and bodies made under Commonwealth/State cooperative arrangements was recently passed by the Federal Parliament (see Item 2(C) below).

According to the Attorney-General, the uncertainty facing the Corporations Law scheme since the High Court's decision on 3 May in The Queen v Hughes is not removed by the decision. A referral of power by the States to the Commonwealth is currently the best option for overcoming this uncertainty.

The High Court has not yet published its reasons in the Residual Assco case.

(C) PARLIAMENT PASSES DPP REFORMS

Earlier this month the Jurisdiction of Courts Legislation Amendment Bill 2000 was passed by Parliament.

This Bill goes some of the way towards resolving problems associated with the decision of the High Court in Re Wakim in relation to the administrative decisions of Commonwealth officers under State legislation such as the Corporations Law (see [Bulletin 22](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0022.htm) for discussion of Re Wakim). The Bill will also restore the power of the Director of Public Prosecutions to appeal under State laws, thereby rectifying the problems exposed in the Bond case in the High Court (see [Bulletin 31](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0031.htm) for discussion of the Bond case).

(D) IFSA MEDIA RELEASE - CORPORATE GOVERNANCE: SHARE AND OPTION SCHEME GUIDELINES

On 16 May 2000, the Investment and Financial Services Association released, in conjunction with the Australian Institute of Company Directors, the Australian Shareholders Association and the Australian Employee Ownership Association, new guidelines for executive share and option schemes, and employee share schemes.

The key principles include:

- Boards should design schemes which meet the particular needs of the company in terms of driving improved company performance;

- Executive share and options schemes with an incentive component should be designed around appropriate performance benchmarks that measure materially improved relative company performance; and

- All aspects of share and options schemes must be disclosed to shareholders in a meaningful way to permit shareholders to determine whether to approve the schemes.

For a copy of the guidelines, contact IFSA on (02) 9299 3022.

(E) NEW REQUIREMENTS FOR PUBLIC COMPANY SHAREHOLDERS TO CALL A MEETING

As a result of an amendment to the Corporations Regulations in April, there are now new requirements for shareholders in public companies to requisition directors to call a meeting of shareholders. The new regulation (Regulation 2G.2.01) amends the application of s 249D(1) of the Corporations Law to public companies.

In summary, the directors of a public company must now call and arrange to hold a general meeting on the request of:

- shareholders with at least 5 per cent of the votes that may be cast at the general meeting; or

- shareholders who constitute at least 5 per cent of the total number of shareholders of the company.

In the case of private companies, the directors of such a company must call and arrange to hold a general meeting on the request of:

- shareholders with at least 5 per cent of the votes that may be cast at the general meeting; or

- at least 100 shareholders who are entitled to vote at the general meeting.

Regulation 2G.2.01 was introduced following concern that an amendment made by the Company Law Review Act 1998 (which introduced the 100 shareholder test) did not achieve a proper balance in public companies – particularly listed companies. The Companies and Securities Advisory Committee, in its Discussion Paper titled Shareholder Participation in the Modern Listed Public Company (September 1999), concluded that the 100 shareholder test in s 249D was not soundly based in principle and had no counterpart in any other comparable jurisdiction. The Advisory Committee noted that the company bears the cost of the meeting called by the 100 shareholders. The Advisory Committee stated that the 100 shareholder test "gives a small number of shareholders in a listed public company considerable influence over the frequency of shareholders meetings, disproportionate to their possible shareholding. To hold meetings at their behest can also impose undue costs on the company, while distracting management from its principal task of conducting the company’s affairs. In addition, non-requisitioning shareholders may suffer inconvenience and cost in attending a requisitioned meeting or otherwise exercising their voting rights through proxies".

It should be noted that Regulation 2G.2.01 applies to shareholders requisitioning directors to call a meeting. There is also a provision in the Corporations Law (s 249F) which provides that shareholders with at least 5 per cent of the votes that may be cast at a general meeting may call and arrange to hold a general meeting themselves (ie, without requisitioning directors). However, under s 249F the shareholders calling the meeting must pay the expenses of calling and holding the meeting. Therefore, there is an advantage in shareholders using s 249D.

(F) STUDY FINDS LOW VOTING LEVELS IN AUSTRALIA’S LARGEST LISTED COMPANIES

On 29 May 2000, the Centre for Corporate Law and Securities Regulation at the University of Melbourne and Corporate Governance International Pty Limited published a Research Report on proxy voting in large listed Australian companies.

The Research Report – titled "Proxy Voting in Australia’s Largest Companies" – was written by Geof Stapledon, Sandy Easterbrook, Pru Bennett and Ian Ramsay.

(1) Importance of the study

(a) The Minister for Financial Services, Joe Hockey, has recently expressed strong interest in corporate governance and the role of institutional shareholders, stating that "funds managers and trustees have a responsibility in particular to make boards accountable for the decisions they make on behalf of shareholders".

(b) When institutional shareholders do vote, they typically do so by way of appointment of proxies. This study examined lodgment of proxy instructions for annual general meetings of large Australian listed companies as a means of determining the extent to which institutional investors vote.

(2) What is the nature and extent of voting at large Australian companies?

The study revealed that:

(a) In companies with a widely held shareholder base – that is, without a major non-institutional shareholder – proxy instructions for director-election resolutions represented on average only 35% of total voting capital in 1999.

(b) For the full sample of companies – that is, including those with a major shareholder – proxy instructions for director-election resolutions represented on average only 41% of total voting capital.

(c) The widely held companies provide the more significant measure because:

- The scope for institutional investors realistically to influence voting outcomes is very much a factor of the presence or absence of a major non-institutional shareholder.

- The existence of a controlling or major shareholder may discourage the exercise by institutional and other public shareholders of their proxy vote on the basis that the will of the major shareholder would in any event ensure passage of the resolutions.

(d) The Australian averages compare poorly with those for the UK (50%), the US (80%) and Germany (73%).

The Newbold Committee – which recently investigated institutional investor voting in the UK – stated that failure to achieve an increase in the UK level from 50% to around 60% over the next few years would "justify further investigation by the Government".

The study also revealed that:

- Only 12% of the sample companies had a poll for director-election resolutions.

- 98% of director-election resolutions were passed. All 4 of the resolutions that were lost were decided on a poll. Also, these 4 unsuccessful resolutions were the only shareholder-initiated resolutions. The 176 successful resolutions were board-initiated.

- An overwhelming majority of voting instructions were to vote "For" the proposed resolution: on average, "For" instructions accounted for 88% of the voting capital for which proxy instructions were given on director-election resolutions. This figure would be even higher if the 4 shareholder-initiated proposals were excluded, bearing in mind that each of those proposals was defeated.

Some investment managers have a policy of not voting on resolutions which are deemed to be "routine", and instead voting only on what they consider to be controversial or major resolutions. In addition, some investment managers regard director-election resolutions as in the routine category. Therefore, all controversial resolutions at the sample companies were also examined – to determine whether or not a substantially greater level of voting occurred on these resolutions. The results reveal no evidence of a substantially higher level of proxy voting on controversial resolutions in comparison with the level on director-election resolutions.

(3) Significance of the results

(a) Trustees of superannuation or investment funds and other fiduciaries who rely on professional investment managers should, for their own protection, take a close interest in their managers’ performance on proxy voting.

(b) Compulsory superannuation laws compel Australians to invest for their retirement. A large proportion of the assets of superannuation funds is invested in Australian equities. The Australian government is, therefore, right to take an interest in the issue of institutional investor voting.

(c) There is strong international interest in the voting policies and practices of institutional shareholders.

- US private-sector pension plans are effectively required to exercise voting rights. The US Department of Labor, which is the regulator under the ERISA legislation, has long held the view that the vote is a scheme asset which needs to be managed by or on behalf of a scheme’s trustee with the same care and diligence as other scheme assets.

- Key recommendations in the UK Newbold Committee’s report referred to earlier were that (i) regular, considered voting should be regarded as a fiduciary responsibility; (ii) trustee boards should record their policy position on voting in their statement of investment principles (a set of principles with which their investment managers must comply); and (iii) the institutional investors’ industry bodies should continue to encourage and provide practical help to their members to adopt or review considered corporate governance and voting policies. Recommendation (ii) has subsequently been implemented by way of regulation.

- Also, the UK Secretary of State and Minister for Trade and Industry recently stated:

"I very much agree that responsible voting involves the application of informed decisions reached within the framework of a considered corporate governance policy. High voting levels are important; but it is essential that voting is considered rather than just simple "box-ticking" if it is to benefit British companies."

Copies of the Report are available for sale – see Item 9(A).

3. RECENT ASIC DEVELOPMENTS

(A) USE OF ABN ON COMPANY DOCUMENTS

On 29 May 2000 ASIC confirmed the use of ABNs (Australian Business Numbers) on company stationery and documents following the gazettal of amendments to the Corporations Regulations.

Copies of the amending regulations and accompanying Explanatory Memorandum can be accessed on Treasury’s website at "<http://www.treasury.gov.au>". Under the Corporations Law, a company is required to show its ACN on all public documents and negotiable instruments. The regulations modify the Law to allow the quotation of an Australian Business Number (ABN) on public documents and negotiable instruments in place of the ACN for Corporations Law purposes.

The amendments to the regulations come into effect immediately.

From 29 May 2000, companies with an ABN can use it in place of their ACN, on the condition that:

(a) the ABN includes the company’s ACN as the last nine digits; and

(b) quoting their ABN is done in the same way in which they quoted their ACN. For example, a company is required to place its ACN with its name on the first page where that name appears in a document.

Alternatively, a company may choose to continue to quote its ACN for Corporations Law purposes. This choice will be available for a transitional period of at least a year to allow companies to use up existing stocks of stationery.

It was not possible for the new regulations to alter the requirement in section 123 of the Corporations Law that a company with a common seal display its ACN on the seal. Legislative amendments to this section will be required to allow quotation of the ABN.

The Government has indicated that it will seek to amend section 123 at an appropriate opportunity to enable companies to use their ABN on company seals. Until an amendment is made the ACN requirements in relation to company seals will remain as they currently stand.

Also, the new regulations do not alter the taxation law requirement that, from 1 July 2000, companies with an ABN display their ABN on adjustment notes for GST purposes and invoices. An ACN will not be able to be used on these documents.

For further information contact:

Dreda Charters-Wood
ASIC Director Business Development
Tel: (03) 9280 3376

(B) ASIC CALLS FOR COMMENT ON MINIMUM BID PRICE PRINCIPLE

On 7 May 2000 ASIC released a policy proposal on practical issues for takeover bidders. The policy proposal concerns the "minimum bid price principle" contained in subsections 621(3) and (4) of the Corporations Law. These subsections were introduced by the Corporate Law Economic Reform Program Act 1999 which commenced operation on 13 March 2000.

The minimum bid price principle requires a bidder to offer a price (consideration) under a takeover bid which at least equals the maximum price at which the bidder purchased the shares the subject of the bid in the four months prior to the bid. The minimum bid price principle applies to both cash and scrip bids.

Under a scrip bid, the minimum bid price principle raises practical problems for bidders because it requires the bidder to value the scrip consideration on the same day that the bidder sends its takeover offers. This may not give the bidder enough time to print the bidder’s statement and offer documents to send to shareholders.

ASIC proposes to allow the bidder to value the scrip five Business Days before it sends its takeover offers to shareholders. In the bidder’s statement, which the bidder must lodge with ASIC and serve on both the target and ASX some weeks before this, the bidder should include a valuation of the scrip that it is offering. The bidder can update the valuation in the bidder’s statement if necessary before sending it to shareholders. ASIC also proposes methods that bidders should use to value scrip consideration.

ASIC has developed these proposals in preliminary consultation with the Corporations and Securities Panel (the Takeovers Panel) and will continue to consult with the Panel. A particular focus of the discussions will be methods of valuation of scrip consideration.

Copies of the policy proposal paper are available from the ASIC Infoline 1300 300 630 or ASIC’s website at "<http://www.asic.gov.au>". ASIC is seeking comments on its policy proposal paper by Wednesday 21 June 2000.

For further information contact:

Richard Cockburn
National Coordinator Mergers, Acquisitions and Fundraising
ASIC
Mobile: 0411 549 034

4. RECENT ASX DEVELOPMENTS

(A) ASX BUSINESS RULES

(1) ASX Business Rules Guidance Note

A Business Rules guidance note relating to trading activities in the options market was issued on 8 May 2000. The guidance note outlines the obligations of Trading Participants in circumstances where they possess information about another person’s intention to deal. It provides examples of improper use of order flow information in the Options market.

(2) Wholesale loan market rules

ASX is proposing to amend the ASX Business Rules to introduce a bulletin board facility for wholesale loan securities (where the minimum consideration is $500,000 per trade). Bids and offers for these securities will be displayed in the usual way, but trading must take place on a direct communication basis (eg by telephone). The amendments expand on the existing functionality of SEATS, and are intended to encourage issuers of wholesale debt securities to apply to have their securities quoted by ASX. Transactions that are undertaken in respect of securities on the new wholesale loan markets will not be covered by the National Guarantee Fund. Assuming the necessary approvals are given, the new rules are anticipated to come into effect in June.

5. RECENT CORPORATE LAW DECISIONS

(A) ANOTHER CHALLENGE TO CORPORATE REGULATION: THE HUGHES CASE
(By Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation, The University of Melbourne)

The Queen v Hughes [2000] HCA 22; High Court of Australia, Gleeson, McHugh, Gummow, Kirby, Hayne, Callinan JJ, 3 May 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/may/2000hca22.html>"

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

(1) The facts

The Commonwealth Director of Public Prosecutions (DPP) alleged that Mr Hughes had breached the Corporations Act of Western Australia by obtaining $300,000 from investors in Western Australia and investing this through a United States securities house, PaineWebber Incorporated, without complying with the disclosure and other requirements in the WA Corporations Act. The investors had been promised that they could double their money although they only ever received their principal back and this was almost three years after they invested.

In order for the DPP to have the power to prosecute a breach of the WA Corporations Act, section 29(1) of that Act provides that Commonwealth laws apply as laws of Western Australia in relation to an offence against the relevant provisions of the WA Corporations Act, as if those provisions were laws of the Commonwealth and that for the purposes of a law of Western Australia, an offence against the applicable provisions of the WA Corporations Act is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth.

Mr Hughes argued that this was unconstitutional. The High Court rejected this argument. The court stated that it was valid to impose powers and functions on Commonwealth officers such as the DPP where those powers are conferred by state law and with respect to the prosecution of state offences, provided that the Commonwealth Parliament has the power under the Constitution to create its own offences against Commonwealth law in relation to those matters.

Because Mr Hughes had invested the $300,000 in the United States, the High Court held that the appropriate Constitutional power was section 51(i) of the Constitution – granting the Commonwealth Parliament power to legislate with respect to trade and commerce with other countries and section 51(xxix) of the Constitution which gives the Commonwealth Parliament power to legislate with respect to external affairs.

Section 51(xx) of the Constitution gives the Commonwealth Parliament power to legislate with respect to foreign corporations and trading or financial corporations formed within Australia but it was doubtful whether this could apply in the circumstances because Mr Hughes had not used a company to offer the investments.

(2) Implications

The implications of the decision in Hughes are significant. The High Court has emphasised the need for there to be specific power under the Constitution where the Commonwealth Parliament imposes functions on Commonwealth bodies in relation to state legislation. Because the Constitution only gives the Commonwealth Parliament limited powers, there is a significant grey area concerning a number of existing powers. For example, an important function of ASIC is the regulation of managed investments, which are typically structured as trusts. The High Court specifically left open whether the current regulation of managed investments is constitutionally valid although the court did note some arguments in support of the validity of the existing arrangements. There is also some doubt in relation to the existing arrangement whereby ASIC regulates the incorporation of companies given that in its 1990 decision (New South Wales v Commonwealth (1990) 169 CLR 482) the High Court ruled that the Commonwealth Parliament has no power to regulate the incorporation of companies.

One can confidently predict further challenges following the Hughes decision. This is because of the narrow basis of the decision – the court was able to uphold the power of the DPP to prosecute Mr Hughes essentially because he had invested the funds overseas and there is specific power in the Constitution dealing with external affairs, and trade and commerce with other countries. Indeed, one of the High Court judges, Justice Kirby, specifically stated that it was only the "peculiar circumstances of this case" that is, the fact that Mr Hughes invested the funds offshore, that meant that the power of the DPP to prosecute Mr Hughes was valid under the Constitution. Justice Kirby clearly highlighted the threat of further challenges to the power of the DPP and ASIC. He specifically stated that "the next case may not present circumstances sufficient to attract the essential constitutional support".

Justice Kirby stated that early reform of our national system of corporate regulation is essential:

"It may be hoped that this and other recent decisions, together with the great national importance of [corporate law], will encourage its early reconsideration and the adoption of a simpler constitutional foundation to reduce the perils that are otherwise bound to recur, possibly with serious results."

(3) Responses

The Commonwealth Attorney-General, The Hon Daryl Williams and the Minister for Financial Services and Regulation, The Hon Joe Hockey, issued a joint media release following the Hughes decision in which they stated that the decision has added uncertainty to our existing system of corporate regulation. They state that "urgent legislative action is required to restore certainty to, and business confidence in, corporate regulation in Australia". They call in their media release for a referral by all of the state governments of their power to regulate companies to the Commonwealth Government. The Chairman of ASIC, Alan Cameron, has also stated that a referral of power is a necessary step that should be taken without delay. A referral of powers by the state governments to the Commonwealth Government is permitted under the Constitution.

While most state governments have indicated their willingness to refer their corporations powers to the Commonwealth Government, the Attorneys-General of Western Australia and South Australia have resisted this suggestion. Clearly, it is important that there be effective national regulation of companies and the securities markets. The solution lies with a negotiated settlement between state governments and the Commonwealth Government. One hopes that the solution is reached quickly.

The Centre for Corporate Law is holding a seminar on the implication of Hughes with speakers including the Hon Michael Black, Chief Justice of the Federal Court and Alan Cameron, Chairman of ASIC. For details, see Item 7 of this Bulletin.

(B) STATUTORY DEMANDS AND GENUINE DISPUTES
(By Adam Brooks, Solicitor, Herbert Geer & Rundle)

Sterling Estates (SA) Pty Ltd v Bradley [2000] NSW SC 366, New South Wales Supreme Court, Hamilton J, 8 May 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/may/2000nswsc366.html>"

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

Mr Bradley had served a notice of demand on Sterling Estates ("Sterling") pursuant to section 459E of the Corporations Law. By virtue of section 459C(2) of the Corporations Law, a Court must presume that a company is insolvent if in certain circumstances a company has failed to comply with such a demand.

In a previous application brought by Sterling before a Master, Mr Bradley’s demand was set aside. Mr Bradley appealed the Master’s decision to Hamilton J.

Mr Bradley’s notice of demand alleged that Sterling owed him $110,000, representing the repayment of an equity contribution he had made in relation to a property development. Hamilton J accepted that the evidence showed that Sterling and Mr Bradley each had held a 50% interest in several property development joint ventures. Hamilton J referred to the confused state of accounting between the two parties in relation to the joint ventures.

Section 459G(1) of the Corporations Law allows a company to apply to a Court for an order to set aside a notice of demand within 21 days of the demand having been served. Hamilton J noted that the key ground upon which a company can seek to have the demand set aside is that there is a "genuine dispute" in relation to the relevant debt.

Hamilton J held that it was Sterling (as the plaintiff before the Master) who had the onus of establishing that there was a "genuine dispute" between the parties (in relation to the debt). On the "genuine dispute" question, Hamilton J noted the following meanings referred to by McLelland CJ in Eyota Pty Ltd v Hanave Pty Ltd (1984) 12 ACSR 785:

"...that expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat."

"It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it), the Court has no function. It is not helpful to perceive that one party is more likely than the other to succeed..."

Hamilton J dismissed Mr Bradley’s appeal and held that there was a genuine dispute as to what capital had been contributed to what project, when those sums became repayable and to what extent it had been repaid.

(C) ACCC APPLICATION TO REINSTATE A COMPANY
(By Stephen Magee, National Legal Support Manager, [Clayton Utz](http://www.claytonutz.com.au), Sydney)

Australian Competition & Consumer Commission v Australian Securities and Investments Commission [2000] NSWSC 316, Supreme Court of New South Wales, Austin J, 17 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/april/2000nswsc316.html>"

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

This was an unusual application for the reinstatement of a company. The applicant was the ACCC and one of the purposes of the application was to obtain penalty orders and declarations against a company that apparently had no assets.

ABB Power Transmission Pty Ltd (ABB Pty Ltd) had been wound up voluntarily by its members. It was later deregistered by ASIC.

Some months later, the ACCC came to the view that the company had been engaging in price fixing. It began proceedings against a number of companies (including companies in the same group as ABB Pty Ltd) and individuals. It now sought to have ABB Pty Ltd reinstated so that it could be joined as a defendant.

Former officers of ABB Pty Ltd opposed the reinstatement application. ASIC took a neutral stand (of which, more later).

(1) Would reinstatement be just?

The main question for the Court under section 601AH of the Corporations Law was whether reinstatement would be "just". This, in turn, depended upon the ACCC's submissions that reinstatement (and subsequent Trade Practices Act proceedings) would be in the public interest. The ACCC submitted three such public interest reasons.

The first was that, if successful, the TPA proceedings could result in a large penalty being imposed on the company. According to the ACCC, this would further the public interest because:

(a) a large penalty would have a deterrent effect; and

(b) the imposition of a large penalty would assist the ACCC to otain large penalties against other companies in the same group (ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) FCR 248).

The second reason was that, if the Court in the TPA action made declarations against ABB Pty Ltd, such declarations would also have a deterrent effect.

The third reason was that findings of fact in the TPA action would assist third parties who might have been injured by the alleged price-fixing (section 83 of the TPA makes findings of fact prima facie evidence in subsequent proceedings).

Austin J was not convinced that the TPA action would be likely to result in penalties against the company (if only because the company might have no assets). Similarly, he did not think that the joining of the company in the TPA action would expand the range of findings of fact open to the Court. However, he thought that the likelihood or otherwise of these possibilities should not be closed off by refusing to order reinstatement.

(2) How to do it

His Honour then turned to a number of practical issues arising out of the reinstatement application. He held that reinstatement would put the company in the position of a company in liquidation whose affairs had not yet been fully wound up. This meant that it would be reinstated with its liquidator and its directors in office - although the latter would not, of course, have any management powers (which would provide them with a defence against any insolvent trading action).

(The fact that the company would be restored along with its liquidator did create a small hiccup for the ACCC. Its reinstatement application had sought the appointment of a different liquidator. Austin J held that, to achieve that outcome, the existing liquidator would have to resign after being reinstated, and the ACCC would have to apply to have another liquidator appointed.)

Austin J also looked at the question of money. While he was prepared to order the ACCC to meet the costs of the reinstatement application, he did not think that the company's financial situation after reinstatement and joinder was a matter for him: the question of how the company would fund its defence or meet any penalty was a matter for the Court hearing the TPA action.

Taking all of these matters into consideration, Austin J decided to order the company's reinstatement.

(3) ASIC's contribution

ASIC had indicated that it would not oppose the reinstatement application as long as the requirements of ASIC Policy Statement 83 were satisfied - in so far as they were applicable.

This was criticised by Austin J, who described it as "not the most helpful way for ASIC to communicate to the Court its attitude to the application". He said that the ASIC position meant that he had had to read through the Policy Statement and to work out for himself which parts were applicable and intended by ASIC to be conditions of its non-opposition. He commented that it would have been better if ASIC had set out the particular matters on which its consent was conditional.

(D) PRACTICALITIES OF DEMERGER BY SCHEME
(By Andrew Walker and Ben Bryce, [Clayton Utz](http://www.claytonutz.com.au))

Re Amcor Limited [2000] VSC 157, Supreme Court of Victoria, Warren J, 28 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/april/2000vsc157.html>"

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

On 25 February 2000, Amcor Limited ("Amcor") applied to the Supreme Court of Victoria for an order under subsection 411(1) of the Corporations Law convening meetings of members to consider a proposed scheme of arrangement ("the Scheme"). This order was granted and the meetings were held on 10 April 2000. On 11 April 2000, Amcor sought an order under subsection 411(6) approving the Scheme, which was also granted. On 28 April 2000, Warren J handed down her reasons for granting both orders.

(1) Facts

The object of the Scheme was to "demerge" PaperlinX Ltd ("PaperlinX"), which was a wholly-owned subsidiary of Amcor which conducted the group's paper business. Under the Scheme, Amcor proposed to reduce its share capital by an amount of $1.22 per share, then to apply that amount as consideration for the transfer to each Amcor shareholder of 1 share in PaperlinX for each 3 shares held in Amcor. Amcor would then dispose of its remaining 18% of the capital of PaperlinX by a way of a public offer (comprising a retail offer and an institutional book-build).

(2) Issues arising under the Corporations Law Rules

Amcor sought an order dispensing with a number of the Corporations Law Rules ("the Rules"), specifically Rules 2.3(a), 2.15, 3.2 and 3.4. All of these dispensations were granted, and in the course of doing so, Warren J made the following observations:

(a) Regulations 5.6.12 to 5.6.36A of the Corporations Regulations are designed to govern meetings of creditors of insolvent companies; however, they are applied to Court-ordered meetings by Rule 2.15 (subject to the Law, the Rules and any direction to the contrary). As they are not as appropriate to a meeting of shareholders of a public listed company as the provisions of the company's constitution, her Honour accordingly dispensed with Rule 2.15 and directed that the meetings be governed by the constitution mutatis mutandis.

(b) Notwithstanding that all of the evidence required by Rule 3.2 of the relationships and interests that the nominated chairperson (Mr Stan Wallis) had in Amcor or its related bodies corporate had not been put before the Court, Warren J directed that Mr Wallis act as chairperson (unless the relevant meeting chose otherwise) given that the shareholders attending such a meeting would expect either the company chairperson or another director to chair the meeting.

(c) Rule 3.4 provides that a notice of the hearing of an application for approval must be published in the form of Form 6 in Schedule 1 to the Rules at least 5 days before the date fixed for the hearing of the application. However, the prescribed form of notice assumes that the notice will not be given until after the Court-ordered meetings have been held. In this case, the approval application was sought to be heard the day after the meeting. As the scheme booklet disclosed the proposed date of the application, Warren J was prepared to dispense with Rule 3.4 but directed that an alternative form of notice be given at least 5 days in advance of the hearing.

(3) Issues arising under the Corporations Law

Warren J considered the application of the following provisions of the Corporations Law in the context of the proposed Scheme:

(a) Section 199A defines the limit of an indemnity which may be given by a company to its officers. Such an indemnity was contained within the Scheme but fell within the permitted ambit prescribed by section199A, so Warren J was able to distinguish an earlier decision of McLelland J in Re Price Mitchell Pty Ltd [1984] 2 NSWLR 273 in which his Honour declined to convene meetings to consider a scheme which contained an indemnity in favour of the proposed scheme manager which was inconsistent with former section 237 of the Companies Code.

(b) Section 411(11) would have required that a copy of the Court's order approving the Scheme be annexed to every copy of Amcor's constitution issued after the order. Amcor applied under s 411(12) for an exemption from compliance with section 411(11). Warren J granted the application on the grounds that Amcor was a large public company listed on the Australian Stock Exchange, and that shareholders and potential shareholders were therefore amply informed of the Scheme through the disclosure regime applicable to listed companies.

(c) Section 411(17) prevents the Court from approving a scheme unless it is satisfied that it was not proposed for the purposes of enabling any person to avoid the operation of the takeovers provisions in Chapter 6 (section 411(17)(a)), or a written statement from ASIC is produced to the effect that ASIC has no objection to the proposed scheme (section 411(17)(b)). Notwithstanding that such a statement from ASIC under section 411(17)(b) had been produced, Warren J also considered whether section 411(17)(a) was satisfied. Her Honour concluded that it was, noting that section 411 had been used to effect the takeovers of BTR Nylex Limited in 1995, GIO Australia Holdings Ltd in 1999 and Hudson Conway Ltd in 2000, and also the demergers of Coca-Cola Amatil Ltd and Boral Ltd.

(d) Section 1109N permits a company to take a "snap-shot" of its register up to 48 hours prior to a meeting of the holders of quoted securities to avoid the difficulties which the CHESS system would otherwise have created in determining voting entitlements. Warren J doubted that section 1109N applied to Court-ordered meetings, but gave a direction which effectively replicated the effect of the provision. It is unclear why Warren J did not believe that section 1109N would otherwise apply to a Court-ordered meeting, as the terms of section 1109N appear prima facie to apply to any meeting of holders of quoted securities despite anything to the contrary in the Corporations Law/Regulations or any other laws (see section 1109N(1) and (8)). It is interesting to contrast the approach of Santow J in Re NRMA Ltd [2000] NSWSC 82, who held that Part 2G.2 of the Corporations Law (which applies to "a meeting of the company's members") would govern a Court-ordered meeting.

(e) Section 1319 empowers the Court to give directions with respect to the convening, holding or conduct of a Court-ordered meeting. In Re Huon Valley Springs Ltd (1986) 10 ACLR 883, it was held that the Court had no power to restrict the right to vote by proxy by limiting the time within which instruments of proxy may be delivered. However, in Re ACP Ltd (1994) 14 ACSR 639, McLelland J held that the predecessor to section 1319 was sufficiently wide to authorise the Court to give directions as to the return of proxy forms. Warren J adopted the view of McLelland J and made directions as to the return of proxy forms which were consistent with Regulation 5.6.36 (ie. the cut-off time was less than 48 hours before the time of commencement of the meetings).

(4) Other Matters

One relatively novel feature of her Honour's decision was that Amcor was permitted to despatch information to its shareholders which was not before the Court at the time of convening the meetings (compare Chief Commissioner of Payroll Tax v Group Four Industries Pty Ltd [1984] 1 NSWLR 680 per McLelland J at 686). Amcor wished to send to its US shareholders an analysis of the US tax position which was in the course of preparation by Amcor's US tax advisers but was not completed at the time of Amcor's application under section 411(1). Warren J allowed Amcor to do so without returning to Court provided that the information was first provided to ASIC and that ASIC had no objection to the material being distributed. If ASIC were to object, Amcor would have needed to return to Court for directions.

(5) Conclusion

Although this decision does not cover much "new territory", it is useful in so far as it distills many salient principles which need to be considered in formulating an application under section 411, and it also discusses several procedural issues which often arise but are seldom the subject of a written judgment.

(E) INSPECTION OF A COMPANY’S BOOKS BY MEMBERS
(By James Paterson and Phillip Tez, [Phillips Fox](http://www.phillipsfox.com.au))

Czerwinski v Syrena Royal Pty Ltd [2000] VSC 125, Supreme Court of Victoria, Justice Warren, 7 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/april/2000vsc125.html>"

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

(1) Summary

The Court has a discretionary power under section 247A of the Corporations Law to allow inspection of the books of a company upon application by a member of the company. The Court will only make such an order if it is satisfied that the applicant is acting in good faith, and the inspection is to be made for a proper purpose. Factors the Court will take into consideration include whether the applicant has a bona fide interest in such access, and whether they have had a prior opportunity to gain such access.

(2) The decision

The decision related to a dispute over a Polish company, Syrena Royal Spa z.o.o., which had been established as a partnership between groups defined as the ‘Syrena Royal interests’, and the ‘Czerwinski interests’. The Polish Company, via a unit trust, was intended to carry on business exporting raw fish and related products (‘the business’). This dispute spawned two Supreme Court of Victoria proceedings. This note reviews the second proceeding.

In the first proceeding the Syrena Royal interests alleged that the Czerwinski interests had breached various fiduciary duties owing to the partnership, and sought certain declarations in relation to interests in the partnership, orders for the taking of accounts, damages and interest. The Czerwinski interests believed that the Polish company sold the business and the Syrena interests received proceeds from the sale.

In the first proceeding Syrena Royal Pty Ltd made discovery to the Czerwinski interests, and any documents not produced were claimed as privileged documents under a general claim for legal professional privilege. The Czerwinski interests took no action by way of interlocutory application to obtain access to those documents.

The Czerwinski interests were concerned that the corporate records of Syrena Royal Pty Ltd had not been disclosed, in particular, documents which related to the proceeds of sale of the business.

The Czerwinski interests made a formal demand for inspection of documents pursuant to section 247A of the Corporations Law (‘the Law’) for various ‘books of account’. This demand was not responded to, and the Czerwinski interests instituted the second proceeding to seek production of the relevant documents.

The Respondent contended that if discovery of documents was required by the Czerwinski interests it should have been pursued using the interlocutory processes in the first proceeding, rather than on the basis of the current application, which it contended was an abuse of process. The Czerwinski interests contended that a party entitled to access documents under section 247A of the Law could not commit an abuse of process, as it was purporting to exercise a statutory right. The Applicant (representing the Czerwinski interests) was a shareholder of Syrena Royal Pty Ltd and submitted that she was entitled to have access to the documents as a member of the company.

Section 247A of the Law provides that on application by a member of the company (or registered managed investment scheme), the Court may make an order which authorises the applicant to inspect the books of the company. However, the Court may only make such an order if it is satisfied that the applicant is acting in good faith, and the inspection is to be made for a proper purpose.

Justice Warren stated that while the Czerwinski interests alleged there was a lack of adequate explanation as to the circumstances surrounding the disposition of the proceeds of sale of the Polish business, they provided no evidence in support of this claim. Further, her Honour noted that the information provided to the Court gave it no knowledge as to the purpose of the Czerwinski interests in instituting the proceeding. She mentioned that she had strong reservations whether the Czerwinski interests were seeking to protect or investigate any interest by them in the company.

Further, Justice Warren mentioned that no effort had been made to pursue the privilege issue in the first proceeding, leading her to conclude that the application under the second proceeding had not been made for a genuine purpose, and had ‘all the hallmarks of a tactical manoeuvre adopted to bypass difficulties and overcome the claim for legal professional privilege’.

It was held that section 247A of Law is intended to enable a member of a company to inspect books in order to obtain information about matters that, as member or shareholder in the company, that member or shareholder ought to be informed of by the company. It was ‘not intended as a form of or substitute for inspection of documents to overcome the obstacle of legal professional privilege claimed in another proceeding’, particularly where, as here, the applicant has no real investment to protect by reason of access to the document of the relevant company. This is consistent with the decisions in Claremont Petroleum NL (No 2) (1990) 8 ACLC 548; Claremont Petroleum NL v AGL (1990) 1 ACSR 504; Quinlan v Vital Technology Australia Ltd (1987) 5 ACLC 389; 393 and Intercapital Holdings Ltd v MEH Limited (1988) 19 ACLR 595; 602.

Justice Warren was not satisfied that the Czerwinski interests were acting in good faith, or that the inspection pursued was made for a proper purpose. Pursuant to the Court’s discretionary power, Justice Warren found that production of documents under section 247A were to be made only where it was otherwise impossible for the party to gain access to the documents, where that party had a bona fide interest in such access, and the inspection was made for a proper purpose.

As the Czerwinski interests did not make use of a previous opportunity to discover the documents, and their motives were considered dubious, the attempt to access the documents was refused, and the application was dismissed.

(F) SEEKING REMOVAL OF ADMINISTRATORS
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

In the Matter of Central Spring Works Australia Pty Ltd (administrator appointed); Tubemakers of Australia Limited v Andrew James McLellan and Wayne Edward Benton (as administrators of the Company) [2000] VSC 145, Victorian Supreme Court, Warren J, 19 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/april/2000vsc145.html>"

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

On 10 March 2000, Mr McLellan and Mr Carson were appointed receivers and managers by Scottish Pacific Business Finance Pty Ltd ("Scottish Pacific") pursuant to a first ranking fixed and floating charge granted by Central Spring Australia Pty Ltd ("Central Spring") and a related company Coburg Spring Works (Vic) Pty Ltd ("Coburg Spring"). On 29 March 2000, Andrew McLellan and Wayne Benton ("the defendants") were appointed as administrators of Central Spring by an order of the court under section 448C(1) of the Corporations Law.

The plaintiff, Tubemakers of Australia Limited ("Tubemakers"), which was also a secured creditor of Central Spring, disputed the distribution by the administrators of a poll conducted at the first meeting of creditors, deciding whether the administrators’ should be removed. In this proceeding, Tubemakers sought an order for the removal of the administrators.

The reasons why Tubemakers wanted the administrators removed included:

(1) Tubemakers sought an order under section 449B of the Corporations Law, asserting that the administrators were under a conflict of interest or there was a reasonable apprehension that the administrators were not independent and/or may not have acted independently. They gave the following reasons for a potential conflict:

(a) Mr McLellan was appointed as receiver by Scottish Pacific. Therefore, he owed a duty to Scottish Pacific over and above his duty to the creditors of Central Spring.

(b) As receiver, Mr McLellan was owed fees and expenses by Central Spring and as a consequence had a conflict of interest in the administration. The defendants were also receivers of Coburg Spring. Coburg Spring owed Central Spring approximately $30,000 and the defendants were the receivers and managers of Coburg Spring while at the same time being administrators of Central Spring.

(c) The administrators were immediately concerned with continuing trading until all debts incurred by McLellan and Carson as receivers had been repaid, and until they or Scottish Pacific were better protected against any possible liability.

(2) Tubemakers sought an order under section 600A of the Corporations Law, asserting that the vote by the creditors for removal of the administrators was wrongfully proportioned by the administrators. The defendants wrongly calculated and overstated the preferred creditors of Central Spring.

Justice Warren’s decision addressed the arguments of Tubemakers as follows:

(1) Justice Warren affirmed that the grounds for the removal of an administrator will be made out where it is established that it is conducive to the better conduct of the administration or it is for the general advantage of those interested in the assets of the company that the administrator be removed: Network Exchange Pty Ltd v MIG International 13ACSR 544 at 551. This will be satisfied where there is a lack of independence or perceived lack of independence on the part of the administrator, or a conflict of interest: Dallinger v Halcha Holdings Pty Ltd (1995) 134 ALR 178 at 183-4. It is a sufficient ground for removal of an administrator if a creditor reasonably perceives that the administrator is not independent. Her Honour held that even though Tubemakers was a major creditor, whose interests and position will carry significant weight, there was no clear evidence of a conflict of interest.

(a) Justice Warren held that substantial involvement with the company prior to its administration will generally disqualify a person from appointment as that company’s administrator. Such involvement will affect impartiality during the course of the administration and the perception of independence from the company. However, no matters raised by Tubemakers warranted the removal of the defendants.

(b) Her Honour held the administrators were and remain prepared to delay the payment of the priority debts (which would be in their interests and the interests of Scottish Pacific) in order for the members and creditors to consider the implementation of a deed of company arrangement. If these priority debts had been paid, essential working capital necessary for the continuation of the business would have been withdrawn. Secondly, if the administrators were removed, Scottish Pacific still had the power to appoint fresh receivers to protect its position in respect of the priority debts.

(c) Mr McLellan’s conduct had not indicated any lack of independence or impartiality. The fact that Mr McLellan was owed fees and expenses by Central Spring was not of itself sufficient to demonstrate a conflict of interest.

(d) Mr McLellan had taken every endeavour on his part to avoid the company being placed into liquidation. The fact that an error had been made does not of itself constitute a basis for finding an actual or potential conflict of interest. Mr McLellan’s initial appointment as receiver by Scottish Pacific of itself was not sufficient to warrant his removal.

Justice Warren held that an order would only be made under section 449B of the Corporations Law if it is demonstrated that such an order would be for the better conduct of the administration. The plaintiffs had not produced anything which indicated that the removal of the administrators would be for the best conduct of the administration of the company involved.

(2) Justice Warren held that to make out Tubemakers claim required an artificial analysis of the various interests of the creditors represented. If Tubemakers’ complaint had been taken into account, and certain creditors were discounted, only a narrow margin would be achieved. Her Honour held that such an artificial analysis of itself is not sufficient to substantiate the removal of the administrators.

In any event, section 600A of the Corporations Law could not be relied upon as the applicant had not demonstrated that the outcome of the resolution at the meeting was one which was contrary to the interests of the creditors as a whole or had prejudiced the interests of the creditors who voted for it.

Justice Warren was satisfied that the removal of the current administrators was not in the interests of the creditors as a whole. Furthermore, such removal risked Scottish Pacific taking action to protect its position by appointing fresh receivers who may not be willing to defer paying priority creditors.

(G) TRACING AND ROT CLAUSES – TRUSTS ARE IN, CHARGES OUT
(By Lloyd Nash, Partner, [Clayton Utz](http://www.claytonutz.com.au), Brisbane, and Professor Berna Collier, [Clayton Utz](http://www.claytonutz.com.au) Professor of Commercial Law, Queensland University of Technology)

Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd [2000] HCA 25, High Court of Australia, 11 May 2000, Gaudron, McHugh, Gummow, Kirby and Hayne JJ

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/may/2000hca25.html>"

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

The High Court of Australia in Associated Alloys held that it is possible to draft an effective ROT clause, whereby the seller can trace proceeds of sub-sale of products, manufactured from the original goods, in the hands of the buyer by way of trust.

Until this decision, delivered on 11 May 2000, the cases in both Australia and elsewhere supported the principle that a clause in this form created an unregistered charge over the assets of the buyer, and hence was void as against an administrator or liquidator under section 266 – see, for example, Tatung (UK) Ltd v Galex Telesure Ltd (1989) 5 BCC 325 and Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd (Receiver Appointed) (in Liquidation) (1992) 28 NSWLR 338.

(1) The facts

Over several years Associated Alloys Ltd ("the seller") had sold steel to Metropolitan Engineering and Fabrications Pty Ltd ("the buyer" – this company was later known as ACN 001 452 106 Pty Ltd). Usually, an ROT was printed on the back of invoices issued by the seller to the buyer. Each invoice recorded the details of the supply and shipment of steel by the seller, and the US dollar sum owed in respect of the particular shipment of steel. The clause contained five sub-clauses. The only one at issue in this case was sub-clause 5 – i.e. "In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/products in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds."

The buyer used the steel to manufacture pressure vessels, heat exchangers and columns, which it sold to a company in Korea. The buyer had not paid the seller an amount owing under particular invoices. It was clear from the facts that the steel supplied by the seller to the buyer had been used to manufacture these products for the Korean company.

The buyer subsequently entered liquidation, and the seller claimed entitlement to proceeds in the hands of the liquidator relating to sale of products made from steel supplied.

(2) Findings of the Majority

Gaudron, McHugh, Gummow and Hayne JJ delivered a joint judgment, with Kirby J delivering a separate judgment. In summary, findings of the majority were as follows :

(a) The principles of equity permitted the effective drafting of a ROT clause allowing the seller to trace proceeds of re-sale by way of trust.

(b) The court did not specifically rule on "ROT" clauses as such, however the court assumed that the first sub-clause of the contract would have operated to retain the property of the goods with the seller had there had been no process of manufacture.

(c) The proceeds sub-clause operated unconditionally in the event that the buyer used the goods in some process of manufacture. This happened here. Clearly the seller could not retain title to any proprietary interest in the steel it supplied under the invoices – the steel was no longer capable of being ascertained in the products manufactured by the buyer.

(d) On these facts, "the proceeds" meant moneys actually received by the buyer, not book debts. The High Court however left open the possibility that a tracing clause could be drafted to encompass book debts of the buyer. The High Court recognised that if "proceeds" do not include book debts, the buyer could assign its book debts and thus defeat the operation of the clause. Alternatively, even if "proceeds" did include book debts, the buyer could avoid the effects of an ROT clause by entering into a forward sale agreement for goods it had yet to manufacture, with the result that there would never be any "book debts" in relation to the goods it was to manufacture. In such circumstances, the buyer would never receive the proceeds of sale, and the ROT clause could never fix on the "proceeds".

(e) The fact that the "trust" was created by contract was not an issue – the contractual relationship is a common base for the establishment or implication and definition of a trust. Similarly the fact that the property subject to the trust was a proportion of the proceeds received by the buyer was not a problem.

(f) In this case the existence of a trust was explicit. In the view of the Court there was nothing to suggest that the parties in their written instrument did not mean what they said, or did not say what they meant.

(g) The inclusion of a period of credit was not inconsistent with a trust – it prescribed the period within which the seller, as beneficiary, could call on the trust property.

(h) The debts owed by the buyer to the seller was discharged when a trust was constituted under this clause. Accordingly, it appears that once the buyer used the goods in a process of manufacturing and resold the products, the seller could no longer sue the buyer for the debt owing, but was limited to an action in equity to trace the proceeds of resale.

(i) As the clause was not a charge within the meaning of the Corporations Law, it was not void as against the administrators or liquidator of the buyer.

(3) Decision

Despite these findings, the Court found against the seller on the evidence. The seller had to establish that the funds in the hands of the buyer were "proceeds" in the meaning of the ROT clause, and in this case it had not done so. The critical lacuna in evidence was that the seller did not show that the steel the subject of the relevant invoices containing ROT clauses was linked to the particular items resold to the Korean company.

(4) Implications of the decision

The decision in Associated Alloys impacts on the practices of suppliers, buyers, lenders and insolvency practitioners. Sellers will inevitably take advantage of the opportunities offered by the case to redraft their ROT clauses, and insolvency practitioners will need to come to grips with the decision in dealing with claims of suppliers, and in taking action on behalf of creditors.

For financial institutions, the process of ascertaining the credit-worthiness of customers will be more difficult, and the enforcement of security may be prejudiced by suppliers enforcing tracing remedies against funds in the hands of a buyer/customer.

Finally, priority creditors such as employees may be unable to recover from moneys representing those proceeds, as the moneys will be outside the operation of the Corporations Law. Accordingly, it is a question for speculation whether the Employees Entitlement Bill currently before Federal Parliament will afford any comfort to employees, in circumstances where funds of the insolvent employer can be successfully recovered by suppliers under pre-existing trust arrangements.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

R Simmonds, ‘Towards a More Perfect Security: From New Bullas Trading to Brumark Investments, and Beyond’ (2000) 8 Insolvency Law Journal 4

What is the place in Australian law of the English Court of Appeal’s decision in New Bullas Trading on security over book debts after the New Zealand Court of Appeal’s decision in Re Brumark Investments? This article answers that question by placing both decisions in a broader context. That context is the present law of secured transactions and the practices of whole undertaking secured lenders. Also considered are the possibilities for future reform of Australian law along lines suggested by the New Zealand Personal Property Securities Act 1999.

D Robinson, ‘Remuneration of Corporate Insolvency Practitioners’ (2000) 8 Insolvency Law Journal 20

This article considers the issues faced by corporate insolvency practitioners when seeking approval of their remuneration. It addresses creditors’ meetings, approval or review by the Court, time costing and the applicability of the IPAA scale, what practitioners and objectors should provide to the Court, grounds for objection and outlays and expenses incurred by practitioners. It is evident from the tenor of recent decisions that an increased onus has been imposed by the Court on insolvency practitioners to justify their claims for remuneration.

T Taylor, ‘Employee Entitlements in Corporate Insolvency Administrations’ (2000) 8 Insolvency Law Journal 32

The preferred treatment given to employee creditors in corporate insolvency administrations does not ensure the repayment of employees. There must still be sufficient assets to fund actual repayment. The Government has announced the establishment of a National Employee Entitlement Support Scheme as a safety net for employees. The establishment of employee claims however continues to be a process governed by the Corporations Law and employment law. "Priority coverage" takes the form of legislative priority of repayment, and sometimes personal liability imposed upon an insolvency administrator by legislation or by contract. Insolvency practitioners also pay employees if the expense in doing so is perceived necessary to their administration. In liquidation legislative priority is fairly exhaustive, in controllership less so, and in voluntary administration and deeds of company arrangement virtually non-existent. This article reveals the complexities, unintended aberrations and pure omissions in the law that make the position of the employees protection unclear to employees, and even to insolvency administrators.

J Bird and J Hill, ‘Regulatory Rooms in Australian Corporate Law’ (1999) 25 Brooklyn Journal of International Law 555

K Wuepper, ‘Piercing the Corporate Veil: A Comparison of Contract Versus Tort Claimants Under Oregon Law’ (1999) 78 Oregon Law Review 347

M Brown, ‘Missouri Close Corporations: Proposals to Strengthen Protections for Minority Shareholders’ (1999) Vol 68 No 1 University of Missouri-Kansas City Law Review

D Thomson, ‘Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?’ (2000) Vol 58 No 1 University of Toronto Faculty of Law Review

J Abrahamson, ‘Mergers and Acquisitions: Tax Planning for Cross-Border Mergers and Acquisitions in Australia’ (2000) 3 The Tax Specialist 230

J Lowry and R Edmonds, ‘The No Conflict-No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism’ [2000] Journal of Business Law 122

Y Miwa and J Ramseyer, ‘Corporate Governance in Transitional Economies: Lessons from the Pre-War Japanese Cotton Textile Industry’ (2000) 29 Journal of Legal Studies 171

M Loewenstein, ‘Shareholder Derivative Litigation and Corporate Governance’ (1999) Vol 24 No 1 Delaware Journal of Corporate Law

M Siegel, ‘The Erosion of the Law of Controlling Shareholders’ (1999) Vol 24 No 1 Delaware Journal of Corporate Law

V Dougherty, ‘A[dis]sembalance of Privity: Criticizing the Contemporaneous Trader Requirement in Insider Trading’ (1999) Vol 24 No 1 Delaware Journal of Corporate Law

J Naylor, ‘Is the Limited Liability Partnership Now the Entity of Choice for Delaware Law Firms? (1999) Vol 24 No 1 Delaware Journal of Corporate Law

T Suenaga, ‘Corporate Governance in Japan’ (2000) No 47 Osaka University Law Review

L Aitken, ‘‘Chinese Walls’, Fiduciary Duties and Intra-Firm Conflicts – A Pan-Australian Conspectus’ (2000) 19 Australian Bar Review 116

C Efflandt, ‘When the Tail Wags the Dog: Environmental Considerations and Strategies in Business Acquisition, Sales and Merger Transactions’ (1999) 39 Washburn Law Journal 28

C Mantziaris, ‘Event Corporations in the System of Responsible Government – Why SOCOG is Constitutionally Unhealthy’ (2000) 11 Public Law Review 39

J Lipton, ‘Secured Finance Law and Practice in the Global Information Age’ (2000) 11 Journal of Banking and Finance Law and Practice 17

R Smerdon, ‘Dividends and Directors’ Duties: The Queens Moat Houses Case’ (2000) Vol 11 No 1 International Company and Commercial Law Review 17

L Fairfax, ‘Explaining the Cautious Growth of Royalty-backed Securitization’ [1999] Columbia Business Law Review 489

The Company Lawyer, Vol 21 No 3, March 2000. Articles include:

- Exporting Corporate Governance: UK Regulatory Systems in a Global Economy

- Directors’ and Officers’ Liability Insurance: A Target or a Shield?

- Directors’ Disqualification: The Vice-Chancellor’s Address to the Chancery Bar Association

- Financial Conglomerates: Evolution of Regulation and the Company Law of Groups

J Matheson and R Eby, ‘The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities’ (2000) Vol 75 No 1 Washington Law Review

T Chorvat, ‘Taxing International Corporate Income Efficiently’ (2000) Vol 53 No 2 Tax Law Review

B Murray, ‘Aftermarket Purchaser Standing Under Section 11 of the Securities Act of 1933’ (1999) Vol 73 No 3 St John’s Law Review

E Simpson and V Jackson, ‘Creating an Aboriginal Corporate Constitution’ (1999) Vol 4 No 27 Indigenous Law Bulletin 19

J Cox, ‘The Social Meaning of Shareholder Suits’ (1999) 65 Brooklyn Law Review 3

Note, ‘The Solicitation and Marketing of Securities Offerings Through the Internet’ (1999) 65 Brooklyn Law Review 185

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fax: int + 61 3 8344 5995;
tel: int + 61 3 8344 7313, or
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7. CENTRE FOR CORPORATE LAW SEMINAR

HUGHES AND WAKIM: THE CHALLENGES FOR CORPORATE REGULATION

Speakers:

The Hon Michael E J Black AC, Chief Justice, Federal Court of Australia
Alan Cameron AM, Chairman, Australian Securities and Investments Commission
Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks
Professor Cheryl Saunders AO, Director, Centre for Comparative Constitutional Studies, The University of Melbourne

Date: Thursday 22 June 2000

Time: 5.30-7.00 pm. Refreshments will be served afterwards.

Venue:

Arthur Robinson & Hedderwicks

Level 34 Conference Room
530 Collins Street
Melbourne Vic 3000

Admission: $60

Seminar Topic:

Following the recent decision of the High Court in The Queen v Hughes on 3 May 2000, the Australian Financial Review in an editorial referred to the "disorder" in corporate law and stated that "the High Court has opened the way to a series of new challenges". An editorial in The Australian stated that the decision "fails to eliminate uncertainty about corporate law enforcement and a range of other schemes agreed between State and Federal governments".

The Attorney-General, The Hon Daryl Williams and the Minister for Financial Services and Regulation, The Hon Joe Hockey, issued a joint media release stating that "Hughes has added uncertainty concerning the enforcement of the Corporations Law and…raises serious doubts for the future about the DPP’s power in a range of other cases…It may also have implications for regulatory and administrative action under the Corporations Law".

Hughes is one of several decisions of the High Court which presents major challenges for corporate regulation. Another key decision is Re Wakim which has removed a significant amount of the Federal Court’s jurisdiction in the area of corporate law while retaining some jurisdiction. The decision may also affect the Federal Court’s regulation of other areas of the law.

This important seminar brings together leading commentators and participants affected by the High Court decisions. The speakers will discuss the High Court cases and consider their impact on existing regulation. The speakers will also consider options for reform, including a referral of powers by the States to the Commonwealth Government in relation to corporate law.

Speaker Details:

The Hon Michael E J Black, AC: is Chief Justice of the Federal Court of Australia, a position he has held since 1991. His Honour also chairs the Cross-Vesting Monitoring Committee established by the Council of Chief Justices.

Alan Cameron, AM: is Chairman of the Australian Securities and Investments Commission, a position he has held since 1993. He has been Chairman of the Executive Committee of the International Organisation of Securities Commissions and was previously the Commonwealth Ombudsman.

Professor Robert Baxt: is a Partner with Arthur Robinson & Hedderwicks and was previously Chairman of the Trade Practices Commission. He is a Professorial Fellow at The University of Melbourne. Professor Baxt is Chairman of the Corporations Law Committee of the Australian Institute of Company Directors and Deputy Chairman of the Corporations Law Committee of the Law Council of Australia.

Professor Cheryl Saunders, AO: is Professor of Law and holds a Personal Chair in the Faculty of Law at The University of Melbourne where she is also Director of the Centre for Comparative Constitutional Studies. She was previously President of the Administrative Review Council and Deputy Chair of the Constitutional Centenary Foundation.

Seminar Details:

Chief Justice Black will discuss the importance of Wakim for the Federal Court and, in particular, will discuss how post-Wakim judgments of the Federal Court have interpreted its remaining jurisdiction to deal with corporate law matters.

Alan Cameron will discuss the significance of Hughes for the enforcement of the Corporations Law from the perspective of ASIC. He will highlight the difficulties that exist for ASIC in this area.

Professor Robert Baxt will discuss the implications for practising corporate and commercial lawyers of the decisions in Hughes and Wakim. He will also present the perspective of the Australian Institute of Company Directors and the Law Council of Australia, both of which have called for urgent reform of the existing structure of corporate regulation.

Professor Saunders will highlight the significance of Hughes for intergovernmental relations and some of the difficulties that exist not only in the area of corporate law but in other areas of regulation. She will also discuss the referral power in the constitution and examine how it may operate in the context of a referral by the State governments of their power to regulate companies.

REGISTRATION DETAILS

Send registration form and payment details by Tuesday 20 June 2000 to: Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Faculty of Law, Baldwin Spencer Building, The University of Melbourne, Vic 3010, fax: 8344 5285, tel: 8344 5281, email: "a.graham@law.unimelb.edu.au". No refunds unless cancellations notified by 20 June.

REGISTRATION FORM

Hughes and Wakim: The Challenges for Corporate Regulation

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8. 2001 CORPORATE LAW TEACHERS ASSOCIATION ANNUAL CONFERENCE: FIRST CALL FOR PAPERS

11-13 February 2001

School of Law
Faculty of Business & Law
Victoria University
Melbourne

The theme for the 2001 conference is

Comparative, Historical and Economic Perspectives on Corporate Law.

The conference will be held at the City Campus of the University at 300 Flinders Street, Melbourne.

If you wish to present a paper at the conference (whether on the main theme or otherwise) please send an abstract (approximately 100 words) by 18 August 2000.

Further details will be made available on our website at "<http://www.business.vu.edu.au/cltcm>" as they become available.

Vanessa Mitchell
2001 CLTA Conference Convenor
Acting Head
School of Law
Victoria University
P O Box 14428
Melbourne City MC 8001 Australia

Tel: 61 3 9688 4318
Fax: 61 3 9688 5066
Email: Vanessa.Mitchell@vu.edu.au

9. CENTRE FOR CORPORATE LAW RESEARCH REPORTS

(A) PROXY VOTING IN AUSTRALIA’S LARGEST LISTED COMPANIES

Authors: Geof Stapledon, Sandy Easterbrook, Pru Bennett and Ian Ramsay

This Research Report, published jointly with Corporate Governance International Pty Limited, contains the results of a study of proxy voting at a sample of major listed Australian companies during 1999.

The study is extremely topical. The Minister for Financial Services, Joe Hockey, has recently expressed strong interest in corporate governance and the role of institutional shareholders, stating that "funds managers and trustees have a responsibility in particular to make boards accountable for the decisions they make on behalf of shareholders".

The Report:

- presents and analyses voting figures on the election and re-election of directors – including total figures and also a breakdown of votes for, against, abstaining and discretionary;

- presents and analyses voting figures on controversial resolutions;

- provides separate figures for widely held companies and companies having a large shareholder;

- provides comparisons with figures for the US, the UK and Germany;

- discusses the regulatory and practical framework within which voting takes place; and

- discusses the role of shareholder voting as a corporate governance mechanism.

The Research Report is of relevance to those in the business sector and their advisers (financial, management, legal and accounting) as well as to regulators and academics.

See below for order form.

(B) SHARE BUY-BACKS: AN EMPIRICAL INVESTIGATION

Authors: Asjeet Lamba and Ian Ramsay

This Research Report examines the effects of the changing legal regulation of share buy-backs in Australia. Prior to 1989 Australian companies were prohibited from repurchasing their shares, and until 1995 they were heavily regulated with few companies repurchasing their shares. In December 1995 the legal regulation of share buy-backs was simplified making it considerably easier for companies to repurchase their shares. The changing Australian regulation of share buy-backs provides a unique opportunity to test the effects of legal regulation on companies’ financing decisions. In particular, the Research Report examines where the highly regulated environment for share buy-backs that existed during 1989-95 meant that companies were unable to undertake buy-backs for the purpose of information signalling (ie, companies signalling to the market that their shares are undervalued). In the less regulated environment, which has existed since 1995, the Report examines whether companies have been able to undertake buy-backs for the purpose of information signalling.

The results indicate that the stringent regulation of share buy-backs during 1989-95 made them less effective as a credible signalling mechanism. Further, the Report finds that the market generally reacts the most positively to on-market buy-backs, while the reaction to other types of share buy-backs is positive but not statistically significant. Finally, the Report finds the abnormal returns earned by resource sector companies announcing share buy-backs are generally higher than the abnormal returns earned by share buy-backs announced by companies in the industrial and financial service sectors.

The Research Report is of relevance to those in the business sector and their advisers (financial, management, legal and accounting) as well as to regulators and academics.

See below for order form.
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