**CORPORATE LAW ELECTRONIC BULLETIN**
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Faculty of Law, The University of Melbourne

with the support of

The Australian Securities and Investments Commission,
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1. CENTRE FOR CORPORATE LAW SEMINARS

(A) THE BUSINESS JUDGMENT RULE: KEY ISSUES FOR COMPANY DIRECTORS AND OFFICERS AND THEIR ADVISERS

Speakers: Professor Douglas Branson, University of Pittsburgh; Professor John Farrar, Bond University, Professorial Associate, The University of Melbourne; Mr Ian Renard, Partner, Arthur Robinson & Hedderwicks, Director of AMP Limited, CSL Limited, Newcrest Mining Limited and Ericsson Australia Pty Ltd

Date: Tuesday 4 May 1999

See item 7 in the Bulletin for further details

(B) SHARE CAPITAL CHANGES: PRACTICAL IMPLICATIONS

Speakers: Mr Quentin Digby, Partner, Freehill Hollingdale & Page; Mr Norman O’Bryan, Member of the Victorian Bar; Mr Timothy Neilson, Special Counsel, Blake Dawson Waldron and Mr Charles Rosedale, Partner, Clayton Utz

Date: Thursday 20 May 1999

See item 7 in the Bulletin for further details

2. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) OECD PRINCIPLES OF CORPORATE GOVERNANCE

The Organisation for Economic Cooperation and Development (OECD) Task Force on Corporate Governance concluded its work on the development of OECD Principles of Corporate Governance earlier this month. The Principles will be submitted to OECD Ministers at their annual meeting on 26-27 May.

The OECD Council Meeting in April 1998 resolved to develop, in conjunction with national governments, other relevant international organisations and the private sector, a set of corporate governance standards and guidelines. In order to fulfil this objective, the OECD established a Task Force on Corporate Governance to develop a set of non-binding principles that embody the views of Member countries on this issue.

The Principles cover five areas:

(a) the rights of shareholders;

(b) the equitable treatment of shareholders;

(c) the role of stakeholders;

(d) disclosure and transparency;

(e) the responsibilities of the board.

The Preamble to the Principles states that they are intended to assist member and non-member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance. The Principles focus on publicly traded companies. However, to the extent they are deemed applicable, they might also be a useful tool to improve corporate governance in non-traded companies, for example, privately held and state-owned enterprises. The Preamble also states that the Principles are not intended to substitute for private sector initiatives to develop more detailed "best practice" in governance.

The Principles are available on the OECD website "http://www.oecd.org/daf/governance/principles.htm".

(B) APRA - SUPERANNUATION TRENDS - DECEMBER 1998

On 31 March 1999 the Australian Prudential Regulation Authority (APRA) reported that total superannuation assets stood at $377.4 billion as at 31 December last year. This represented a growth rate of 3.7% for the December quarter, or 11.6% during the 1998 calender year.

Other statistics in the Bulletin show that:

(a) Contributions rose by 13.5% in the December 1998 quarter over the December 1997 quarter, or 18.8% during the 1998 calender year, an increase from $31.2 billion to $37.1 billion for the year.

(b) Strongest growth again came from member contributions. They increased by 24% over the previous year to $14.4 billion.

(c) Net contributions (ie contributions less benefits) totalling $15.2 billion - a rise of $4.4 billion or 40.9% - flowed into superannuation during the 1998 calender year.

According to the Bulletin, self-managed or DIY funds were the fastest growing market segment with assets increasing by 24% during the 1998 calender year. In the same period, industry fund and retail fund assets grew by 21% and 20% respectively. In comparison, reflecting continuing consolidation and rationalisation in how companies are managing their superannuation, corporate fund assets grew by only 10% during the year, while public sector fund assets grew by 14%. Remaining at their usual levels, inward transfers accounted for 38% of all money deposited into superannuation during the December quarter.

(C) DTI CONSULTATIVE PAPER ON INVESTMENT COMPANIES USING CAPITAL PROFITS FOR SHARE REPURCHASES

In March 1999 the UK Department of Trade and Industry released a Consultative Paper titled "Investment Companies - Share Repurchases Using Capital Profits". The Paper seeks comments on a proposed change to company law. At present, investment trust companies (ITCs), like other companies, may purchase their own shares. Such shares subsequently have to be cancelled. Unlike other companies, ITCs may not use "capital profits", ie profits derived from increases in the value of the securities in which they have invested, to repurchase their own shares (or make other types of distributions), if they wish to be treated as "investment companies" under the UK Companies Act 1985. However ITCs may use "revenue profits", ie dividends and income from other investments to repurchase their own shares. The Consultative Paper seeks views on the proposal that investment companies should be allowed to use capital profits to repurchase their own shares. Comments on the Paper should be submitted to the DTI by 14 May 1999.

The Consultative Paper is available on the DTI website "http://www.dti.gov.uk/cld/".

(D) DTI CONSULTATIVE PAPER ON POLITICAL DONATIONS BY COMPANIES

In March 1999 the UK Department of Trade and Industry released a Consultative Paper titled "Political Donations By Companies". In October 1998 the UK Committee on Standards in Public Life presented its Report to the Prime Minister in which it made two main recommendations in relation to political donations by companies. First, the Committee recommended that a company wishing to make a donation to a political party should be required to have the prior authority of its shareholders. Second, the Committee recommended that "donation" should be defined so it covers not only monetary donations but other forms of financial benefit, including any sponsorship, or loans or transactions at a favourable rate. The UK Government has announced that it has accepted both of these recommendations but, through the DTI, seeks views in relation to implementation. The DTI Consultative Paper seeks views in relation to:

(a) how "political donation" should be defined;

(b) how companies legislation should be amended to give effect to the Committee’s recommendation that a company should have the prior authority of its shareholders

(c) what changes should be made to the existing disclosure provisions relating to political donations contained in Schedule 7 of the UK Companies Act 1985.

Submissions on these questions should be sent to the DTI as soon as possible. The Consultative Paper is available on the DTI website "http://www.dti.gov.uk/cld/".

Editors’ Note: The Centre for Corporate Law and Securities Regulation at The University of Melbourne is currently conducting an empirical investigation on the extent of political donations by Australian companies. A Research Report will be completed later this year. If you would like a copy of the Report please e:mail the Centre’s Administrator Ann Graham (cclsr@law.unimelb.edu.au).

(E) YEAR 2000 PREPAREDNESS IN THE AUSTRALIAN FINANCIAL SECTOR

In a statement made on 15 April 1999 on the Year 2000 computer date problem, the Treasurer emphasised that the stability, integrity and efficiency of the financial system are critical to the performance of the Australian economy. As such, the Year 2000 preparedness of the financial sector is crucial for a smooth transition into the next millennium.

Against that background, he stated that "I have been advised that the Australian banking and financial sector is well advanced in its Year 2000 preparedness, and is internationally recognised as being at world’s best practice. I understand that remediation and internal testing of critical systems has largely been completed, and that the majority of financial institutions expect to complete external testing – the last stage towards achieving Year 2000 compliance – by end-June 1999." The Treasurer also noted that the Australian Prudential Regulation Authority (APRA) is closely monitoring financial institutions’ Year 2000 preparations.

Financial institutions have indicated to APRA that they are also carefully reviewing their contingency plans to ensure the continuity of their services and businesses if there were to be any problems as a result of the Year 2000 and that they expected this work to be completed by end-June 1999.

The Treasurer has also been advised that testing is well advanced in the various payments clearing systems, a key element of the financial system – the target date for completion is end-June 1999. The Reserve Bank of Australia (RBA) is participating in this testing and is closely monitoring the payments industry’s Year 2000 preparations. Contingency planning in the payments system is also well underway.

Around the century date change it is possible that people may increase their demand for currency notes to tide them over this period. The RBA has already stated that it is taking steps to supplement the significant buffer stocks of notes it usually holds. This is being done by printing a quantity of notes in addition to its normal requirement for 1999, and by stockpiling for possible use notes that in normal circumstances would be withdrawn on quality grounds. The RBA is also liaising with financial institutions and armoured car companies on distribution arrangements required to get additional notes into the hands of the public.

The financial sector regulators have all put in place procedures to increase awareness of the Year 2000 problem within their sectors and to monitor progress towards Year 2000 compliance. APRA and the Australian Financial Institutions Commission (AFIC) have introduced detailed quarterly reporting procedures to assess progress and to ensure that the issues are addressed at the board/senior management level within each financial institution. The Australian Stock Exchange also requires all listed companies to make Year 2000 disclosure statements.

The financial sector regulators work closely with each other (through a Year 2000 coordinators group of the Council of Financial Regulators), with financial industry groups and with international Year 2000 initiatives. This ensures that they keep in touch with current and emerging issues and international best practice, and that relevant information is shared throughout the sector.

The Treasurer supported the recent letters from APRA to the financial institutions it regulates recommending that they disclose more fully their Year 2000 preparations. APRA has encouraged institutions to use the Global 2000 Coordinating Group approach as the minimum basis for disclosure. The Year 2000 Information Disclosure Act 1999 (the "Good Samaritan" legislation) should also assist them in making these disclosures. The Minister for Financial Services and Regulation will also be writing to industry representatives in the financial sector in the near future along similar lines.

It is important that disclosure be as open as possible so that other financial institutions, customers and the community in general are kept fully informed of Year 2000 progress. Such information also needs to be managed in a responsible manner. In this regard, the Treasurer noted that the media has a key role in providing an objective and balanced view on Year 2000 related issues - the community expects it to show a responsible attitude by not broadcasting unsubstantiated commentary and rumours. The Treasurer noted that these rumours could themselves have a greater impact on various sectors of the economy (especially the financial sector) than the direct consequences of Year 2000 related problems.

The Treasurer referred to the report of the Council of Financial Regulators entitled "Year 2000 Preparations in the Australian Banking and Financial System", which was released on 28 January 1999. This provides detailed information on developments in the financial sector and the preparations of the regulators themselves. The next version of this report will be released in the next few weeks. The booklet, and contact information, can be found at the web-sites of the various regulators:

Reserve Bank of Australia "www.rba.gov.au"
Australian Prudential Regulation Authority "www.apra.gov.au"
Australian Securities and Investments Commission "www.asic.gov.au"
Australian Financial Institutions Commission "www.afic.com.au"

3. RECENT ASIC DEVELOPMENTS

(A) ASIC EXTENDS DEADLINE FOR RESPONSIBLE ENTITIES TO JOIN AN EXTERNAL COMPLAINTS RESOLUTION SCHEME

On 30 March 1999 the Australian Securities and Investments Commission (ASIC) announced that it is extending the deadline to 1 November 1999 for responsible entities of managed investment schemes to join an external complaints resolution scheme.

Under the managed investments provisions of the Corporations Law each managed investment scheme must have a single responsible entity that is licensed by ASIC and is liable to scheme members for all aspects of the scheme’s operations. It is a condition of every licence that the responsible entity become a member of an external complaints resolution scheme that is approved by ASIC.

ASIC is currently developing its policy for the approval of external complaints resolution schemes in consultation with industry and consumers. When the policy is finalised and issued, ASIC will invite applications from any scheme that seeks to consider and resolve complaints in the managed investment sector.

Director of ASIC’s Office of Consumer Protection, Peter Kell, said that the establishment of an effective external complaints resolution system is an important part of the consumer protection regime for managed investments. "This extension will allow the complaints resolution bodies and industry members to better address the requirements for external complaints resolution" Mr Kell said.

(B) SURVEY RESPONSE RATE WORRIES ASIC

On 5 April 1999 ASIC reported a poor response by licensed securities dealers, investment advisers and insurance brokers to a Y2K readiness survey.

ASIC recently surveyed 700 smaller licensed firms, independent financial planning and broking groups that had not been reviewed by other organisations like the ASX or APRA. ASIC received responses from only half the sample.

With just 270 days left before 1 January 2000, ASIC is concerned that those who did not respond may not be prepared for the Year 2000. This may place them in breach of the law by putting consumer’s funds at risk.

Due to the poor response rate ASIC is now writing to all securities licensees and insurance brokers, over 3000, asking them to give an undertaking to ASIC that details their preparedness for the Year 2000. ASIC will send letters to licensees by mid-April and will expect all responses to be received by mid-May. This will allow ASIC time to compile and analyse results before taking the necessary further action.

ASIC Chairman Alan Cameron said that people who do not respond to this letter can expect a visit from ASIC officers to discuss their Y2K readiness. "ASIC believes that Year 2000 readiness is necessary for licensees to meet their obligations under the Law." "Failure to do so could provide grounds for disciplinary action," Mr Cameron said. "We are disturbed by the low rate of response to our survey. It is vital at this time that financial service firms are taking the Y2K issue seriously and are doing all they can to deal with it. "

(C) TAKEOVERS INVOLVING STAPLED SECURITIES

On 6 April 1999 ASIC announced it is developing a policy in relation to takeovers involving offers for stapled securities (a security that is stapled to another security).

ASIC National Takeovers Coordinator Richard Cockburn said there is an increasing number of Australian companies with stapled securities, including stapling of shares in Australian companies to overseas entities. "In some instances, the effect of the stapling can be to disadvantage bidders for the Australian company or companies, with the result that those companies are less likely to be the target of takeover activity," Mr Cockburn said.

ASIC considers that it is in the best interest of an efficient and competitive market for the takeover hurdles created by a stapled security structure to be minimised. Accordingly, ASIC has granted relief to facilitate a takeover involving shares in an Australian company which are stapled to shares in a foreign incorporated company.

ASIC has granted relief which modifies the Corporations Law to clarify that, although the shares the subject of the takeover offers are stapled securities, the shares the subject of the offers are the shares in the Australian company. ASIC considers that the grant of this relief will add certainty to the proposed takeover offers, while maintaining shareholder protection under Australian law.

Listed stapled securities generally trade as one security so when determining a takeover price, a bidder will need to have regard to the value of both stapled securities. Bidders can be disadvantaged if, during the course of a takeover, the securities are unstapled or a fundamental change in the structure or financial circumstances of one of the entities occurs.

ASIC has also granted relief to extend the definition of "prescribed occurrence" in section 603 of the Corporations Law to changes in the structure or circumstances of both the company whose shares are the subject of takeover offers and the entity whose securities are stapled to them. All modifications relating to stapled securities should be sought from ASIC before a bid is announced. This is to ensure that the documentation clearly outlines the modifications and their effects, particularly in relation to the modification of the definition of "prescribed occurrence" which may be necessary.

For further information contact:
Richard Cockburn
National Takeovers Coordinator
Tel: (03) 92803201

(D) ENFORCEABLE UNDERTAKINGS: A NEW ENFORCEMENT TOOL IN ASIC’S ARMOURY

On 7 April 1999 ASIC issued guidance on when it would use its power to accept enforceable undertakings.

Parliament last year passed legislation giving ASIC the power to accept enforceable undertakings. The guidelines clarify ASIC’s position on enforceable undertakings and for the first time clearly set out the circumstances in which they can be used, their limitations and the consequences of failing to comply with an undertaking.

Enforceable undertakings are promises made to ASIC by companies, responsible entities of managed investment schemes, and/or individuals in relation to ASIC’s functions and responsibilities. They may also be made where a breach of the Corporations Law or other legislation which ASIC administers has occurred or is suspected. Typically, enforceable undertakings will set out what someone has promised to do to address ASIC’s concerns. These promises are enforceable in court.

ASIC’s National Director of Enforcement, Joe Longo, said ASIC regarded the acceptance of undertakings as a serious matter and believed ASIC’s position needed to be clarified for the general community. "ASIC will monitor compliance with all undertakings and will initiate court action to enforce compliance with an undertaking when there had been a failure to comply."

ASIC has already accepted 19 undertakings in a variety of circumstances, including:

(a) a person promising not to give investment advice without holding a proper licence;

(b) a director of a company promising not to manage a corporation for a specified period of time;

(c) a company promising to cease promoting a prescribed scheme on an internet site without a registered deed and prospectus;

(d) a company promising to set up an internal compliance plan and to report quarterly to the market as part of its compliance with the continuous disclosure obligations;

(e) an unlicensed person promising to compensate investors who have purchased units in a unit trust; and

(f) a company promising that, on an ongoing basis, it will retain tapes of certain telephone conversations in connection with securities traded on the ASX and/or futures traded on the SFE for a period of 3 months, (this followed a Federal Court declaration that the company had engaged in contravening conduct).

"Enforceable undertakings provide an open and effective way of getting companies and individuals to comply with the law. Their use has enabled ASIC to achieve outcomes which could not have otherwise been sought from a court" Mr Longo said. "Maintaining the integrity of the financial markets and promoting investor and consumer confidence is one of ASIC’s key aims. Enforceable undertakings allow us to achieve more timely and innovative results."

A copy of Practice Note 69 on enforceable undertakings is available on ASIC’s Internet site at "http://www.asic.gov.au".

(E) TAX SCHEME PROMOTERS MUST DISCLOSE TAX RISKS

On 20 April 1999 ASIC warned tax scheme promoters that they must provide sufficient disclosure in prospectuses so investors are aware of the risks involved.

Tax schemes are generally considered to be high risk, not only because of their often speculative nature but also the risk that tax deductions could be denied by the Australian Taxation Office (ATO) through amended assessments. ASIC has told tax scheme promoters that they must have adequate disclosure of tax risks in prospectuses and investors must be fully informed before they make investment decisions.

ASIC believes that when deciding the level of disclosure in a prospectus, a promoter should consider the following issues:

(a) the ATO’s intention to target schemes where the investor is "not subject to significant, or indeed any, risks when the tax benefit is taken into account whether because of the use of limited or no-recourse financing, put-options or whatever combination of ingenious financing arrangements". (Announced by the Commissioner of Taxation in June 1998);

(b) the ATO's willingness to provide product rulings on the availability of claimed tax benefits if the arrangement is carried out in accordance with details described in the ruling;

(c) the promoter’s intention or otherwise to apply for a product ruling; the status of any application; the reasons for not applying for a ruling; and the reasons for any withdrawal of an application;

(d) what the ATO product ruling states about the taxation status of the product offered if it is received. (It is a condition of product rulings that a ruling may only be reproduced in its entirety.)

(e) the nature of finance facilities that the promoter is able to arrange on behalf of investors;

(f) the importance of ensuring that investors are clearly warned that if the deduction is disallowed, investors who receive amended assessments could also be required by the ATO to pay penalties and interest; and

(g) if a tax opinion is not provided by an independent expert, the nature of the promoter’s expertise in providing the opinion.

ASIC will consider the adequacy of disclosure of tax risks in the registration and surveillance of tax scheme prospectuses. It should be noted that in making a product ruling, the Commissioner of Taxation accepts no responsibility in relation to the commercial viability of the product.

For further information contact:
Pauline Vamos
National Compliance Adviser
Managed Investments National Team
Tel: (02) 9911 2178

(F) ASIC ELECTRONIC ENFORCEMENT UNIT

On 20 April 1999 ASIC Acting Deputy Chairman Jillian Segal announced the appointment of Tim Phillipps to lead its new national electronic enforcement unit based in Sydney. Mr Phillipps was previously ASIC’s NSW Director of Enforcement.

The new unit aims to increase ASIC’s ability to take swift and effective action against unlawful behaviour on the Internet and focus on building expertise in the electronic world. Mr Phillipps has already been extensively involved in working on ASIC internet surveillance and enforcement.

Ms Segal said electronic enforcement was a new area for regulators and it presented a raft of technological opportunities and challenges. "The new unit will be staffed by legal, investigation and technical experts who have extensive backgrounds in dealing with electronic commerce and the regulatory issues which are associated with it," Ms Segal said. "This commitment by ASIC is part of the Commission’s overall strategy on electronic commerce which is well advanced and will be announced progressively over the next 12 months.

Ms Segal said enforcement of the internet played a vital role in maintaining consumer confidence in the electronic markets. She said ASIC had received increasing numbers of complaints about suspect websites and chat rooms, frequently associated with possible attempts to ramp share prices or otherwise manipulate the market. "A number of investigations are already in progress, and we recently took action in the Federal court to restrain the operations of one site operator whom we felt had overstepped the mark," she said.

(G) ELECTRONIC FUNDS TRANSFERS WORKING GROUP ESTABLISHED

On 21 April 1999 ASIC announced the formation of a Working Group which aims to ensure consumers using electronic banking have access to adequate consumer protection.

ASIC Acting Deputy Chairman Jillian Segal said the working group was formed to look at new electronic forms of banking including telephone and internet banking. She said consumers needed to be confident that they have adequate protection regardless of the technology they use to conduct their banking transactions.

Ms Segal said the creation of the Working Group follows a Federal Government request that ASIC establish the group and implement a recommendation contained in a 1998 review by Treasury and the Australian Competition and Consumer Commission of the Electronic Funds Transfer (EFT) Code of Conduct.

The EFT Code aims to protect consumers by setting out rules covering important issues like who bears the liability for unauthorised transactions and the nature of that liability; disclosure and privacy requirements and rules for handling disputes, including acceptable timeframes. Adherence to the EFT Code is voluntary but it has been accepted by all Australian card issuers.

The 1998 review found that the EFT Code mainly covers ATM and EFTPOS transactions, meaning many of the newer forms of electronic banking, such as telephone and internet banking and some transactions involving stored value products, remain uncovered.

Ms Segal said that while individual institutions offer varying levels of protection in their terms and conditions there is a need for consistent standards of protection so consumers can feel confident in their use of these new technologies.

The Working Group is charged with considering possible consumer issues arising from these new technologies and recommending appropriate responses. One option which will be considered will be expanding the present EFT Code so that it applies to transactions regardless of the technology used to implement them.

The 13 member Working Group consists of industry, consumer and government representatives. It will consult widely with interested parties and expects to report within a year.

4. RECENT ASX DEVELOPMENTS

(A) FINANCE INDUSTRY STARTS YEAR 2000 EQUITIES TEST

On 1 April 1999 the ASX announced that during April, ten stockbroking organisations, five institutions, six banks,Australias largest share registry processor and the Australian Stock Exchange will commence an integrated Year 2000 test.

The test, involving some of the industry’s key players will take 15 business days and will concentrate on the most common equity trading and settlement transactions. For example, during the test, brokers will trade with each other in 1999 and settle the transactions in 2000 with other test participants. The process will also take into account simulated company announcements, namely a dividend and a bonus issue. The test dates will commence with 28 December 1999, and finish in early March 2000.

"Although ASX is managing the test, this is not an ASX test, it is an industry test. This is an industry-wide initiative aimed at boosting public confidence in the state of readiness of this market," said Richard Humphry, ASX Managing Director.

The Industry Test Steering Committee includes representatives of each sector that is taking part in the test and the Australian Securities and Investments Commission.

5. RECENT CORPORATE LAW DECISIONS

(A) COMPULSORY ACQUISITION OF SHARES ISSUED AFTER A TAKEOVER BID

D B Management Pty Ltd v Australian Securities and Investment Commission, Southcorp Wines Pty Ltd, Batoka Pty Ltd and Winpar Holdings Ltd [1999] FCA 293, No NG 764 of 1998, Federal Court of Australia, NSW Registry, Beaumont, O’Connor and Dowsett JJ, 25 March 1999

This was an appeal from a decision of Whitlam J made on 7 July 1998.

In 1996, Southcorp Wines Pty Ltd (Southcorp) made Part A offers for the ordinary shares of Coldstream Australasia Ltd (Coldstream) and separate offers to acquire 50 cent and 72 cent listed Coldstream options. The takeover of the shares succeeded when 97 per cent acceptance was achieved. Southcorp then used the procedure in section 701 of the Corporations Law (the Law) to acquire the outstanding shares compulsorily. Some options, however, remained outstanding and one option holder, D B Management Pty Ltd (DB) exercised its options, acquiring shares in Coldstream.

Southcorp applied for a declaration under section 730(1) of the Law to enable it to compulsorily acquire the shares issued on the exercise of those options. The Australian Securities and Investments Commission (the Commission) made the requested declaration. In order to acquire the shares, Southcorp was obliged to give notice to the relevant shareholder of its desire to do so, setting out a cash sum as the proposed acquisition price. The notice was to be accompanied by an expert’s report made within 6 months before the date of the notice, stating whether, in the expert’s opinion the terms of the offer were fair and reasonable and giving reasons for forming that opinion. Under the terms of the modification, a dissenting offeree retained its right to apply to a court for an order that the compulsory acquisition provisions should not apply to the relevant shareholder.

DB applied to the Administrative Appeals tribunal to review the decision to make the declaration. The Tribunal affirmed the decision. DB appealed to the Federal Court from the Tribunal’s decision on questions of law. Whitlam J dismissed the appeal. This was an appeal from that decision to the Full Federal Court on the grounds:

1. that the Commission had no power to make the declaration;
2. that the power to make any declaration terminated two months after the end of the takeover offer period;
3. that the power to make any declaration did not extend to permitting ‘different offers to be made to the holders of shares in the same class under the same takeover scheme’;
4. that the declaration was manifestly unreasonable and beyond power.

By majority, Beaumont J dissenting, the Full Federal Court allowed the appeal.

O’Connor and Dowsett JJ delivered a joint judgment, holding that section 730 of the Law did not authorise the declaration which was made in this case. They reached this conclusion by considering the overall operation of Chapter 6 and applying two canons of statutory construction: the presumption that legislation is not intended to interfere with vested proprietary interests; and the proposition that an express reference to one matter indicates that other matters are excluded.

Their Honours reviewed the compulsory acquisition provisions and noted:

- the express provision for the compulsory acquisition of outstanding shares;

- the absence of any provision relating to shares which were not the subject of the original offer; and

- the omission in the provisions dealing with options to provide for compulsory acquisition of options at the suit of an offeror or to deal with shares issued following the exercise of options.

These matters suggested that Parliament did not intend that shares issued following the exercise of options would be subject to compulsory acquisition at the suit of an offeror.

Even more compelling to O’Connor and Dowsett JJ were the provisions of section 730, which they held did not authorise the abrogation of the property rights of third parties. Section 730 purported only to authorise the Commission to vary the Law as it applied ‘in relation to a specified person or persons, or a specified class or classes of person’, which their Honours interpreted to mean the person or persons making the application for a declaration or on whose behalf it was made. O’Connor and Dowsett JJ contrasted the absence of any provision in Part 6.9 providing for notice to persons whose property rights are to be affected by a proposed declaration conferring on them a right to be heard with the express provisions regarding these matters in Part 6.10 dealing with the powers and functions of the Corporations and Securities Panel and the Court. They concluded that ‘[h]ad Parliament contemplated that such rights might be affected, it would surely have dealt with the matter expressly’. Importantly in this regard, O’Connor and Dowsett JJ rejected the finding of the Administrative Appeals Tribunal, quoted with approval by Whitlam J at first instance, that the modification did not affect the option holders’ rights.

Beaumont J, dissenting, considered that the declaration fell squarely within the policy of the compulsory acquisition provisions because:

- it facilitated the acquisition of all the shares (but not the options) where there had been, as here, a very high level of acceptance; and

- it provided safeguards in the form of: (a) the provision of expert’s report; and (b) the preservation of the Court’s power under section 701(6) to intervene.

Moreover, his Honour considered that the very existence of this legislative policy (within its own limits) left no room for the application of the general statutory presumption against an intention to interfere with proprietary rights.

Beaumont J also rejected the applicant’s alternative submission that the declaration was manifestly unreasonable, in light of the two limiting factors (high level of acceptance and the preservation of the Court’s role under section 701(6) to intervene).

Editor’s Note: As a consequence of this decision, ASIC has withdrawn Policy Statement 126 "Compulsory Acquisition of Shares Issued After the Close of a Takeover Bid". ASIC has appealed the decision.

(B) ASIC FAILS TO HALT GREAT CENTRAL MINES TAKEOVER

ASIC v Yandal Gold Pty Limited (First Respondent), Yandal Gold Holdings Pty Ltd (Second Respondent), Edensor Nominees Pty Ltd (Third Respondent), Normandy Mining Limited (Fourth Respondent), Normandy Mining Finance Limited (Fifth Respondent) and Normandy Consolidated Gold Holdings Pty Ltd (Sixth Respondent), Normandy Mining Holdings Pty Ltd (Seventh Respondent) [1999] FCA 324, No V0394 of 1999, Federal Court of Australia, Merkel J, 26 March 1999

On 12 January 1999, the third respondent, Edensor Nominees Pty Ltd (Edensor) held 12.6% of the issued shares in Great Central Mines Ltd, a company listed on the ASX. At that time, Normandy Mining Holdings Pty Ltd, the seventh respondent, and a member of the Normandy group, held 27.8% of the issued shares in Great Central Mines. Together they held all the issued shares in Yandal Gold Holdings which in turn owned all the issued shares in the first respondent, Yandal Gold Pty Ltd (Yandal Gold).

On 12 January 1999, Yandal Gold served on Great Central Mines a Part A takeover offer. The offer and Part A statement were lodged with ASIC. On 27 January 1999, ASIC approved a variation of the offer in respect of Great Central Mines shareholders resident in the USA.

On 11 January 1999, Edensor and the Normandy group entered into a Shareholders’ Agreement. ASIC contended that the effect of the agreement was that each party ‘acquired’ relevant interests in the shares held by the other in Great Central Mines and that, as a consequence, Edensor’s relevant interest in shares in Great Central Mines increased from 12.6% to 40.4%, and the Normandy group’s relevant interest increased from 27.8% to 40.4%.

ASIC contended that the effect of the Shareholders’ Agreement was an acquisition of relevant interests by both Edensor and the Normandy group in contravention of s 615 of the Corporations Law which prohibits a person holding more than 20% of the target company unless the person makes a takeover bid. ASIC contended that, through the Agreement, the respondents had acquired a significant stake in the takeover target, thus discouraging rival bidders and potentially enabling them to gain control without the appropriate premium. ASIC sought orders:

(a) cancelling the offers made by Yandal Gold pursuant to its takeover offer;

(b) requiring Yandal Gold to offer the option to each person who had accepted its offer of cancelling their acceptance and recovering their shares upon repayment of the amount paid to them by Yandal Gold;

(c) vesting in ASIC all shares acquired by Yandal Gold and in respect of which the option in (b) above had not been exercised;

(d) cancelling the Shareholders’ Agreement

Edensor and the Normandy Group contended that under the Shareholders’ Agreement, no relevant interest was ‘acquired’ by any of the respondents. They contended that their respective holdings were not directly or indirectly affected by entry into the Agreement.

In this proceeding, ASIC sought interim relief under s 744(4) of the Corporations Law to restrain payments to the 39.1% of shareholders in Great Central Mines who had accepted Yandal Gold’s offer.

Merkel J found there was a serious issue to be tried but the balance of convenience did not favour the grant of relief sought. The relief sought to restrain payments due under valid contracts to innocent third parties who had accepted bona fide a takeover offer which had been the subject of registration and variation by ASIC. ASIC had not contended that the interim relief sought was necessary to preserve the subject matter of the litigation. Merkel J observed that the matter would come on for final hearing in the near future irrespective of the outcome of the application for interim relief. Had the interim relief been granted, innocent shareholders who had accepted the offer but not received payment would have been significantly disadvantaged as their shares would have been effectively frozen until final determination of the matter.

ASIC argued relief was necessary at this stage because the larger the number of shares ultimately vested in it pursuant to order (c) above (if successful), the more unsettling it would eventually be for the market as a result of the downward impact of price with such a large number of shares being required to be sold onto the market.

Merkel J found this contention puzzling. ASIC submitted no evidence in support; the court could structure its orders to ensure an orderly divestment of shares onto the market, and it did not follow that the interim relief would deter shareholders from accepting the offer and so there was no reason to conclude that ASIC would end up with a significantly greater number of shares than if the relief were not granted.

Merkel J also found there had been undue delay by ASIC in commencing its proceedings and that the real dispute was between ASIC and Edensor and the Normandy group. If the outcome of the dispute were to be a lowering effect on the share price, shareholders should have the option to accept and be paid now with the prospect of reacquiring their shares if ASIC were ultimately successful. Merkel J refused the application for interim relief but did order a directions hearing to set dates for the early hearing of the dispute.

(C) ASIC DECISION TO BAN SECURITIES DEALERS AND NATURAL JUSTICE

Malcolm Boyd McLachlan v ASIC (No SG 107 of 1998 and McLachlan v ASIC (No SG 109 of 1998), [1999] FCA 244, Federal Court of Australia, O’Loughlin, Mansfield and Kenny J, 17 March 1999

This was an appeal from a decision of Finn J, noted in Corplaw Bulletin 12, in which the appellants had sought review under section 6 of the Administrative Decisions (Judicial Review) Act of conduct engaged in by ASIC for the purposes of making a decision to make a banning order under s 829(f) of the Corporations Law on the basis that ASIC had reason to believe that the applicants had not performed their duties as securities dealers efficiently, honestly and fairly.

At first instance, the appellants had submitted that in making its decision to issue a notice of hearing under s 829(f), ASIC had relied on a ‘tainted’ ASX report which the appellants had sought to quash in separate proceedings and that ASIC had refused to identify the material of ASX origin relied upon in deciding to issue the notice of hearing and this constituted a breach of natural justice. The appellants had contended they were entitled to discovery of all that passed between the ASX and ASIC to test the extent to which ASIC’s belief was based on material which was void or quashed.

At issue here was whether the rules of natural justice required ASIC to provide access to all material in its possession which would be relevant to the subject of the hearing, even though ASIC did not seek to rely on that material and had not placed it before its delegate for the purpose of determining whether or not a banning order should be made. The appellants submitted they would be subject to impermissible prejudice if they were not permitted access to that material.

The Court unanimously rejected the appeal. Kenny J, with whom O’Loughlin and Mansfield JJ agreed, examined the relevant statutory provisions. Section 829(f), subject to s 837, empowers ASIC to make a banning order against a person if it has reason to believe that he or she has not performed efficiently, honestly and fairly the duties of a representative of a dealer or of an investment adviser. Section 837 requires ASIC to afford the person potentially subject to a banning order an opportunity to be heard and to make submissions before any such order is made.

Kenny J found that it is for ASIC to determine the nature of the circumstances which, it its view, will afford the ‘reason to believe’ required by s 829(f). Further, it was for ASIC to determine the material upon which it proposed to rely to support the existence of those circumstances in the particular case. Having done this, ASIC was required to afford an opportunity to be heard and to identify the matters and material upon which it had relied but the interests of justice, in the absence of bad faith, did not require other material in ASIC’s possession to be disclosed because it was not adverse to the appellants’ interests.

The appellants also sought to have ASIC’s delegate disqualified on the ground of bias on the basis that he had read material which formed the basis of the decision to hold a hearing and that same delegate had also been, in his capacity of ASIC Regional General Counsel, the solicitor of record on other proceedings involving one of the appellants. The appellants contended a fair minded person might entertain a reasonable apprehension that ASIC’s delegate might not bring an impartial and unprejudiced mind to deciding whether or not a banning order should be made.

The Court rejected this submission. The delegate was required by law to inform the appellants of the risk that a banning order would be made on the basis of adverse material before him, and it could not be said that in fulfilling this obligation, there was created a reasonable apprehension of bias. No case of apprehended bias is made merely because the decision-maker has read relevant material prior to a hearing and has formed tentative views.

Nor did the fact that the delegate was the solicitor of record in the other proceeding lead to a reasonable apprehension of bias of itself. Further, the delegate did not personally conduct the proceeding, had not been involved in any inquiry, had not spoken to potential witnesses, advised in the matter or been involved in the decision to institute that proceeding.

(D) VALIDITY OF CHARGE

Cuthbertson & Richards Sawmills Pty Ltd v Gavin Frederick Crichton Thomas [1999] FCA 315, No AG 66 of 1998, Federal Court of Australia, Heerey, Carr and Mansfield JJ, 30 March 1999

This was an appeal from a decision of Justice Einfeld in the Supreme Court of the ACT, noted in Corplaw Bulletin 11, where it had been held that a floating charge was void as against the liquidator. The appellant sought a declaration that its charge was valid. At issue on appeal was whether the charge secured the amount of a liability under an obligation undertaken ‘on behalf of, or for the benefit of’ the grantor within the meaning of s 588FJ(2)(c) of the Corporations Law. Section 588FJ(2)(c) provides that a charge is void as against the company’s liquidator except so far as it secures an obligation undertaken on behalf of, or for the benefit of the company.

The facts were that in November 1994 a funding arrangement was set up whereby the National Australia Bank agreed to lend the directors of a company, Glenwood Cottages Pty Ltd (Glenwood), a total of $350,000. This money was on-lent to Glenwood. Westpac Bank guaranteed its repayment to National Australia Bank (NAB), and the appellant, Cuthbertson & Richards Sawmills Pty Ltd (Cuthbertson) indemnified Westpac’s obligation under the guarantee. In return, Glenwood granted to Cuthbertson a fixed charge over certain mortgaged property and a floating charge over all its other property.

At first instance, Einfeld J held that the charge did not secure an obligation undertaken for the benefit of Glenwood. Einfeld J held it was necessary to look at the substance of the transaction and to identify the purpose of the charge. Einfeld J found that, even if Glenwood repaid the $350,000 to its directors, who for any reason failed to pay it back to NAB, that Bank could call on the Westpac guarantee, thus triggering the liability of Glenwood under the indemnity. Far from benefiting Glenwood, Einfeld J concluded Glenwood was potentially liable to pay the moneys twice.

On appeal, the Court unanimously found that Einfeld J’s conclusion ignored the relevant contractual provisions. Clause 4.3 of the funding arrangement obliged Glenwood to repay the moneys to the directors who were then obliged ‘upon receipt of any such repayment’ to repay those moneys to NAB. Thus unless there was a breach of duty of care, there was no real chance of Glenwood paying the money to its directors without immediate on-payment to NAB. The Court held the possibility of this occurring was sufficiently remote in commercial terms to not be taken into account.

The Court held that the test of whether an obligation is undertaken on behalf of or for the benefit of a company is an objective one. The result of the funding arrangement here in question was that a debt immediately due was replaced with a debt not payable for eight months and this was a significant benefit to Glenwood as it placed it in a position where its prospect of continuing to receive supplies from trade creditors was considerably enhanced. The Court also took into account the fact that two of the directors mortgaged their homes as additional security for the raising of these moneys which were deposited directly into the company’s bank account.

Accordingly, the Court allowed the appeal and declared the charge valid, securing repayment of the sum of $350,000 paid by the appellant to Westpac under its indemnity.

(E) WHEN MATERIAL DISTRIBUTED TO SHAREHOLDERS IS LIKELY TO MISLEAD OR DECEIVE

ASIC v Solution 6 Holdings Ltd [1999] FCA 398, No NG 3035 of 1999, Federal Court of Australia, Tamberlin J, 14 April 1999

ASIC sought an order restraining the respondent, Solution 6 Holdings Ltd (Solution 6) from further distributing a Notice of General Meeting and an Explanatory Statement dated 10 March 1999 to its shareholders in relation to a placement of shares Solution 6 was making to Thorney Holdings Pty Ltd (Thorney). The meeting was scheduled to be held on 9 April 199. ASIC alleged the distribution constituted conduct likely to mislead or deceive in contravention of s 995(2) of the Corporations Law.

ASIC also sought to restrain Solution 6 from considering at its general meeting two resolutions referred to in the Notice and Statement which concerned the issue and allotment of shares pursuant to a Share Placement Subscription Agreement made in January 1999 with Thorney. Under this Agreement, Solution 6 would raise $12.7 by way of three different share placements to Thorney.

Under the Agreement, it was required that resolutions approving the share placements be passed by the company in general meeting. On 5 March 1999, KPMG Corporate Finance (KPMG) furnished an independent expert’s report in relation to the proposed placements. In its report, KPMG expressed the opinion that the proposed placements were fair and reasonable. This report formed part of the Statement whose distribution ASIC now sought to restrain.

The basis of ASIC’s objection was that at the time it furnished its report, KPMG was aware of the possibility of an imminent one for two rights issue by Solution 6 at a price of $2 per share, yet KPMG’s report was silent on this possibility. On 12 March 1999, the rights issue was announced with Thorney to be a sub-underwriter..

ASIC contended that the failure of KPMG’s report to explain the necessity of the proposed share placements to Thorney in the context of the proposed rights issue was a material omission which made the Statement and the Report misleading, and that the issue of the Statement and subsequent refusal in the face of an ASIC request to amend the Report was misleading or deceptive conduct within the meaning of s 995(2).

Solution 6 argued that the share placements and rights issue were two separate and distinct transactions, the Statement and Report were complete and accurate at the time they were issued on 10 March 1999, and there was no reason why the rights issue should have been dealt with in the Report.

Tamberlin J held that where an expert opinion is expressed in relation to a decision to be made at a known future date, in this case the general meeting of 9 April 1999, and the party expressing the opinion subsequently becomes aware of a matter which could materially affect that opinion, then it may be misleading conduct to fail to take steps to supplement or vary the report. Where circumstances change, a statement which may not be misleading when made may become misleading if unamended or not supplemented by reference to later events.

Tamberlin J found the announcement of a rights issue only two days after the Notice and Statement had been sent out to be a material circumstance. Shareholders needed to not only be informed of the fact of the rights issue, but also of the views of the directors and KPMG as to its impact on the share placements. Tamberlin J rejected Solution 6’s contention that they were two separate transactions; there was a temporal and financial inter-relationship which required further comment to prevent the statements made in the KPMG report from being misleading by omission. Tamberlin J ordered that Solution 6 be restrained from further distributing its Notice and Statement and be restrained from considering the resolutions relating to the share placements at the general meeting.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

D Loxton, ‘One Step Forward, One Step Back: The Effect of Corporate Law Reform on Procedures in Dealing with Companies Borrowing or Giving Guarantees’ (1999) 10 Journal of Banking and Finance Law and Practice 24

This article examines the effect of the Corporate Law Reform Act 1998 on lenders’ practices. It summarises the old law and examines the effect of the changes, particularly the new statutory indoor management rule, and what is meant by "know or suspect" in the case of a lending corporation. The article urges a minimalist approach to due diligence, where a little knowledge can be a dangerous thing. It also examines the likely effect of the Corporate Law Economic Reform Bill 1998 which, in its attempts to clarify or state the law, will only sow doubt and confusion amongst lenders.

I M Ramsay, G P Stapledon and K Fong, ‘Affixing of the Company Seal and the Effect of the Statutory Assumption in the Corporations Law’ (1999) 10 Journal of Banking and Finance Law and Practice 38

Courts are divided on the important question of the effect of the statutory assumption in the Corporations Law dealing with affixing the company seal on documents. While some courts have made a distinction between formal authority (that is, demonstrating that the company’s assent to the transaction is in proper form) and substantive authority (that is, demonstrating that the company has authorised the transaction in question), other courts have not. Some courts infer that all that is required for a company to be bound by a sealed document is for the statutory assumption of due sealing to apply. The issue is important for determining whether a company is bound by a sealed document. The authors argue that the statutory due sealing assumption relates only to formal authority and not substantive authority. They examine the case law in this area, the statutory provisions regarding the company seal (and their history) as well as policy considerations, and conclude that those seeking to enforce a sealed document can rely on the statutory assumption of due sealing for formal authority but not substantive authority.

Pamela Hanrahan, ‘Managed Investment Schemes: The Position of Directors under Chapter 5C of the Corporations Law’ (1999) 17 Company and Securities Law Journal 67

The commencement of the Managed Investments Act on 1 July 1998 altered fundamentally the legal environment for managed investment schemes. This article analyses the position of the directors of a scheme’s "responsible entity", which is the company primarily responsible to investors and the regulator for the operation of the scheme. Unlike directors of a corporate trustee at general law, directors of a responsible entity owe performance obligations directly to scheme members under the statute. The article reviews the general law and statutory duties of directors, and the enforcement options available to investors, the responsible entity and the regulator for breach of those duties.

Graeme Dean, Frank Clarke and Erne Houghton, ‘Corporate Restructuring, Creditors’ Rights, Cross-guarantees and Group Behaviour’ (1999) 17 Company and Securities Law Journal 85

Recent insolvencies have evoked protracted arguments over the rights of various classes of creditors. In the so-called Patricks affair, capital reductions allegedly presaged the attempted "retrenchment" of MUA employees within the Lang Corporation/Patrick Stevedores groups. This article clarifies (i) the mix of separate legal entity principles underpinning group trading, financing and administration; and (ii) exposes the illusion of creditors’ protection encouraged by group financial statements and the existence in many cases of cross-guarantees. Statistics evidence a continuing popularity of the Deeds and show that a strong trend towards smaller deed participating groups existed before any "Simplification project" changes of 1996 may have taken effect.

Paula Darvas, ‘Employees’ Rights and Entitlements and Insolvency: Regulatory Rationale, Legal Issues and Proposed Solutions’ (1999) 17 Company and Securities Law Journal 103

Employees may have accrued rights and entitlements upon the event of their corporate employer’s insolvency, such as unpaid wages and accrued long service leave. However, there is a problem because although employees are recognised as a special class of creditor for the purposes of the application of certain "priority provisions" in various forms of external administration, these provisions fail adequately to ensure that employees are fully paid what is owed. This article examines why this problem exists and the policy reasons for establishing separate regulation to solve this problem. It also includes a brief examination of the current operation of the provisions of the Corporations Law when a company enters into voluntary administration, has a receiver appointed, or is wound up. By comparing and contrasting briefly the underlying rationale and the statutory scheme of operation of these forms of external administration, the consequences for employees can be illustrated. Finally, possible regulatory solutions are canvassed, including the two Bills which were introduced into federal Parliament during 1998.

Andrew Keay, ‘The Unity of Insolvency Legislation: Time for a Re-think?’ (1999) 7 Insolvency Law Journal 4

This article asserts that now is an appropriate time to consider whether the present scheme of having separate legislation for personal and corporate insolvency law remains optimal, particularly in light of the significant divergence which has occurred in recent years in the legislative regimes regulating personal and corporate insolvency law. After considering the background to the present scheme and briefly examining the English system and proposed changes in South Africa, the article focuses on the advantages and disadvantages of introducing a unified scheme of insolvency law. It is argued that a unified scheme is preferable for Australia and that the legislation should be modelled on that of the United States rather that which operates in the United Kingdom.

Andre Boraine and Piet Delport, ‘Elements of South African Insolvency Law’ (1999) 7 Insolvency Law Journal 16

This article introduces South African insolvency law by providing the legal framework for this branch of law. The influence and interaction between English law and Roman Dutch law has had a profound effect on its development. The article outlines administrations for insolvent natural persons, liquidation of companies and close corporations, and statutory fresh start procedures for companies. In view of the ongoing insolvency law reform project, the article also reflects some of the new ideas and subjects that still need further investigation before a new Insolvency Act will be adopted.

Peter Gothard, ‘Insurance Litigation Funding Agreements: Benefits and Potential Problems’ (1999) 7 Insolvency Law Journal 29

Following the decisions of the courts in the Movitor and Tosich Construction cases, Insured Litigation Funding (ILF) Agreements have become an increasingly common feature of insolvency administrations. These insurance products constitute a valuable resource to insolvency practitioners yet their use raises some serious concerns, not all of which have surfaced in experience to date. This article seeks to explore and raise awareness of these potential problems so that they do not restrict the realisation of the benefits ILF Agreements can provide. These potential problems include possible injustices to third parties, the issue of who really controls the litigation proceedings under an ILF Agreement, whether ILF Agreements always accord with the intent of the relevant legislation and whether insolvency practitioners are obligated to enter into ILF Agreements.

L Alles, ‘The Process of Securitisation’ (1999) (No 1) Journal of the Securities Institute of Australia 27

P Mather, ‘Financial Covenants in Australian Bank-Loan Contracts: Incidence, Measurement Rules and Monitoring’ (1999) 9 (No 1) Australian Accounting Review 63

R Gengatharen, ‘Regulatory Reform of the Australian OTC Derivatives Markets’ (1998) 2 Southern Cross University Law Review 76

F Donnan, ‘Self Regulation and the Demutualisation of the Australian Stock Exchange’ (1999) 10 Australian Journal of Corporate Law 1

P Latimer, ‘Failure to Issue a Contract Note Under Section 842 of the Corporations Law’ (1999) 10 Australian Journal of Corporate Law 34

X Zhang, ‘One Country, Two Separated Markets and Their Bumping Integration - Legal Issues Concerning Cross-Border Listing of Mainland-Funded Companies in Hong Kong’ (1999) 10 Australian Journal of Corporate Law 47

L Oswald, ‘Shareholders v Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause’ (1998) 24 Journal of Corporation Law 1

K Valihura and L Stark, ‘Fiduciary Duties Derailed? Appropriation of Directors’ Duties in the Battle for Control of Conrail’ (1998) 24 Journal of Corporation Law 29

F Warin and J Schwartz, ‘Corporate Compliance Programs as a Component of Plea Agreements and Civil and Administrative Settlements’ (1998) 24 Journal of Corporation Law 71

M Coco, ‘Toward Enterprisation: Shareholder Rights and Economic Reform in Russia’ (1998) 39 Virginia Journal of International Law 169

P Roberts and J Poole, ‘Shareholder Remedies - Efficient Litigation and the Unfair Prejudice Remedy’ [1999] Journal of Business Law 38

L Cerioni, ‘The Barriers to the International Mobility of Companies Within the European Community: A Re-Reading of the Case Law’ [1999] Journal of Business Law 59

G Forrai, F Horsey and D Purdy-Tsang, ‘Hong Kong Shadow Directors: Patchwork Provisions or Blanket Protection?’ [1999] Journal of Business Law 84

J Ross, ‘Corporate Criminal Liability: One Form or Many Forms?’ [1999] The Juridical Review 49

D Baird, ‘Bankruptcy’s Uncontested Axioms’ (1998) 108 Yale Law Journal 573

W White, ‘Taming the Market: The New Russian Securities Law and the Protection of Shareholder Rights’ (1998) 37 Columbia Journal of Transnational Law 125

S Miller, ‘Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the US: A Comparative Analysis of US, German and UK Veil-Piercing Approaches’ (1998) 36 American Business Law Journal 73

C Leung, ‘First Chinese Securities Law Fails to Clarify Regulation’ (1999) (February) International Financial Law Review 45

R Hampel, ‘World Trends in Corporate Governance’ (1999) (No 1) Company Director 12

J Brewis, ‘The Move to Shareholder Value in Germany’ (1999) (February) Corporate Finance 24

J Morrissey, ‘United States v O’Hagan: A Results-Oriented Approach to Insider Trading Cases’ (1998) 48 DePaul Law Review 161

G Blanke, ‘Choice of the Most Profitable Legal Structure for German Subsidiaries’ (1999) 27 International Business Lawyer 66

T Andre, ‘Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany’ (1998) 73 Tulane Law Review 69

D Chow, ‘The Limited Partnership Joint Venture Model in The People’s Republic of China" (1998) 30 Law and Policy in International Business 1

C Hague, ‘Directors - De Jure, De Facto, or Shadow?’ (1998) 28 Hong Kong Law Journal 304

D Levine and A Pritchard, ‘The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California’s Blue Sky Laws’ (1998) 54 Business Lawyer 1

D Kupetz, ‘The Bankruptcy Code is Part of Every Contract: Minimising the Impact of Chapter 11 on the Non-Debtor’s Bargain’ (1998) 54 Business Lawyer 55

J Madden, ‘Financing Small Bank Holding Companies: Securitization of Capital Securities’ (1998) 54 Business Lawyer 93

R Flannigan, ‘Commercial Fiduciary Obligation’ (1998) 36 Alberta Law Review 905

D Weber-Rey and W Tischvirek, ‘New Regulations on Private Business Participation Companies to Promote the Venture Capital Market in Germany’ (1999) 10 International Company and Commercial Law Review 31

The Company Lawyer (Volume 20 No 2, February 1999). Articles include:

(a) Company Investigations: A Comparative Analysis of Israeli and UK Law

(b) Takeover Defence Tactics Part 2: Specific Defensive Devices

(c) Derivatives: Internal Controls for Users and Sellers

Corporate Governance Bulletin (Volume 16 No 4, November-December 1998). Articles include:

(a) Vigorous US Shareholder Activism on Governance Expected in 1999

(b) Focus of Proxy Contest Continues to Shift in 1998

(c) Director Pay Continues to Rise Report Study

(d) Dawn of European Monetary Union Spurs Changes in European Governance

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7. CENTRE FOR CORPORATE LAW SEMINARS

(A) THE BUSINESS JUDGMENT RULE: KEY ISSUES FOR COMPANY DIRECTORS AND OFFICERS AND THEIR ADVISERS (co-hosted with the Australian Institute of Company Directors)

Speaker:

Professor Douglas Branson, Professor of Law, University of Pittsburgh; Visiting Fellow, Faculty of Law, The University of Melbourne

Commentators:

Professor John Farrar, School of Law, Bond University, Professorial Associate, Faculty of Law, The University of Melbourne

Mr Ian Renard, Partner, Arthur Robinson & Hedderwicks; Director of AMP Limited, CSL Limited, Newcrest Mining Limited and Ericsson Australia Pty Ltd

Date: Tuesday 4 May 1999

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:

One of the most important changes contained in the Corporate Law Economic Reform Program Bill is the business judgment rule. It is expected that the Bill will be enacted by Federal Parliament this year. The Minister for Financial Services and Regulation, the Hon Mr J Hockey MP has stated that the business judgment rule is designed to "provide directors with a safe harbour from personal liability in relation to honest, informed and rational business judgments…The objective of the rule is to protect the authority of directors in the exercise of their management duties…Directors will benefit from the certainty that the rule provides in terms of their liability as they will be encouraged to take advantage of business opportunities and not behave in an unnecessarily risk-averse way".

Many important issues arise from the business judgment rule. In what circumstances will it operate to protect directors? What practical advice can be given by professional advisers to companies and their directors with respect to the business judgment rule?

Because the business judgment rule draws to a large extent upon the business judgment rule in the United States where the rule has operated for many years, the main speaker is Professor Douglas Branson, a leading US authority on the duties and liabilities of company directors. Professor John Farrar will analyse the Australian business judgment rule and will give particular attention to issues of monitoring, delegation and reliance in respect of the duties of company directors. Mr Ian Renard will provide the perspective of both a senior corporate lawyer as well as a professional company director on the Australian business judgment rule.

Speaker Details:

Professor Douglas Branson: Professor Branson is the W Edward Sell Professor of Law at the University of Pittsburgh. He is the author of the leading United States treatise on company directors titled Corporate Governance. He is the author of over 50 journal articles on corporate law and securities regulation subjects. He has been a Visiting Fellow in the Faculty of Law at The University of Melbourne since 1995 where, with Professor John Farrar, he teaches a subject titled Corporate Governance and the Duties of Company Directors. He has been a consultant to several leading United States corporations. Professor Branson has been a visiting professor or lecturer at many universities around the world including the University of London and the University of Paris.

Professor John Farrar: Professor Farrar is Professor of Law at Bond University and Professorial Associate in the Faculty of Law at The University of Melbourne. He has been a professor of law in the United Kingdom and New Zealand and has practised law in England and New Zealand. His publications include Farrar’s Company Law, an English company law textbook now in its fourth edition. In addition, he has numerous articles on matters of company law and securities regulation. He has acted as a consultant to the New Zealand Department of Justice, Treasury and Law Commission, the Business Council of Australia, the Australian Institute of Company Directors and the Australian Investment Managers Group. In 1994 he was a member of the four-person panel advising the Australian Federal Attorney-General on differential voting rights on ordinary shares. He is a member of the Corporations Law Committee of the Australian Institute of Company Directors.

Mr Ian Renard: Ian Renard is a Partner with Arthur Robinson & Hedderwicks where he has advised on many leading transactions including the public offering of shares in Telstra, the merger of CRA Limited (as it then was) and RTZ through a dual listed companies structure, the public offering of shares in Tabcorp Ltd, the privatisation of CSL Limited, and the sale of the Bank of South Australia. He is a director of AMP Limited, CSL Limited, Newcrest Mining Limited, Ericsson Australia Pty Ltd and other companies. He is the co-author of the leading text on takeovers titled Takeovers and Reconstructions in Australia. He has also published articles on directors’ duties.

(B) SHARE CAPITAL CHANGES: PRACTICAL IMPLICATIONS

Speakers:

Mr Quentin Digby, Partner, Freehill Hollingdale & Page
Mr Norman O’Bryan, Member of the Victorian Bar
Mr Timothy Neilson, Special Counsel, Blake Dawson Waldron
Mr Charles Rosedale, Partner, Clayton Utz

Date: Thursday 20 May 1999

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

Venue:

Freehill Hollingdale & Page
Level 48 Conference Room
101 Collins Street
Melbourne Vic 3000

Admission: $60

Seminar Topic:

Fundamental changes in the area of share capital were introduced last year with the enactment of the Company Law Review Act 1998. These changes included the abolition of par value for shares, new requirements for reductions of share capital, and changes in the area of dividends and redeemable preference shares. These changes have had a significant effect on corporate transactions. This seminar explores the practical implications of the share capital changes and presents the views of leading practitioners who have worked and advised on transactions which have been affected by the changes.

Speaker Details:

Quentin Digby: Quentin Digby is a member of the Head Office Advisory Team at Freehill Hollingdale & Page. His principal area of practice involves the provision of advice to listed companies in respect of Corporations Law and ASX compliance issues. He is a member of the Australian Institute of Company Directors National Corporations Law Committee and has closely followed the development of the share capital provisions introduced by the Company Law Review Act 1998.

Timothy Neilson: Timothy Neilson is Special Counsel with Blake Dawson Waldron and has practised with that firm in the area of taxation since 1985. He is a member of the Revenue Law Committees of the Law Council of Australia and the Law Institute of Victoria and the Technical Committee of the Taxation Institute of Australia.

Norman O’Bryan: Norman O’Bryan is a barrister practising at the Victorian Bar. He was previously a Partner with Minter Ellison. His practice at the Victorian Bar has a particular focus upon corporate law transactions. He is a member of the Corporations Law Committee of the Australian Institute of Company Directors. He has published many articles on corporate law and securities regulation subjects.

Charles Rosedale: Charles Rosedale is a Partner of Clayton Utz. He works exclusively in the corporate law area including takeovers, acquisitions, corporate restructurings, floats and underwritings. He is an associate member of the Securities Institute of Australia and an Australian correspondent for the International Company and Commercial Law Review published in London.

REGISTRATION DETAILS

Send registration form and payment details by Friday 30 April 1999 for The Business Judgment Rule Seminar and Tuesday 18 May for the Share Capital Seminar to: Mary Petras, Events Organiser, External Relations, Faculty of Law, The University of Melbourne, Parkville Vic 3052, fax: 9349 4287, tel: 9344 6194**,** email: m.petras@law.unimelb.edu.au

REGISTRATION FORM

Seminar attending (please indicate):

The Business Judgment Rule \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Share Capital Changes: Practical Implications \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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8. ARCHIVES

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http://www.law.unimelb.edu.au/centres/cclsr/Activities/email\_archive.html

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