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EDITOR'S NOTE

This is an additional issue of the Corporate Law Electronic Bulletin. The recent judgments section of the Bulletin will return in the February issue.

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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) US COMMISSION PROPOSES MAJOR REFORMS IN CORPORATE GOVERNANCE, AUDITING AND ACCOUNTING PRACTICES

On 9 January 2003 the United States Conference Board's Commission on Public Trust and Private Enterprise recommended a wide range of actions to improve corporate governance, auditing and accounting practices.

The Conference Board's Commission issued its first report on executive compensation (including stock options) last September.

The Commission was co-chaired by John W Snow, Chairman and CEO of CSX Corporation, former Chairman of The Business Roundtable, and President George W Bush's nominee for US Secretary of the Treasury, and by Peter G Peterson, Chairman of The Blackstone Group, Chairman of the Federal Reserve Bank of New York, and former US Secretary of Commerce.

The Commission stated that it was profoundly troubled by the corporate scandals of the recent past. It felt that a key to making certain that these acts of corporate malfeasance are minimized in the future is to establish an appropriate balance between managing the corporation and providing the independent directors on the board with the powers and resources they need to perform their roles of oversight of management, legal, and ethical compliance.

The Commission, noting that no single board structure has yet been demonstrated to be superior in providing the oversight that leads to corporate success, recommends three alternative board structures, all of them a break from the tradition that most American corporations follow:

- Alternative 1: The Commission urges companies to carefully consider separating the offices of Chairman of the Board and CEO.
- Alternative 2: The roles of Chairman and CEO should be performed by two separate individuals. If the chairman is not "independent" according to strict stock exchange definitions, a "Lead Independent Director" should be appointed. It is essential that non-CEO chairmen not have any relationships with the CEO or management that compromises their ability to act independently.
- Alternative 3: Where boards do not choose to separate the Chairman and CEO positions, or where they are in transition to such a separation, a "Presiding Director" position should be established.

Regardless of which alternative is chosen, the Commission recommends that the independent Chairman, Lead Independent Director, or the Presiding Director should have ultimate approval over the information flow that goes to the board, board meeting agendas, and board meeting schedules. The Commission encourages frequent, regular meetings of the non-management directors. Chairing these meetings is another responsibility that should be part of the independent Chairman's, Lead Independent Director's, or Presiding Director's functions.

The Commission was clear that the relationship between the board and management need not be and should not be, except in unusual circumstances, adversarial. Rather, the relationship should be open, honest, and constructive.

If companies choose not to adopt any of these three approaches, they should explain their reasons and how the board structure they use achieves strong, independent board leadership.

John H Biggs, former Chairman, President and CEO, TIAA-CREF, filed a dissent from the recommendation that boards separate the Chairman and CEO positions, noting that he believed that separation of the roles of Chairman and CEO is unwarranted and would impose unnecessary costs on American businesses.

The Commission also urges boards be composed of a substantial majority of independent directors. This proposal goes beyond recommendations of the New York Stock Exchange which propose only a majority of directors who are independent of CEO and other management control. A key theme running through the Commission's report and recommendations is that boards of directors must effectively oversee the company's management, legal, and ethical compliance.

(1) Director qualifications are key: a three-tier evaluation process is recommended

Boards should have a mix of backgrounds, skills, and knowledge bases so that they can respond effectively to corporate problems and effectively challenge management. There is a need to establish a three-tier director evaluation process. This should include evaluation of the performance of the board as a whole, the performance of each committee and the performance of each individual director, as necessary. The Commission also suggests that the non-CEO Chairman or the Lead Independent Director, or the Presiding Director, in conjunction with the Chairman, take a lead role in the evaluation process.

(2) Ethical conduct and setting up management processes to "follow through" is essential for all companies

The Commission recommends policies and procedures that define and demand ethical conduct and enforce companies' codes of conduct. The Commission's report noted that "corporations should work to support responsible behavior and build environments in which employees take the initiative to address misconduct rather than waiting until after the damage is done."

The Conference Board's Commission report notes that ethical codes of conduct by themselves are not enough. The Commission recommends that a committee of the board oversee ethics issues and that companies develop tools and processes to create and enforce an ethical working environment. The Commission's report noted studies that describe how whistleblowers are often fired or demoted after reporting misconduct. Among its recommendations, the Commission wants companies to embed ethics in performance evaluation throughout the company and have "processes that encourage and make it safe for employees to raise ethical issues and report possible ethical violations."

(3) Independent investigation of alleged wrongdoing is vital, according to the Commission report

The report discusses when companies should hire special counsel to conduct an investigation that is likely to implicate a company's executives. To ensure that special counsel's interests are not aligned with, or influenced by management, the Commission believes that special counsel should not be one of the corporation's regular outside counsel or a firm that receives a material amount of revenue from the company.

(4) Boards and shareowners must focus on the corporation's long-term success

The Commission urges boards, management, and shareowners alike to focus on the company's long-term growth and prosperity. The Commission challenges shareowners, particularly large, institutional shareowners, to accept responsibility for encouraging long-term growth in the companies in which they invest.

To further address short-term focus in the markets, the report recommends establishing compensation arrangements for portfolio managers that encourage a long-term rather than short-term focus. It also asks corporations to reevaluate the implications of providing short-term "earnings guidance," as well as the advisability of meeting financial targets through aggressive accounting techniques. Finally, the report encourages policy makers to create incentives for investors to hold their shares for the long-term, possibly by increasing the differential tax rates for long-term and short-term holders.

(5) The Commission also calls on boards of directors to listen more to long-term shareowners

In a move that challenges corporate managements, the Commission urges companies to listen to long-term shareowners and to be receptive to their nominations for candidates for the board. The Commission also urges companies to explain their reasons for not implementing shareowner proposals when those proposals garner a substantial number of votes.

(6) The constituencies of the corporation

The Commission also notes the importance of the corporations responding to a wide variety of constituencies including employees, customers, communities and suppliers. In its report, the Commission acknowledges that "the free enterprise system exists at the pleasure of society, and the trust and confidence of these other constituencies is crucial to its productive functioning."

(7) Give the audit committee and other watchdogs a strong role

Responding to widely reported audit failures, the Commission emphasized the importance of independent, knowledgeable audit committees. Orientation programs and continuing education are necessary for audit committees to do their jobs and protect the company from faulty accounting practices and risk-prone situations. The Commission also recommends audit committees hire their own advisors if they need assistance in carrying out their duties.

The Commission urges every company to have a strong internal audit function. In another move to balance board powers against those of management, the Commission wants internal auditors to have a direct line of communication and reporting responsibility to the audit committee and to attend all regularly scheduled audit committee meetings.

(8) Auditors should confine their activities to auditing

The report notes that this may call for a rotation of audit firms. Clearly concerned about the quality of outside audits, the Commission urges public accounting firms to limit their services to their clients to performing audits and to providing closely related services that do not put the auditor in an advocacy position. The Commission recommends against public audit firms performing services that put them in an advocacy position, such as proffering novel and debatable tax strategies and products that involve income tax shelters and extensive off-shore partnerships or affiliates.

The Commission outlines circumstances in which companies should consider changing their audit firms. At a minimum, companies should thoroughly review and evaluate the quality of the audit firms and their work at least every five to seven years. In order to ensure the independence of any audit, the audit committee should seriously consider rotating outside audit firms when some or all of the following circumstances exist: (1) the audit firm has been employed by the company for a substantial period of time - eg, over 10 years; (2) one or more former partners or managers of the audit firm are employed by the company; and (3) significant non-audit services are provided to the company - even if approved by the audit committee.

(9) The business model of accounting firms should be reevaluated

The business model, strategies and focus of the Big Four accounting firms should ensure that quality audits are their number one priority. The Big Four must be sure that they each represent a "gold standard" in auditing.

(10) Subcommittee of the Commission

The Commission's report also includes a separate report on audit principles of a subcommittee consisting of the members of the Commission who are experts in accounting and auditing issues. (The other Commissioners did not believe that they had the technical expertise or requisite experience to comment on this topic.) Among the subcommittee's recommendations are: urging the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) to consider a "principles" rather than "rules" based approach to audit opinions. In considering a "principles-based" approach, the overall objective of accounting standards should be to reflect the actual underlying economics of the business transactions in the financial statements.

The subcommittee's recommendations also included moving to a more timely response by accounting rule makers. It also encouraged convergence between US and global accounting standards. The subcommittee report also urges the SEC, the new Public Corporation Accounting Oversight Board, and the Financial Accounting Foundation to find a way to finance the American share of the International Accounting Standards Board Foundation through the issuer assessments established under the Sarbanes-Oxley Act of 2002.

(11) Conference Board commitment

Richard E Cavanagh, President of The Conference Board, emphasized the Board's commitment to implementing the Commission's findings and best practices throughout the United States. He announced that The Conference Board has formed a Directors' Institute to educate corporate directors throughout the United States.

(12) Executive Compensation: Part 1

The first set of Commission findings were released in September 2002 and involved executive compensation. In assessing executive compensation practices, the Commission said companies should tie executive compensation to corporate operating performance and develop incentives to encourage long-term growth and profitability. It recommended that compensation committees be composed entirely of independent directors, that they hire their own consultants as needed, and that they become less dependent on industry averages in setting compensation levels. The compensation report also emphasized that senior executives should hold stock in their companies for the long term and that companies should strive for transparency in disclosure of their compensation policies and practices. The Commission broke with tradition when it recommended expensing stock options and advocated senior corporate executives give advance notice of stock sales.

(13) Members of The Conference Board's Commission are:

Co-Chairs
- Peter G Peterson, Chairman of The Blackstone Group, former Secretary of Commerce and Chairman of the Federal Reserve Bank of New York
- John W Snow, Chairman and CEO, CSX Corporation and former Chairman, Business Roundtable
- John H Biggs, former Chairman, President and CEO, TIAA-CREF
- John C Bogle, Founder and former Chairman, Vanguard Group, Inc
- Charles A Bowsher, former Comptroller General
- Peter M Gilbert, Chief Investment Officer, State Employees' Retirement System, Commonwealth of Pennsylvania
- Andrew S Grove, Chairman of Intel Corporation
- Ralph S Larsen, former Chairman and CEO of Johnson & Johnson, former Chairman of The Business Council
- Arthur Levitt Jr, former SEC Chairman and former Chairman of the American Business Conference
- Professor Lynn Sharp Paine, John G McLean Professor of Business Administration at Harvard Business School
- Former Senator Warren B Rudman, Paul, Weiss, Rifkind, Wharton & Garrison
- Paul A Volcker, former Chairman of the Board of Governors, Federal Reserve System

(14) Availability of the report

Copies of the reports of The Conference Board's Commission on Public Trust and Private Enterprise can be obtained at <http://www.tcb.org> or on request from Frank Tortorici at 212-339-0231.

(B) SEC PROPOSES AUDIT COMMITTEE LISTING STANDARDS RULE

On 8 January 2003 the United States Securities and Exchange Commission voted to publish for comment a rule proposal that would direct national securities markets to prohibit the listing of any security of an issuer not complying with audit committee requirements set out in the Sarbanes-Oxley Act of 2002.

The proposals would implement the requirements of Section 10A(m)(1) of the Securities Exchange Act of 1934, as added by Section 301 of the Sarbanes-Oxley Act of 2002.

Under the proposed rule, national securities exchanges and national securities associations would be required to prohibit the listing of any security of an issuer that is not in compliance with the following.

- Each member of the audit committee of the issuer must be independent according to the specified criteria in Section 10A(m).
- The audit committee must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or related work or performing other audit, review or attest services for the issuer, and the registered public accounting firm must report directly to the audit committee.
- The audit committee must establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.
- The audit committee must have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties.
- The issuer must provide appropriate funding for the audit committee.

The proposed rule would apply to both domestic and foreign listed issuers. It is important to note that, based on significant input from and dialogue with foreign regulators and foreign issuers and their advisers, several provisions have been included that seek to address the special circumstances of particular foreign jurisdictions. These provisions include, under conditions specified in the proposed rule:

- allowing non-management employees to serve as audit committee members, consistent with "co-determination" and similar requirements in some countries;
- allowing shareholders to select or ratify the selection of auditors, also consistent with requirements in many foreign countries;
- allowing alternative structures such as boards of auditors to perform auditor oversight functions where such structures are provided for under local law; and
- addressing the issue of foreign government shareholder representation on audit committees.

The proposed rule would also make several updates to the Commission's current disclosure requirements regarding audit committees, including:

- disclosure of the use of any exemptions to the recommendations;
- the identification of the audit committee in annual reports; and
- updates to the audit committee independence disclosure in proxy statements.

The proposed new requirements would need to be operative no later than the first anniversary of the publication of the Commission's final rule. Comments on the proposed rule should be received by the Commission within 30 days of publication in the Federal Register.

The full text of detailed releases concerning each of these items is available on the SEC website at <http://www.sec.gov/>

(C) REFORM OF INVESTMENT RESEARCH - US$1.4 BILLION SETTLEMENT

On 20 December 2002 the United States Securities and Exchange Commission Chairman Harvey L Pitt, New York Attorney General Eliot Spitzer, North American Securities Administrators Association President Christine Bruenn, NASD Chairman and CEO Robert Glauber, New York Stock Exchange Chairman Dick Grasso, and state securities regulators announced an historic settlement with the nation's top investment firms to resolve issues of conflict of interest at brokerage firms.

The "global settlement" concludes a joint investigation begun in April by regulators into the undue influence of investment banking interests on securities research at brokerage firms.

Terms of the agreement include:

- The insulation of research analysts from investment banking pressure. Firms will be required to sever the links between research and investment banking, including analyst compensation for equity research, and the practice of analysts accompanying investment banking personnel on pitches and road shows. This will help ensure that stock recommendations are not tainted by efforts to obtain investment banking fees.
- A complete ban on the spinning of Initial Public Offerings (IPOs). Brokerage firms will not allocate lucrative IPO shares to corporate executives and directors who are in the position to greatly influence investment banking decisions.
- An obligation to furnish independent research. For a five-year period, each of the brokerage firms will be required to contract with no less than three independent research firms that will provide research to the brokerage firm's customers. An independent consultant ("monitor") for each firm, with final authority to procure independent research from independent providers, will be chosen by regulators. This will ensure that individual investors get access to objective investment advice.
- Disclosure of analyst recommendations. Each firm will make publicly available its ratings and price target forecasts. This will allow for evaluation and comparison of performance of analysts.
- Settled enforcement actions involving significant monetary sanctions.

Each of the firms will pay a fine, pay monies toward investor restitution, and will be required to escrow funds that will be used to pay for independent research. The agreement that was reached totals more than US$1.4 billion in penalties, restitution and monies to be used for investor education.

(D) CODE OF CONDUCT RELEASED FOR AUSTRALIA'S CFOS AND SENIOR FINANCE OFFICERS

The Group of 100, the representative association for the CFO's of Australia's leading enterprises released in December 2002 a Code of Conduct for its members and senior finance officers.

The Code provides for 10 key governing principles. The principles require CFOs to:

(1) Discharge their duties at the highest level of honesty and integrity having regard to their position and their organisation. Integrity is the quality from which public trust is derived and a benchmark against which the CFO must measure all decision making.

(2) Observe the rule and spirit of the law and comply with the ethical and technical requirements of any relevant regulatory or professional body.

(3) Respect all the confidentiality of all confidential information acquired in the course of business and not make improper use or disclose such confidential information to third parties without specific authorisation or legal requirement.

(4) Observe the principles of independence, accuracy and integrity in dealings with the board, audit committees, board committees, internal and external auditors and other senior managers within the organisation and other relevant bodies external to the organisation.

(5) Disclose to the Board any actual or perceived conflicts of interest of a direct or indirect nature of which the CFO becomes aware and which the CFO believes could compromise in any way the reputation or performance of the organisation.

(6) Maintain the principle of transparency in the preparation and delivery of financial information to both internal and external users.

(7) Exercise diligence and good faith in the preparation of financial information and ensure that such information is accurate, timely and represents a true and fair view of the financial performance and condition of the organisation and complies with all applicable legislative requirements.

(8) Ensure the maintenance of a sound system of internal controls to safeguard the organisation's assets and to manage risk exposure through appropriate forms of control.

(9) Set a standard for honesty, fairness, integrity, diligence and competency in respect of the position of CFO that will encourage emulation by others within the organisation.

(10) Remain committed, at all times, to observing, developing and implementing the principles embodied in this Code in a conscientious, consistent and rigorous manner.

Commenting on the Code, the President of the Group of 100, Tom Pockett, said, "CFO's should be the champions of good corporate governance throughout an organisation and in the wider business community in Australia. We believe this initiative will further enhance Australia's reporting framework. This self-regulatory code sets a best practice benchmark for the independent, ethical and professional behaviour of CFO's in Australia and provides a framework for the actions a CFO and finance executives should subscribe to."

The Code of Conduct, together with a commentary on the Code, is on the Group of 100 website at <http://www.group100.com.au/>

(E) FINANCIAL INSTITUTIONS NEED TO TAKE A GREATER LEAD IN THE BATTLE TO REBUILD PUBLIC TRUST - NEW STUDY

After a spate of high-profile corporate collapses and damage to the public's trust in the integrity of companies and financial markets, corporate governance and disclosure have never been more paramount. Yet a new study by PricewaterhouseCoopers reveals a level of uncertainty among the management of financial institutions about how best to improve their own standards of disclosure and governance.

The study titled 'The trust challenge: how the management of financial institutions can lead the rebuilding of public confidence', examined how the financial world is reacting to the crisis in public confidence. As part of the research, senior executives from 43 institutions were surveyed to find out what financial institutions are doing to improve their own standards of disclosure and governance. In addition, over 30 one-to-one interviews were held with fund managers, investment associations, equity analysts, ratings agencies, international financial institutions, bankers and insurers in the US, Europe and Asia. These interviews explored the role that financial institutions play as providers of capital to companies worldwide, and their consequent ability to influence general standards of governance and disclosure.

Sixty per cent of survey respondents believed that trust in financial institutions has been eroded, and most believe that it has been eroded to a degree that requires structural change, at the regulatory level and most importantly within the institutions themselves. Eighty per cent of respondents said that failure to improve their own standards of corporate governance would result in a higher cost of capital, more volatile share prices or even investors refusing to buy their stock, with just 2% believing that they would not be penalised by investors.

However, the results of the survey suggest that financial institutions are not taking a leadership position on these issues. Over half of all respondents said that the most intense pressure for improved governance within financial institutions is coming from investors and regulators, rather than their own management an indication that financial institutions may be reacting primarily to regulatory and market pressure, rather than actively looking for ways to improve governance and disclosure.

The survey also revealed that European and Asian respondents were more supportive of global accounting standards. Almost two thirds of European respondents and over a half of Asian respondents believed the creation and adoption of a global set of generally accepted accounting standards would materially increase public trust in financial institutions. Just 33% of US respondents believed such standards would have a significant effect.

On the basis of the research, PricewaterhouseCoopers identified five ways which could help management of financial institutions to play a leadership role in the restoration of public trust:

(1) The industry should lend its support to moves by regulators to formulate consistent international accounting principles. Consistent standards enable investors and underwriters to gain a clearer picture of an institution's performance. Financial institutions should use such standards in their own disclosure and demand their use from client and investee companies.

(2) Financial institutions must rethink their own standards of disclosure, and especially non-financial disclosure. The survey showed that they remain wary of disclosing more than they are required to. Within individual institutions, the gap between internal and external reporting practices needs to narrow.

(3) Financial institutions and regulators must work together to develop internet-based reporting standards. Harnessing the internet's capability to improve the timeliness and relevance of reporting, particularly through the use of Extensible Business Reporting Language (XBRL), will make analysis of performance easier for everyone.

(4) Whenever financial institutions provide capital to companies, they should seek to strengthen standards at those companies.

(5) Financial institutions must do more to establish the appropriate checks and balances on their own top managers. If financial institutions are to hold other companies to the highest standards of governance through their capital-allocation activities, their own house must be in order.

To view 'The trust challenge: how management of financial institutions can lead the rebuilding of public confidence', please visit <http://www.pwcglobal.com/financialservices> or email stephanie.peters@uk.pwcglobal.com

2. RECENT ASIC DEVELOPMENTS

(A) ASIC EXTENDS DIFFERENTIAL FEE RELIEF

On 8 January 2003 ASIC confirmed a variation to Class Order [CO 02/214] on differential fee arrangements.

The variation of Class Order [CO 02/214], which took effect in December 2002, exempts an extended range of differential fee structures from the equal treatment requirement of section 601FC(1)(d) of the Corporations Act 2001 (the Act).

The effect of the varied Class Order [CO 02/214] is to permit a responsible entity to offer differential fee structures that are based on the aggregation of a member's scheme interests, together with a member's interests in any superannuation and investment life insurance products issued by the responsible entity, or a related body corporate of the responsible entity.

The expressions 'investment life insurance product' and 'superannuation product' have the same meaning as in section 761A of the Act.

ASIC has made this variation in response to further industry submissions on this topic, and the harmonised licensing and product disclosure regimes introduced by the Financial Services Reform Act 2001. This variation will provide a greater degree of flexibility to responsible entities in setting fee arrangements, while maintaining an appropriate level of consumer protection.

ASIC will give consideration early in 2003 as to whether any further variations to Class Order [CO 02/214] are appropriate.

The variation is contained in Class Order [CO 02/214] and can be obtained from the ASIC website at <http://www.asic.gov.au>

(B) ASIC SEEKS COMMENT ON POSSIBILITY OF SOCIALLY RESPONSIBLE INVESTING DISCLOSURE GUIDELINES

On 19 December 2002 ASIC released a discussion paper seeking stakeholders' views on whether it should issue guidelines on the new socially responsible investing (SRI) disclosure requirements for products with an investment component (investment products) and, if so, what these guidelines should contain.

The issue arises as a result of recent reforms to the Corporations Act requiring investment products to disclose in their product disclosure statements (PDS), the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment. These reforms also give ASIC the power to make guidelines about such disclosure.

'The main arguments in favour of guidelines are to provide consumers with better disclosure to enhance their ability to ensure that the products they purchase match any SRI goals they may have and to provide industry with greater certainty about how it can meet this new disclosure obligation', said ASIC's Deputy Executive Director of Consumer Protection, Ms Delia Rickard.

In developing the paper, ASIC consulted with over 20 industry, government and community sector organisations. ASIC staff also attended a number of forums dealing with SRI issues. The content of the paper addresses the issues raised in those early consultations.

The paper also argues that where an investment product claims to take into account labour standards and environmental, social and ethical considerations, the disclosure must cover its approach to monitoring the ongoing compatibility of its investments with its stated strategy, and what it will do when an investment no longer fits its disclosed SRI approach.

ASIC recommends that product issuers always ask themselves:

- Is there anything they are saying (or not saying) that is likely to give rise to a misleading or deceptive impression about the SRI characteristics of their product?
- Are they providing their target consumers with sufficient information to allow them to clearly understand the product issuers approach to SRI issues, and to determine whether or not it meets any SRI goals consumers may have?

Submissions on the discussion paper are due by Friday 28 February 2003. Copies of the paper are available from <http://www.asic.gov.au> or by calling ASIC's Infoline on 1300 300 630.

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(C) CROSS BORDER POLICY PROPOSAL PAPER: DISCRETIONARY POWERS - FOREIGN FINANCIAL SERVICES PROVIDERS

On 19 December 2002 ASIC released a policy proposal paper, Licensing: Discretionary powers - Foreign financial services providers.

The paper seeks comments on the way ASIC plans to use its powers under the Corporations Act 2001, to facilitate the entry of foreign financial services providers who are regulated by overseas regulatory authorities, into the Australian market.

'New provisions in the Act give some offshore-based financial service providers an opportunity to enter the Australian market place by relying on the regulation that applies to them in their home country', said ASIC's Executive Director Policy and Markets Regulation, Mr Malcolm Rodgers.

'This paper sets out ASIC's approach to recognising other regulatory regimes for this purpose, and seeks industry and consumer comment. 'As Australia is a part of a global market for financial services, we want to facilitate entry by new overseas players, yet at the same time ensure Australian markets and consumers are not put at risk', Mr Rodgers said.

'In this paper, ASIC proposes to limit exemptions from the Australian licensing regime to wholesale providers, and require those who provide services to retail clients to comply with the Australian regime', he said.

The paper is part of ASIC's ongoing development of policy on the regulation of cross border financial services. It follows the release of Principles for cross border financial services regulation on 18 November 2002, and the release of policy proposal papers on Australian market licenses: Overseas operators and Foreign collective investment schemes on 21 November 2002.

Comments on the policy proposal paper are sought by 28 February 2003. ASIC plans to issue a final policy statement on these topics dealt with in the policy proposal paper during the second quarter of 2003.

A summary of the policy proposal paper follows.

This policy proposal paper outlines how ASIC intends to use its powers under either section 911A(2)(h) or section 911A(2)(l) of the Corporations Act 2001 to facilitate the entry into the Australian market of foreign financial services providers who are regulated by overseas regulatory authorities.

Subject to certain conditions, section 911A(2)(h) exempts a foreign financial services provider from the requirement to hold an Australian financial services (AFS) licence if they are regulated by an overseas regulatory authority approved by ASIC.

The power under section 911A(2)(l) deals with exemptions specified by ASIC. ASIC intends to use section 911A(2)(l) to exempt certain foreign financial services providers regulated by certain overseas regulatory authorities from the requirement to hold an AFS licence.

Specifically, the policy proposal paper sets out:

- the criteria for an approval under s911A(2)(h) and an exemption under section 911A(2)(l);
- guidance on ASIC's interpretation of section 911A(2)(h);
- the types of conditions that ASIC may impose on an exemption under section 911A(2)(l); and
- how foreign financial services providers can apply for exemption under the proposed policy.

The criteria for an approval under section 911A(2)(h) and an exemption under section 911A(2)(l) are derived from ASIC' s Principles for cross border financial services regulation (November 2002). Consistent with those Principles, ASIC considers that a foreign financial services provider should only be exempted from the requirement to hold an AFS licence if:

- regulation of the foreign financial services provider by their overseas regulatory authority is sufficiently equivalent to regulation by ASIC; and
- there are effective co-operation arrangements between the foreign financial services provider's overseas regulatory authority and ASIC.

Until this policy on section 911A(2)(h) and exemptions for foreign financial services providers more generally is finalised, ASIC will grant interim relief using its power under section 911A(2)(l). An explanation of this interim position is available in the ASIC FAQ: 'What is ASIC's policy on approving overseas regulatory authorities for the purposes of section 911A(2)(h)'?.

This FAQ is available on the ASIC website at <http://www.asic.gov.au>

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(D) ASIC RELEASES STAGE ONE RESULTS OF ACCOUNTING SURVEILLANCE

On 18 December 2002 Mr David Knott, Chairman of ASIC provided the stage one results of ASIC's most recent accounting surveillance project.

In the last three months ASIC has reviewed the audited full-year financial reports of more than 1000 listed companies with balance dates between 30 June and 31 July, looking at three particular risk areas:

- capitalised and deferred expenses;
- recognition of revenue; and
- recognition of controlled entities and assets.

These three risk areas were seen to be significant in producing misleading financial reporting in the failures of Enron and other high profile companies in the United States.

'Our review to date confirms ASIC's belief that there is no reason to believe that the type of accounting abuses identified in the United States pose a material risk in Australia', Mr Knott said. 'During this review it was noted that there is a reasonably high incidence of auditors either qualifying company accounts or highlighting risks through "emphasis of matter" commentary relating to going concern. This suggests that there is a reasonably high level of transparency in financial reporting on this significant matter.

'While it is always possible that underlying transactions have been deliberately misrepresented in the audited accounts reviewed by us, experience suggests that this is unlikely. In those cases where we have continuing doubts about the reliability of financial reports, enquiries are continuing with the companies and their auditors. In the meantime, there is evidence that public debate on these issues, including ASIC's surveillance, has resulted in some companies adopting more conservative accounting policies in the areas reviewed. Overall, we believe that the level of compliance with existing accounting standards in Australia is high. However, the initiatives currently underway to upgrade accounting standards, to fill unacceptable gaps and to implement better quality control of audit are all critical enhancements to our financial reporting regime', Mr Knott said.

(1) Findings

As ASIC expected, in relation to the overwhelming majority of companies, the review did not raise any systemic issues in the three risk areas examined.

It is believed that pressure from auditors, and the fact of ASIC's review, caused the listed company sector to closely re-examine its accounting policy in these areas and saw the adoption of more conservative policies in some cases.

The review identified accounts of 215 companies that had audit qualifications and/or 'emphasis of matter' paragraphs. The accounts for six companies had audit qualifications relating to their continuation as going concerns. Where appropriate, ASIC is making enquiries in relation to each of these companies.

Another 160 companies had an 'emphasis of matter' in the audit report which related to significant uncertainty about going concern. An 'emphasis of matter' is required under Australian Auditing Standards to draw particular attention to matters disclosed in the notes of a financial report that are of particular importance to the company's future as a going concern.

At this time, ASTC has been unable to conclude a view about some 31 companies. Enquiries are continuing and it is expected that ASIC will reach a view about these companies' accounts and whether further action will be taken against the company or its auditor in the first quarter of 2003. If, in the meantime, ASIC forms any adverse view of the reliability of these accounts, it will seek corrections and full market disclosure.

ASIC is also concerned about the level of compliance by companies in relation to the timing of the publication of their audited financial reports. Some 107 listed companies with a 30 June balance date had failed to lodge their accounts 2 weeks after they were due, without obtaining an extension from ASIC.

ASIC has so far made orders against 42 of these companies prohibiting them from relying on the lower content prospectus regime and is contemplating compliance action against a number of others.

There are 10 companies that have not yet lodged their financial reports and they have been suspended from trading by the ASX.

The principal standards involved in the review's focus are:

- AASB 1040 Statement of Financial Position;
- AASB 1018 Statement of Financial Performance;
- AASB 1004 Revenue; and
- AASB 1024 Consolidated Accounts.

The names of those companies that have audit qualifications relating to their continuation as going concerns, an 'emphasis of matter' statement relating to significant uncertainty about their solvency, or which have failed to lodge their financial reports are available from ASIC's website at <http://www.asic.gov.au>

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(E) ASIC UPDATES PRACTICE NOTE ON REPORTING OBLIGATIONS OF EXTERNAL ADMINISTRATORS

On 17 December 2002 ASIC released revisions to Practice Note 50, External administrators: reporting and lodging.

The revised Practice Note provides general guidance to external administrators on their reporting obligations, and effective lodgement of reports and documents with ASIC. It also sets out specific guidance on:

- preliminary reports;
- reports of suspected contraventions;
- supplementary reports; and
- lodgement of other documents such as reports as to affairs, and accounts, notifications and resolutions.

The revised Practice Note aims to promote and facilitate the lodgement of forms by external administrators electronically, although lodgement in paper form will still be accepted.

The electronic lodgement of documents allows ASIC to provide a prompt response to the information contained in reports, and to efficiently collate and publish statistical information on external administrations.

In particular, ASIC will use Schedule B reports (reports under sections 422, 438D and 533 of the Corporations Act) to compile statistical information in an aggregated and anonymous form. This information will be available to Government, the profession and other relevant stakeholders.

In order to facilitate the compilation of this statistical information, Practice Note 50 requests that, wherever possible, practitioners lodge Schedule B reports within two months of appointment.

Individual reports under sections 422, 438D and 533 of the Act, or extracts from them, will not be placed on the public database.

ASIC is also releasing a guidance note on Schedule B reports, which will be forwarded to practitioners by email. It will also be available on ASIC's website at <http://www.asic.gov.au>

3. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL ACCEPTS UNDERTAKING FROM BURNS PHILP IN DECLINING GOODMAN FIELDER APPLICATION

On 10 January 2003 the Takeovers Panel advised that it had accepted undertakings from BPC1 Pty Ltd (Burns Philp) (a subsidiary of Burns, Philp & Company Ltd) in relation to Burns Philp's takeover bid for Goodman Fielder Ltd (Goodman Fielder).

On the basis of the undertakings from Burns Philp, the Panel has declined the application from Goodman Fielder in relation to the proposed takeover bid for Goodman Fielder by Burns Philp, which the Panel received on 30 December 2002.

The Panel had previously decided not to make any interim order restraining the dispatch of Burns Philp's bidder's statement.

The application sought a declaration of unacceptable circumstances, interim orders restraining the dispatch of the Burns Philp bidder's statement until the Panel had finally determined the application, and final orders in relation to various conditions proposed to be in the Burns Philp bid.

Goodman Fielder sought the deletion, or amendment, of three of the conditions Burns Philp had proposed for its bid, in relation to: Burns Philp's financing for its bid, advice from the Goodman Fielder board concerning Goodman Fielder's earnings and liabilities, and material adverse changes in relation to Burns, Philp & Company Ltd (and its subsidiaries).

Goodman Fielder also requested that Burns Philp disclose that it cannot waive the 90% minimum acceptance condition for its proposed bid without its financiers' consent.

The undertakings primarily relate to Burns Philp varying its bid to grant a withdrawal right (Withdrawal Facility) to Goodman Fielder shareholders who accept its bid prior to the time when Burns Philp has settled, documented and signed the terms of the financing for the various loans (Facilities) it requires to finance its bid. Goodman Fielder shareholders will initially receive a supplementary bidder's statement setting out the changes to Burns Philp's bid, and describing the Withdrawal Facility which will commence from that time.

When Burns Philp has settled and signed the Facilities documentation Goodman Fielder shareholders will receive a further supplementary bidder's statement which will contain a withdrawal form. Shareholders who have accepted at that stage may, if they wish to, withdraw their acceptance up to 10 days from the date of the supplementary bidder's statement, when the Withdrawal Facility will lapse. The Withdrawal Facility will also lapse (without notice) if Burns Philp declares its bid to be free from the defeating condition in its bid that the Facilities be available to it (the Finance Condition).

Burns Philp has also undertaken to waive two defeating conditions in its bid, those relating to material adverse changes in the operation of the business of Burns Philp or its related companies, and adverse changes in financial markets. The Facilities however, still remain subject to similar conditions, but the decision on whether or not to rely on them will be up to the financiers to Burns Philp's bid rather than Burns Philp itself.

Burns Philp has also undertaken to vary the terms of the defeating condition in its bid relating to the Facilities to exclude from the Finance Condition any precondition or event of default that the financiers to the bid have agreed to waive. The undertaking reduces concerns that the Finance Condition may have offended the principle that a bidder should not be able to frustrate its own bid, but may only rely on conditions which are outside its sole control.

Burns Philp has also undertaken to give a statement to Goodman Fielder shareholders which will assist them in assessing the likelihood of the Facilities being available to Burns Philp to fund its bid.

Burns Philp has already addressed the concerns raised by Goodman Fielder about disclosure concerning its ability to waive the 90% minimum acceptance conditions in its bid. Burns Philp included some additional disclosure in the Chairman's letter which accompanied Burns Philp's bidder's statement, and then formally repeated that disclosure in a supplementary bidder's statement.

The Panel did not require any undertakings in relation to the "Accounting Conditions" in paragraphs 9.6(g) and (h) of the Burns Philp bidder's statement.

The Panel will post the reasons for its decision on its website when they are finalised, at
<http://www.takeovers.gov.au/Content/Decisions/decisions.asp>

The President of the Panel appointed Ilana Atlas, Michael Tilley and Marian Micalizzi
to be the Sitting Panel to consider the application.

(B) PANEL ACCEPTS DISCLOSURE UNDERTAKINGS FROM BIDDER IN RELATION TO S.A. LIQUOR DISTRIBUTORS

On 23 December 2002 the Takeovers Panel advised that it had accepted undertakings from Australian Liquor Marketers Pty Ltd (ALM) for further disclosure in its bidder's statement in relation to a takeover bid for S.A. Liquor Distributors Limited (SALD). On the basis of those undertakings the Panel decided to decline to make any declaration of unacceptable circumstances. The application from SALD was received on 11 December 2002.

SALD had criticised ALM's disclosure in its bidder's statement regarding the future conduct of the business of the target and the defeating conditions of its bid.

Following discussions between the Panel and the parties, the Panel has accepted a number of changes and additional disclosures in ALM's bidder's statement. They relate to a number of the defeating conditions in the bidder's statement, and to the benefits which may flow to shareholders in SALD as customers if ALM takes over the supply of liquor to the SALD shareholders.

SALD had also submitted that a customer share incentive scheme, which is described in ALM's bidder's statement, offends the equality of opportunity principle because a proportion of SALD shareholders would not be eligible to participate in the scheme. On the basis of the facts before it in this matter, the Panel did not accept that proposition.

The Panel notes that the issue of whether collateral benefits are being offered unequally between shareholders is difficult in many circumstances and is especially difficult where the target company has strong trading links with shareholders. The Panel considered that the market may be assisted by guidance in this area and proposed to consult with the market in early 2003 to assess the desirability of providing guidance and the specific areas which it should address.

The President of the Panel appointed Jeremy Schultz, Elizabeth Alexander AM, and Anthony Burgess to be the Sitting Panel to consider the application.

(C) PANEL DECISION IN RELATION TO APPLICATION FOR REVIEW OF ANZOIL DECISION

On19 December 2002 the Takeovers Panel advised that it had made a decision in relation to the application by Anzoil NL for a review of the Panel's decision at first instance to make a declaration of unacceptable circumstances and orders in relation to the affairs of Anzoil. Anzoil made its application on the basis that the facts found by the Anzoil 01 Panel supported wider orders being made.

With one exception, the review Panel decided to make no change to the declaration and orders made by the Anzoil 01 Panel, which it regarded as having been appropriate at the time they were made. The exception was to vary the orders to allow the nomination by Dormley Pty Ltd of Dr Jaap Poll for appointment to the board of Anzoil to be put to the annual general meeting of Anzoil on 31 December 2002.

The Anzoil 01 Panel had found that IGM Group Ltd, Capersia Pte Ltd and Dormley (whose aggregate holding in Anzoil at the time of the decision exceeded 20%) had become associates of one or more of the others for the purpose of influencing the composition of the Anzoil board. The Panel declared circumstances to be unacceptable and made various orders which have the effect of preventing Anzoil from acting on any nominations to the board by any of those parties unless it is received after 20 December 2002, or to act on any nominations previously received by those parties at a general meeting of Anzoil at or before that date. Each party in relation to whom the orders were made had nominated a person for election to the board of Anzoil. Those nominations were, however, withdrawn following the commencement of the proceedings at first instance, with the exception of the nomination of Dr Poll by Dormley.

Following the commencement of the review proceedings, IGM sold its entire holding in Anzoil to Monarch Resources Ltd. It was this change in circumstances, the fact that Dr Poll's nomination remained current (although the effect of the nomination had been suspended as a result of the orders), a statutory declaration from Dr Poll that neither he nor Dormley has any relationship with Monarch, and the absence of any evidence contradicting that declaration that led to the review Panel varying the orders referred to above.

Following IGM's sale of its shares in Anzoil to Monarch, Anzoil sought the Panel's consent to withdraw the review application while submitting that the decision and orders of the Anzoil 01 Panel should remain unchanged. The Panel decided not to give that consent because it considered that given the changed circumstances, to do so, would unfairly prejudice the interests of Dr Poll and Dormley.

The reasons for the decision of the review Panel are available on the Panel's website at <http://www.takeovers.gov.au/Content/Decisions/decisions.asp>

The sitting Panel for the review application comprised Dr Annabelle Bennett SC (sitting President), Ms Nerolie Withnall and Mr Scott Reid.

4. COMMERCIAL LAW PROGRAM AT MELBOURNE UNIVERSITY

The Melbourne Law School offers a diverse and contemporary program in graduate law that helps you keep pace with the changing law. Subjects may be undertaken for credit towards a Masters degree or Graduate Diploma, or as single subjects with or without assessment.

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- Managed Investments Law (26 February - 4 March)
- Market Power and Competition Law (14 - 18 July)
- Principles of Corporate Finance (10 - 14 November)
- Project Finance (20 - 24 October)
- Regulation of Securities Offerings (23 - 29 October)
- Risk Management and Compliance in the Financial Services Industry (16 - 22 July)
- Securities for Corporate Lending (11 - 17 June)
- United States Securities Regulation (4 - 8 August)

(2) Corporate and general commercial

- Advanced Restrictive Trade Practices (Semester 2: Thursdays 6:30pm - 8:30pm)
- Corporate Governance and the Duties of Directors (5 - 9 May)
- Corporate Insolvency and Reconstruction (Semester 2: Mondays 5pm - 7pm)
- The Corporation as Criminal (19 - 25 March)
- Equity and Commerce (7 - 11 July)
- Law of Obligations (23 - 27 June)
- Recent Developments in Contract Remedies (7 - 11 April)

(3) Construction

- Advanced Construction Claims (17 - 23 September)
- Avoidance, Management and Resolution of Construction Disputes (19 - 25 February)
- Construction Contracts (23 - 29 July)
- Design and Construct: Specialised Construction Contracts (19 - 25 November)
- Rights and Liabilities in Construction (7 - 13 May or 12 - 18 November)

(4) Dispute Resolution

- Advanced Litigation (29 October and 20 - 25 November)
- Alternative Dispute Resolution (3 - 9 December)
- Commercial Dispute Resolution in Asia (11 - 17 June)
- International Commercial Arbitration (12 - 18 March)

(5) e-Law

- Commercial Information and the Law (2 - 8 July)
- Cybercrime (18 - 22 August)
- Dispute Resolution in the Cyberspace Era (24 - 30 September)
- Electronic Commerce Law (5 - 11 February or 18 - 22 August)
- Internet Law (26 - 30 May)

(6) Energy, Resources and Environment

- Australian Environmental Law: Rights, Regulation and Sustainability (12 - 18 February)
- Infrastructure Development in Australia and Overseas (11 - 15 August)
- International Environmental Law (18 - 24 June)
- Mineral Exploration and Production Law (8 - 12 September)
- Native Title Law and Practice (7 - 11 April)

(7) Insurance

- Insurance Litigation (30 January - 4 February)

(8) Intellectual Property

- Competition Law and Intellectual Property (26 March - 1 April)
- Copyright Law (26 - 30 May)
- Designs Law and Practice (1 - 8 October tbc)
- Intellectual Property in the Digital Age (21 - 25 July)
- International and Comparative Patent Law (3 - 9 September)
- International and Comparative Trade Mark Law (4 - 8 August)
- International Issues in Intellectual Property (3 - 7 March)
- Interpretation and Validity of Patent Systems (26 November - 2 December)
- Licensing Law and Technology Transfer (12 - 17 August)
- Patent Law (12 - 18 March or 22 - 28 October)
- Patent Practice (23 - 29 July)
- Trade Mark Practice (26 June - 1 July or 3 - 8 July)
- Trade Marks and Unfair Competition (3 - 8 April or 13 - 18 November)

(9) International Law

- Commercial Law in Asia (Semester 1: Tuesdays 5:30pm - 7:30pm)
- International Business Law (9 - 15 April)
- International Sale of Goods (6 - 12 August)
- International Trade Law (30 June - 4 July)
- Law and Economic Reform in Asia (Semester 2: Tuesdays 5:30pm - 7:30pm)

(10) Media

- Broadcasting and Telecommunications Law (25 - 29 August)
- Defamation Law (24 - 28 March)

(11) Sports Law

- Sports Marketing Law (10 - 14 February)

(12) Taxation

- Australian International Tax (Semester 2: Thursdays 6pm - 8pm)
- Capital Gains Tax: Problems in Practice (Semester 2: Wednesdays 6pm - 8pm)
- Corporate Taxation (Semester 1: Wednesdays 6pm - 8pm)
- Current Issues in Tax Law and Administration (Semester 1: Tuesdays 6pm - 8pm)
- Goods and Services Tax Principles (Semester 1: Thursdays 6pm - 8pm)
- Tax Administration (28 April - 2 May)
- Tax Litigation (Semester 2: Tuesdays 6pm - 8pm)
- Taxation of Business and Investment Income A (Semester 1: Mondays 6pm - 8pm)
- Taxation of Business and Investment Income B (16 - 22 July)
- Taxation of Controlled Foreign Companies, Foreign Investment Funds and Transferor Trusts (Semester 1: Tuesdays 6pm - 8pm)
- Taxation of Corporate Groups under Consolidation (10, 11, 19, 20, 21 February or Semester 2: Mondays 6pm - 8pm)
- Taxation Superannuation (27 November - 3 December)

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Mr Andrew Tucker, Norton Rose Amsterdam
Professor Russell Weaver, University of Louisville
Mr Peter Winn, Office of the United States Attorney

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5. NEW CORPORATE LAW BOOKS

(A) COMMERCIAL APPLICATIONS OF COMPANY LAW IN NEW ZEALAND

Authors: Gordon Walker, Terry Reid, Pamela Hanrahan, Ian Ramsay and Geof Stapledon

Publisher: CCH New Zealand Limited, PO Box 2378, Auckland 1, fax: (09) 484 3312

Publication Date: December 2002

(B) COMMERCIAL APPLICATIONS OF COMPANY LAW IN MALAYSIA

Authors: Pamela Hanrahan, Ian Ramsay, Geof Stapledon, Aiman Sulaiman and Aishah Bidin

Publisher: CCH Asia Pte Limited, 11 Keppel Road, RCL Centre, Singapore 089057, fax: (65) 6224 2555

Publication Date: August 2002

(C) THE PROSECUTION OF CORPORATIONS

Authors: Jonathan Clough and Carmel Mulhern

Publisher: Oxford University Press, Melbourne, website: <http://www.oup.com.au>

Publication Date: November 2002

The Prosecution of Corporations is the first book to examine the law of corporate prosecutions and sentencing in Australia in an integrated and comprehensive fashion. Focusing on corporations as a distinct class of offender, it provides an exposition of existing law, gives a critical analysis of the legal complexities and thoroughly reviews the legal principles that apply to corporate criminality.

Written in an accessible style by authors who have both academic credentials and corporate experience, the book:

- discusses the rationales for imposing criminal liability upon corporations;
- outlines the regulatory framework in which corporations operate;
- details the different models of corporate criminal liability including the new Part 2.5 Criminal Code Act 1995 (Cth); and
- concludes with a discussion of the vital issue of sentencing corporations and the possibilities for reform.

While the focus of the book is on Australian law, it draws upon comparative legal materials from Canada, New Zealand, the United Kingdom and the USA.

6. CONTRIBUTIONS

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

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