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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) NEW REQUIREMENT FOR PUBLIC COMPANY SHAREHOLDERS TO CALL A MEETING REVOKED BY SENATE

In [Bulletin 33](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0033.htm) (May 2000) it was reported that an amendment to the Corporations Regulations in April introduced new requirements for shareholders in public companies to requisition directors to call a meeting of shareholders. In summary, the effect of the regulation was to require directors of a public company to call and arrange to hold a general meeting on the request of:

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

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

The regulation substituted a new threshold (shareholders who constitute at least 5 per cent of the total number of shareholders of the company) for the previous lower threshold (at least 100 shareholders who are entitled to vote at the general meeting).

On 28 June 2000 the Senate (which is not controlled by the Government) disallowed the regulation. The Government tabled a statement during the Senate debate in which it said that the regulation was made because of concern that the 100 member threshold could be abused and result in unnecessary and substantial costs for largely publicly listed companies. In reply, Senator Ridgeway of the Australian Democrats stated that the regulation imposed too high a threshold and Senator Conroy of the Labor Party stated that the issue of the appropriate threshold should have been dealt with by way of a Bill amending the Corporations Law rather than a regulation. The Senate debate is available on the Parliament of Australia website at "<http://www.aph.gov.au/hansard/>".

(B) MANDATORY BID RULE SUPPORTED

On 21 June 2000 the Parliamentary Joint Statutory Committee on Corporations and Securities published its report on the Mandatory Bid Rule. The Committee recommends that the Corporations Law be amended to include a mandatory bid rule. Dissenting reports were submitted by the Labor Party and the Australian Democrats.

The mandatory bid rule would allow the acquisition of shares beyond the holding of 20 per cent of the total voting rights in a company provided the acquisition is immediately followed by the announcement of a full takeover bid.

The report is available on the Committee’s website at "<http://www.aph.gov.au/senate/committee/corp_sec_ctte/index.htm>".

(C) CORPORATIONS LAW AMENDMENT (EMPLOYEE ENTITLEMENTS) BILL

On 26 June 2000 the Senate passed the Corporations Law Amendment (Employee Entitlements) Bill. The Bill proposes the introduction of a prohibition (to be contained in a new Part 5.8A of the Corporations Law) on persons who deliberately enter into agreements or transactions (whether formal or informal, oral or written, or with or without legal effect) for the purpose of avoiding payment of employee entitlements and makes a person who contravenes the prohibition liable to pay compensation for the loss.

Employee entitlements are defined as wages; superannuation contributions payable by the company; amounts due for injury compensation; leave entitlements; and retrenchment payments. The new provisions do not include employees who are or have been directors of the company or their spouses or relatives.

The Bill will commence upon the granting of assent by the Governor-General.

(D) CORPORATE POLITICAL DONATIONS

On 21 June 2000 the Centre for Corporate Law and Securities Regulation at the University of Melbourne published a Research Report on corporate political donations.

(1) Importance of the study

Corporate political donations are of interest for several reasons including:

(a) a concern that commercial interests can be advanced by donating funds to political parties; and

(b) in the case of public companies, that the funds being donated are not those of the directors of the company who make the decision to donate the funds but are the funds of the company’s shareholders.

(2) The study’s findings

The data for the study was derived from the annual returns lodged with the Australian Electoral Commission by the major political parties for 1995/96, 1996/97 and 1997/98.

Over this 3 year period, total corporate donations were $29 million. Of this amount:

- 64% was donated to the Liberal Party while 23% was donated to the ALP;

- over $17 million was donated by public companies (with 63% of this going to the Liberal Party and 29% to the ALP); and

- more than $11.6 million was donated by private companies (with 65% of this going to the Liberal Party and 15.5% to the ALP).

With respect to donations by ASX-listed companies, most donations were by companies in the Banking and Finance sector (which donated almost $3 million over the 3 year period).

Combining donations made to all major political parties, over the three-year period studied, the Top 10 ASX-listed company donors were:

Westpac $1,272,346
Village Roadshow $1,124,800
Santos $833,800
WMC $778,500
Coles Myer $687,730
Lend Lease $669,500
Amcor $640,000
HIH $462,000
National Australia Bank $445,330
Boral $420,000

(3) Reform proposals

In Australia, concerns have been expressed about inadequate disclosure requirements for political donations. The Electoral Act requires disclosure of political donations. However, disclosure under this Act is inadequate because it does not require disclosure of "financial benefits" other than donations and loans made to political parties. For example, it may not catch a bank forgiving a loan made to a political party. In January 2000 the Australian Democrats outlined reform proposals:

- To require shareholder approval of "donation policies" of public companies. This follows the UK Government announcement that it will amend its Companies Act to require that any company wishing to make a donation to a political party in the UK must obtain the prior approval of its shareholders.

- To require "full donations disclosure" in a public company’s annual report.

Copies of the Research Report are available for sale – please see [Item 7](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0034.htm#7.centreforcorporatelawresearchreport) of this Bulletin.

(E) TASKFORCE ON INDUSTRY SELF-REGULATION – DRAFT REPORT

On 6 June the Federal Government’s Taskforce on Industry Self-Regulation released its draft report. The matters dealt with in the report include:

(1) types of self-regulation in consumer markets in Australia;

(2) gaps and overlaps in the coverage of self-regulation;

(3) industry environment and market circumstances where self-regulation is likely to be most effective;

(4) good practice and cost-effective self-regulation methods;

(5) approaches to promoting and coordinating industry self-regulation; and

(6) options that facilitate the improvement and harmonisation of dispute resolution schemes.

The report is available on the Treasury website at "<http://www.treasury.gov.au>" under the heading of "What’s New".

(F) THE IMPACT OF RE WAKIM ON FEDERAL COURT MATTERS

On 30 May 2000, the Attorney-General, the Hon Daryl Williams, tabled in Parliament statistics regarding the impact of the High Court decision in Re Wakim on Federal Court matters. The decision in Re Wakim removed most of the jurisdiction of the Federal Court to hear corporate law matters. The decision is discussed in [Corporate Law Email Bulletin 22](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0022.htm).

The High Court handed down its decision in Re Wakim on 17 June 1999. In the 24 months up to June 1999, 1500 corporations law cases were filed in the Federal Court or 62 cases each month on average. In the period July 1999 to March 2000, only 6 corporations law cases were filed in the Federal Court or less than 1 case each month on average.

(G) COMPANIES AND SECURITIES ADVISORY COMMITTEE – CORPORATE GROUPS FINAL REPORT

On 16 June 2000 the Companies and Securities Advisory Committee released its Corporate Groups Final Report, following a comprehensive review of the issues relating to the use of the corporate group structure. The Advisory Committee is a statutory body set up to advise the Federal Treasurer and the Minister for Financial Services and Regulation on all aspects of corporate law.

In releasing the Report, the Convenor of the Advisory Committee, Richard St John, said:

"Many corporate businesses, including over 90% of Australia’s top 500 listed companies, employ a corporate group structure. This Report examines the issues and difficulties that can arise in the administration of these groups. The Advisory Committee identifies a number of areas where changes are necessary to assist corporate groups to operate with optimal efficiency, while ensuring that the rights of minority shareholders and outside creditors are not compromised."

(1) Synopsis of the Recommendations

(a) Methods of regulating corporate groups

- A single uniform control test should replace the holding/subsidiary and related company tests.

- A wholly-owned corporate group should have the choice to be a consolidated corporate group for all or some of its group companies and be governed by single enterprise principles.

- The prescribed ASIC Deed of Cross-Guarantee should clearly indicate that a wholly-owned corporate group does not retain liability under that Deed for the pre-sale debts of a group company once that company has been sold.

(b) Directors of group companies

- Directors of a solvent partly-owned group company should be permitted to act in the interests of the parent company if authorised by the minority shareholders of the partly-owned company. Where that authorisation is given, all minority shareholders who did not vote in favour of the resolution should have buy-out rights.

- Directors of all companies should be required to disclose all situations that may put them in positions of conflict of duty or interest.

(c) Corporate group reconstructions

- Wholly-owned group companies should be able to merge with each other or with their parent company with the approval of the directors of each of the merging companies.

- Any other companies should be permitted to merge, with the approval of the board of directors, and the shareholders, by special resolution of each company.

- There should be a new court-approved merger provision.

- The provisions regulating asset and liability transfer schemes of arrangement should be amended to apply to partial consolidations and/or partly-owned group companies.

- Liquidators should be permitted to assign a company’s liabilities with the consent of all the creditors or the court.

- An administrator should be permitted to pool the administration of several companies where no creditor who attends the creditors’ meetings votes against the proposal or the court otherwise approves.

(d) Liquidation of group companies

- Liquidators should be permitted to pool the unsecured assets of two or more group companies in simultaneous liquidation with the prior approval of all unsecured creditors of those companies.

- Courts should be permitted to make pooling orders where two or more companies have simultaneously gone into liquidation.

The Report is available from the ASIC website at "<http://www.asic.gov.au>".

2. RECENT ASIC DEVELOPMENTS

(A) ASIC PUTS TECHNOLOGY COMPANIES UNDER THE DISCLOSURE MICROSCOPE

On 22 June 2000 ASIC and the Australian Stock Exchange Limited announced that ASIC will contact a representative sample of ASX listed entities to review aspects of their compliance with obligations under the Corporations Law. This initiative is part of an expansion in the joint Continuous Disclosure Program commenced by ASIC and ASX in February this year. The program will expand to all state capitals after its initial success in Perth and Brisbane and be broadened to place more emphasis on best practice disclosure.

Up to now, the first point of contact with companies falling within the project was an audit letter. The program initially targeted delays in the release of price sensitive information by listed companies in the technology and mining sectors which would have had the effect of increasing the price of the companies shares.

ASIC and ASX will initially look at newly listed companies or those which recently raised funds to assist in a backdoor listing under ASX Listing Rule 11.1. The program will examine company activities against two benchmark documents:

(i) the prospectus issued by the company; and

(ii) the cash flow statement lodged by the company under ASX Listing Rule 4.7B.

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(B) ASIC POLICIES AND CLERP CHANGES

On 22 June 2000 ASIC highlighted a number of policy updates it has implemented to the fundraising provisions of the Corporations Law as amended by the Corporate Law Economic Reform Program (CLERP) Act 1999. The CLERP Act commenced operation on 13 March 2000. The updates were necessary as the Commission continues to monitor the need for class order relief and fine tuning of its Policy Statements.

(1) Amendments to Policy Statement 152

Issuers are reminded that to make a disclosure document generally available, they should, in most cases, place the document on an internet web site for a minimum period of seven days after it was lodged with ASIC.

During that period the document is to be available for public scrutiny and applications may not be accepted (see section 727(3) of the Law). ASIC believes it is essential for companies to comply with this requirement to make the disclosure documents generally available during the exposure period and it will take action in appropriate cases where this does not happen.

To help issuers circulate disclosure documents on the internet during the exposure period ASIC has clarified a number of aspects of Policy Statement 152.

Application forms will not need to be circulated with a disclosure document during the exposure period unless the form incorporates information by reference or acts as a supplementary disclosure document. Where the issuer does not circulate the application form with the disclosure document and states that offers will only be made after the exposure period by hard copies of the document, the requirements of class order [CO 00/44] will be avoided. That class order has been amended to reflect this change.

Issuers who do intend to make an offer over the internet are advised that Policy Statement 141 strongly recommends that jurisdictional disclaimers should be placed on web sites where the disclosure document can be accessed by people outside of Australia. These disclaimers combined with appropriate conduct may avoid unintentional infringement of foreign securities laws.

(2) Employee share schemes

ASIC is waiting for the Parliamentary Inquiry recommendations and the Government’s response to them before reviewing its employee share scheme policy statement (PS 49). It has, however, made some concessions on a case by case basis which have expanded the width of available relief for individual applicants.

These concessions include:

(a) extending the relief to casual employees;

(b) reducing the period during which domestic and foreign securities must have been listed; and

(c) extending relief to offerings of securities listed on certain exempt markets.

ASIC has issued two new class orders dealing with offers of shares through a trust structure [CO 00/223] and employee share and option contribution plans [CO 00/224].

ASIC has declined to extend the policy statement to partly paid securities and has declined to allow total employee share offers to exceed 5% of the issued capital. In the latter case issues under section 708 of the Law which are otherwise exempt from the need for a disclosure document do not count toward the 5% limit.

(3) Other class orders

(a) Warrants

Institutions issuing warrants under the ASX Business Rules will be exempt from the disclosure document requirements of Chapter 6D.2 of the Law and many of the advertising and liability provisions which would otherwise apply.

This conditional relief is available where the warrant is over quoted securities and otherwise complies with ASX business rules. The relief also applies to people who purchase the warrants in the ordinary course of ASX trading.

Full details are contained in class order [CO 00/1068]. This class order will remove the current need for many warrant issuers to apply for individual relief.

(b) Application form relief for bonus issues of options

Class Order [CO 00/1092] provides conditional relief to allow a body whose securities are listed on the ASX to make a bonus issue of options without the need to comply with certain requirements of the Corporations Law concerning application forms at the time of the bonus issue.

(c) Transitional arrangement under the exempt offering provisions

Class Order [CO 00/237] modifies the Corporations Law to clarify whether and to what extent issues and sales of securities resulting from offers made before the commencement of Chapter 6D or under disclosure documents regulated by former Part 7.12 Div 2 are to be counted for the purposes of the small scale offerings (20 issues in 12 months exemption) in section 708(1).

(d) Dividend reinvestment

Section 708(13)(a) of the Corporations Law and regulation 6D.2.02 of the Corporations Regulations have the effect of exempting certain offers by companies and foreign companies under dividend reinvestment plans and bonus share plans from the disclosure requirements in Chapter 6D of the Law. Class Order [CO 00/238] extends the exemption to registrable Australian bodies and ensures that companies are able to take advantage of the exemption outside their jurisdiction of registration.

(e) Disclosure by registered Managed Investment schemes

Class Order [CO 00/240] provides some additional certainty when interpreting Chapter 6D as it applies to offers of interests in managed investment schemes. For example, this class order avoids any doubt that the disclosure required by section 711(2)(a) is disclosure of interests relating to the formation or promotion of the scheme, not its responsible entity. Similarly, this class order avoids any doubt that the "business" and "financial report" referred to in section 715(1)(b) and (i) are those of the scheme, and not those of its responsible entity.

(f) Announcing spinoffs by listed companies

Class Order [CO 00/656] allows a listed body to make an announcement to a securities exchange about an offer or intended offer of securities by a subsidiary of the listed body, without breaching section 734(2) of the Law. The announcement should contain nothing more than the material required by law or by the rules of the securities exchange. The class order has the effect of widening the exception to section 734(2) which is created by section 734(7)(a).

(g) Options over listed securities

Class Order [CO 00/843] provides conditional relief so that an offer of options to acquire quoted securities under a disclosure document will not be subject to the exposure period contained in section 727(3) of the Law.

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(C) ISSUES WITH CONCISE FINANCIAL REPORTS

On 21 June 2000 ASIC announced that its review of selected concise reports sent to shareholders for 1999 has found some entities are adopting a "minimal effort" approach.

ASIC Chief Accountant, Jan McCahey said the ASIC review found some entities did not comply with the spirit of the concise reporting requirements, which is to include information relevant to evaluating the business but without all the detailed accounting disclosures included in a full financial report. "The concise report is the only financial report sent to many company shareholders and, in the interests of investors being fully informed, companies need to make a greater effort to give more meaningful information to those shareholders," Ms McCahey said.

Several deficiencies were noted in the review. Some companies:

(a) did not clearly identify that the concise report was not the full report (eg in the title of the report);

(b) did not give a meaningful discussion and analysis of the company’s financial position and performance (eg some companies stated changes in figures from the prior year but gave no explanation of underlying causes);

(c) did not state that the report is a concise report and that the full financial report and auditor’s report could be sent to members free of charge on request;

(d) did not note the limitations of the concise financial report as compared to the information included in a full financial report or note that the concise financial report is derived from the full financial report. Most companies which did provide this information did not display it in a prominent way as required by accounting standards; and

(e) did not provide details of dividends paid and proposed as required by accounting standards.

A number of companies did not lodge the full financial report or the concise financial report before the Corporations Law deadline.

In one case, a company’s concise report stated that the full financial report was available on the company’s website but it was not available. That company’s staff would not accept standing requests from members for future full financial reports despite the requirements of the Law.

Ms McCahey said 1999 was the first year that most entities were allowed to send concise reports to shareholders and ASIC would be looking closely at this year’s reports for an improvement.

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(D) FINANCIAL REPORTING ISSUES

On 21 June 2000 ASIC stated that some financial reports looked at by the regulator in its six month review had a number of disappointing deficiencies. ASIC released the results of its most recent surveillance of 100 full financial reports of listed entities for the last six months of 1999.

The review focussed on disclosure of directors’ and officers’ emoluments, revenue recognition, and recognition and amortisation of intangible assets.

ASIC was again disappointed at the disclosure of directors’ emoluments where many companies did not:

(a) disclose the value and terms of options granted to directors and officers;

(b) disclose the emoluments of all or some of the five executive officers receiving the highest emoluments;

(c) adequately state the policy for determining the nature and amount of emoluments or did not discuss the relationship between that policy and the company’s performance.

The Law requires the amount of all emoluments to be disclosed, including the value of options. All options granted have some value at the time of issue. The terms of some options mean that they have significant value.

ASIC also found that some companies are recognising revenue before services are rendered, contrary to the requirements of AASB 1004 "Revenue". Other companies did not provide any details of revenue recognition policies.

ASIC Chief Accountant, Jan McCahey said she was concerned that businesses might adopt policies designed to record revenue earlier than was appropriate in order to achieve revenue on or about a target. "Because of this ASIC will continue to focus on revenue recognition policies in future reviews," Ms McCahey said.

Some entities are still refusing to amortise intangible assets in accordance with AASB 1021 "Depreciation". However, there is some evidence that other entities have responded positively to ASIC’s emphasis on amortisation of intangible assets. ASIC remains concerned by claims by some entities that they did not amortise because the assets had indefinite or infinite lives, or that amortisation would be immaterial because of the long lives of the assets and the residual values at the end of their lives.

ASIC is also concerned that the values attributed to many unamortised intangible assets include internally-generated or purchased goodwill. Recognition of internally-generated goodwill is prohibited by accounting standards and purchased goodwill must be amortised over no more than 20 years.

Other matters ASIC noted included:

(a) failure to include bailment stock and the related liability to a financier on the balance sheet; and

(b) deferring expenditure relating to establishment of an online business.

Ms McCahey said ASIC intended to focus on reporting by the following types of entities in the first half of 2000:

(a) companies engaging in "new economy" activities, with particular focus on revenue and asset recognition, and lease accounting; and

(b) Former government-owned enterprises which have recently been privatised.

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(E) ASIC GUIDELINES FOR INTERNET DISCUSSION SITES

On 20 June 2000 ASIC released for public comment its proposed policy paper for the operation of internet discussion sites (IDSs) including web based bulletin boards. The guidelines propose conditions under which people can operate IDSs without having to obtain an ASIC licence.

The proposed guidelines apply to IDSs that carry information, opinions or advice about securities which can be viewed by anyone accessing the site. The material displayed on an IDS may range from stock tips, information about listed companies and price movements of certain stock to personal opinions about certain stock. The operation of these IDSs may be an investment advice business as defined in the Corporations Law. Under the Law, all investment advice businesses are generally required to operate under an ASIC licence.

Information on IDSs can reach vast audiences with relative ease, low cost and speed. Depending on the way IDSs are operated and used, they have the potential to become effective and inexpensive self-education tools for internet users or a medium by which securities frauds can be easily perpetrated on consumers.

ASIC’s proposed guidelines for IDSs attempt to strike a balance between the need to foster investors’ access to an inexpensive and easy method of self-education using the internet, and the need to ensure consumer protection and market integrity are not put at risk by increased opportunity for market manipulation and unconscionable conduct using IDSs.

ASIC’s proposed guidelines for operating IDSs without a licence cover three areas:

(a) disclosures and warnings to people who read the material displayed on IDSs;

(b) warnings to people who post material on IDSs; and

(c) obligations for people who operate IDSs.

Warnings to users of material on IDSs are designed to alert them to the dangers of relying on this material to make investment decisions because the material is not professional investment advice.

Warnings to people posting material on IDSs are designed to make sure they know they are personally responsible for the accuracy and authenticity of the material they post on the IDS.

IDS operators are subject to obligations including the need to maintain proper identities of the people who make postings on the IDS and provide that information to ASIC where necessary to enhance ASIC’s ability to monitor the activities on IDSs.

ASIC seeks public comments on the proposals by 25 July 2000. The policy proposal paper is available from the ASIC Infoline on 1300 300 630 and is available on the ASIC web site at "<http://www.asic.gov.au>".

Comments on the policy proposal paper should be sent to:

Dhammika Amukotuwa
Principal Lawyer
Regulatory Policy Branch
ASIC
Ph: (03) 9280 3395
Fax: (03) 9280 3006
email: dhammika.amukotuwa@asic.gov.au

(F) ASIC SEEKS COMMENT ON MUTUALITY

On 19 June 2000 ASIC announced its proposed policy on mutuality.

ASIC will use the proposed policy to decide on applications for exemption from the disclosure requirements that apply when credit unions, building societies and friendly societies plan to demutualise (see Corporations Law (Part 5 Sch 4)).

The final policy will replace Interim Policy Statement 147, which is currently being used by ASIC and APRA. The closing date for industry comment is Friday 21 July 2000.

The policy proposal is available on ASIC’s website at "<http://www.asic.gov.au>".

For further information contact:

Malcolm Rodgers
Director Regulatory Policy
ASIC
Tel: (02) 9911 2680

(G) ASIC GRANTS INTERIM EXEMPTION FOR REDUNDANCY FUNDS

On 14 June 2000 ASIC announced that it had granted an interim exemption from the Law while it conducts a public consultation program into trust funds established to protect employees’ redundancy entitlements.

These funds are known as redundancy funds because they are set up to pay workers’ redundancy payments in the event of company failures. While they may not be primarily investment related, ASIC is considering whether they should be regulated under the managed investments provisions of the Corporations Law.

Following consultation with the Federal Treasury Department, ASIC will undertake the public consultation to assess the consumer protection issues that arise in relation to redundancy funds. ASIC will particularly consider if members of these schemes need the same protection under the law as those who invest in other managed investment products.

A policy proposal paper will be released for public comment later this year.

In the meantime, ASIC has granted interim relief for redundancy funds from the requirements of the managed investments provisions of the Corporations Law. Relief has also been granted for those funds which are still governed by the prescribed interest provisions of the law.

The relief will expire on 30 June 2001, in order to provide a sufficient period for the industry to comment and for ASIC to finalise its regulatory approach.

For further information contact:

Darren McShane
Director, Managed Investments, ASIC
Tel: (02) 9911 2181
Mob: 0411 549 266

3. RECENT ASX DEVELOPMENTS

(A) ASX LISTING RULE CHANGES - EFFECTIVE 1 JULY 2000

(1) Quotation

Appendix 2A (application for quotation) has been merged with Appendix 3B (notice of new issue of securities). This means only one document has to be given to ASX instead of 2 documents at separate times.

(2) Periodic Disclosure

The changes to the half yearly/preliminary final report (Appendix 4B) are as follows.

(a) There will no longer be a separate Appendix 4B for non-equity accounted reporting. The amended format will cater for reporting of both.

(b) The remaining Appendix 4B includes changes in terminology. This format is to be used until the proposed changes to accounting standards come into effect.

(c) A new Appendix 4B will be introduced, reflecting changes to accounting standards. This format is to be used after those changes come into effect.

(3) Securities

Options issued by an entity at the time of admission will still require an exercise price of at least 20 cents, but this will no longer be a requirement for options issued by the entity after listing.

(4) Changes in capital and new issues

A ratio greater than 1:1 will be permitted under a pro rata offer of securities if the offer is renounceable and the issue price is not greater than the average market price over 5 days.

Shareholder approval will no longer be required for the introduction of an employee incentive scheme or for changes to an existing scheme. However, issues to related parties under a scheme will still require shareholder approval.

(5) Transactions with persons in a position of influence

Shareholder approval will no longer be required for an issue to related parties where the issue is of securities in the main class, to all security holders on the same terms, and to a value of up to $3,000 per holder.

Shareholder approval obtained for an issue of securities to a related party will now be taken as satisfying the requirement for shareholder approval under the 15% rule if the notice of meeting contains a statement to that effect.

Shareholder approval for an issue of securities to a related party will no longer require a special resolution.

(B) ASX BUSINESS RULE CHANGES - EFFECTIVE 1 JUNE 2000

(1) Authorised Deposit Taking Institutions

(a) Amendments to the ASX Business Rules came into effect on 1 June 2000:

(i) to introduce a concept of "ADI" (Authorised Deposit-Taking Institutions) as a general definition in the Rules and have it replace the term "bank" where appropriate; and

(ii) to ensure that the trust accounts which Participating Organisations hold on behalf of their clients can only be held with ADIs incorporated in Australia which have a rating of at least short term investment grade.

These amendments have been incorporated in an Amendment List and have been distributed to Business Rules subscribers.

4. RECENT CORPORATE LAW DECISIONS

(A) UNFAIR PREFERENCES IN CONSTRUCTION CONTRACTS
(By Adam Brooks, Solicitor, Herbert Geer & Rundle)

Minister for Transport v Ian Charles Francis and Antony Leslie Woodings as joint liquidators of Civcon Pty Ltd (in liq) [2000] WASCA 149, Supreme Court of Western Australia, Full Court, Kennedy, Pidgeon and Templeman JJ, 1 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/june/2000wasca149.html>"

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

Civcon Pty Ltd ("Civcon") entered into a contract with the Western Australian Minister for Transport ("the Minister") to construct a harbour at Exmouth in January 1996. The contract provided for a lump sum payment to Civcon to be paid progressively upon the issue of progress certificates by the contract superintendent.

In April and May 1996, Civcon received payments from the Minister notwithstanding that progress certificates had not yet been issued. These payments (totalling approximately $300,000) were to be brought to account by being credited against future progress certificates. The payments were made because Civcon experienced some unforeseen delays in performing the contract and because the excavation of rock for the harbour construction was found to be unexpectedly difficult. Civcon pursued a latent condition claim against the Minister under the contract and on 9 August 1996 the superintendent offered to increase the contract price by an amount of approximately $450,000. The superintendent’s letter stated:

"Any agreement to pay a variation ... would be dependent on an agreement by the Contractor to repay any monies currently held by him ... outside the terms of the Contract ..."

Civcon agreed to the $450,000 increase in the contract price and accepted a payment certificate which stated that the April and May advances (totalling $300,000) were to be repaid out of the $450,000.

On 4 October 1996, the respondents were appointed as administrators of Civcon and on 31 October 1996, they became Civcon’s liquidators. The liquidators claimed that the deduction of the sums totalling $300,000 from the 9 August 1996 certificate was an unfair preference by reason of section 588FA(1) of the Corporations Law which provides as follows:

"A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

(a) the company and the creditor are parties to the transaction (even if someone else is also a party); and

(b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company..."

In trying to recover the $300,000 as an unfair preference, the liquidators argued that the payments made before the issue of progress certificates were effectively loan advances. Alternatively, the liquidator argued that the 9 August 1996 certificate constituted an acknowledgement by Civcon of debts owed to the Minister totalling $300,000 and that debt was subsequently discharged.

All three judges dismissed the liquidators’ application and concluded that the transaction in question did not involve an unfair preference. Kennedy J agreed with the reasons of Templeman J with Pidgeon J giving a separate but similar judgment.

Templeman J noted the High Court’s approach to composite transactions in Richardson v The Commercial Banking Co of Sydney Ltd (1951-52) 85 CLR 110, 132:

"In considering whether the real effect of a payment was to work a preference its actual business character must be seen and when it forms part of an entire transaction which if carried out to its intended conclusion will leave the creditor without any preference priority or advantage over other creditors the payment cannot be isolated and construed as a preference."

Templeman J suggested that if there is a complex transaction, involving a number of elements, it is necessary to regard each element as a separate transaction for the purposes of section 588FA and in particular to identify any sub-transaction which results in a creditor receiving something from the company "in respect of an unsecured debt that the company owes to the creditor". Templeman J further held "that sub-transaction, or element of the complex transaction is then the relevant transaction for the purposes of the section".

Templeman J said that the key question was whether the transaction of 9 August 1996 resulted in the discharge of an unsecured debt. Templeman J did not construe the events of 9 August 1996 as embodying an agreement that Civcon was indebted to the Minister.

Templeman J noted that the Minister paid the net amount to Civcon rather than paying to Civcon the whole amount certified followed by a repayment by Civcon of the $300,000. Templeman J held that the overall transaction, or any element of it did not result in a decrease in the net value of the assets available to Civcon’s creditors because the Minister was not a creditor of Civcon but was rather a debtor, with the result that section 588FA had no application.

Templeman J held that if on the contrary there was a transaction that fell within the ambit of section 588FA, it would be necessary notionally to set that transaction aside and, if that were done, then so too must the net payment of $150,000 be set aside because it would be unrealistic to separate these items. Templeman J held that in those circumstances, it would be inappropriate to ask what the Minister would receive if he were to prove for the debt in a winding up because he would then be a debtor who would be the subject of a claim by the liquidators for the whole amount of the certificate. Templeman J held that in the circumstances, it could not be said that if the transaction of 9 August 1996 was set aside, the Minister would receive less than he received on 9 August 1996 if he were to prove in a winding up.

Pidgeon J said that the critical question was whether the Minister was a creditor of Civcon when the monies were deducted from the progress payment on 9 August 1996. Pidgeon J considered that the inference was compelling that at the time the relevant payments were made, they were paid on account of the contract price. This was because the payments were made at a time when the contract was on foot and whilst Civcon was performing the contract. Pidgeon J held that it was intended that the advance payments could be credited against future certificates but that the Minister did not have a right of action to recover the advance payments.

Pidgeon J held that once the conclusion was reached that the payments were made on account of the contract price and that the Minister had no right of action to receive the advance payments, then the Minister was not a creditor of Civcon with the result that section 588FA(1) had no application.

This case is a reminder that establishing that the alleged recipient of an unfair preference was a creditor of the insolvent company is a key threshold step in making out a claim. In circumstances where a payment is made on account of a contracted price, the requisite relationship is not established.

(B) REVIEW OF THE POWERS OF THE COURT IN RELATION TO THE EXTERNAL ADMINISTRATION PROCESS UNDER PART 5.3A
(By James Paterson, [Phillips Fox](http://www.phillipsfox.com.au))

Australasian Memory Pty Limited v Brien [2000] HCA 30, High Court of Australia, Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ, 25 May 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/may/2000hca30.html>"

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

In Australasian Memory Pty Limited v Brien, the High Court of Australia reviewed the operation of the external administration process under Part 5.3A of the Corporations Law (‘the Law’) and the court’s power to alter the operation of Part 5.3 of the Law under section 447A. Part 5.3A provides for the administration of the affairs of insolvent companies.

The respondents were appointed joint administrators of the first appellant (‘the Company’) following a resolution of the directors of the Company pursuant to section 436A of the Law. The respondents convened the first meeting of creditors as required under Part 5.3A within the prescribed time.

Section 439A(2) requires a second meeting to be held within 5 days after the end of the convening period. The convening period is fixed by section 439A(5), but may be extended by a court under section 439A(6).

In this case, the second meeting of creditors was held 8 days before the end of the convening period fixed by section 439A(5). That meeting was adjourned until 24 March 2000, which was 4 days after the last day on which the meeting could be held under section 439A(2). No court order had been sought or granted for an extension of time under section 439A(6). On 24 March 2000, the creditors resolved to wind up the Company and, under section 446A, the administrator became the liquidator for the purposes of winding up the Company.

The respondents then took substantial steps to get in and realise the Company’s assets including issuing statutory demands to 2 companies associated with the second appellant. Those companies sought to have the statutory demands set aside by the Federal Court.

(1) Federal Court decision

The Federal Court granted the application on the grounds that:

(a) The creditors’ meeting which had been adjourned was invalid and of no effect as it was not convened within the period permitted by section 439A(2).

(b) Consequently, the creditors’ resolutions at that meeting were invalid and of no effect.

The respondents (in the name of the Company) applied for orders from the Federal Court validating the meeting. The court held that the respondents were not able to bring the application in the name of the Company and dismissed the application.

(2) Supreme Court of New South Wales decision

The respondents then applied to the Supreme Court of New South Wales for orders curing the irregularity in the calling of the second meeting of the Company’s creditors.

Santow J made the orders sought, under section 1322, to abridge the period for holding the second creditors’ meeting and declared the resolutions made valid. The court also ordered that, pursuant to section 447A, Part 5.3A of the Law was to operate ‘in relation to the company’ as if section 439A(2) and various other sections were modified in the manner required.

(3) Court of Appeal of New South Wales decision

The appellants then appealed to the Court of Appeal of New South Wales, which upheld the decision of Santow J. By special leave, the appellants appealed to the High Court against the orders dismissing their appeal to the Court of Appeal.

(4) High Court of Australia decision

The appellants contended that section 447A did not enable a court to make an order departing from the timetable for a second meeting of creditors prescribed by section 439A, or at least not after an administration has ended.

(a) Part 5.3A of the Corporations Law

Section 447A empowers a court to make orders about how Part 5.3A is to operate "in relation to a particular company". Part 5.3A contains detailed provisions about how and when the administration of a company is to operate.

(b) Interaction of general power under section 447A(1) given particularity of section 439A(6)

The appellants submitted that as section 439A(6) makes particular provision for extension of the timetable for a second meeting of creditors, section 447A(1) should not be construed as permitting a variation to that timetable and relied on the decisions of Gavan Duffy CJ and Dixon J in Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Union of Australia (1932) 47 CLR 1 at 7 and of Dixon J in R v Wallis (1949) 78 CLR 529 at 550.

The court held that the appellants argument was fundamentally flawed: section 447A is not properly described as a general power standing apart from the scheme found in Part 5.3A, as it enables the making of orders which alter the way in which ‘this Part is to operate in relation to a particular company’. To characterise section 447A as a ‘general source of power to which resort cannot be had because to do so would "circumvent" the statutory limitations upon the exercise of the power that is given by section 439A(6)’ would be to ‘give all of the other provisions of Part 5.3A a fixed and unchanging operation in relation to all companies.’

The court stated that ‘the evident legislative intention of section 447A is to permit alterations to the way in which Part 5.3A is to operate’. Further, there is nothing on the face of section 447A(1) that suggested it should be read down. The court relied on the decision of Owners of "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404.

(c) Does section 447A apply unless there is continuing administration (or, presumably, an extant deed of company arrangement)?

The court held that as section 447A allows the court to vary the operation of Part 5.3 in relation to ‘a particular company’ rather than a ‘particular administration’, the court was empowered to make orders in relation to the operation of the Part which would otherwise result in the end of an administration under that Part. The temporal requirement arising from the expression ‘how the Part is to operate’ is satisfied if orders made under section 447A are orders that have effect only from the time of their making, albeit that the orders are made in respect of past matters or events.

The court held that a company can enter administration under Part 5.3A more than once. Part 5.3A provides for an administration to end in a number of ways, including by execution of a deed of company arrangement, a creditors’ resolution that the administration should end or a creditors’ resolution that the company should be wound up.

The court determined that where a second meeting of creditors was not convened in accordance with section 439A, the Law provides no greater consequence than that the administration ends.

The court also determined that the propositions that section 447A only authorises orders with prospective effect and cannot be used to make orders where to do so would effect vested rights are closely connected. The court distinguished between 2 instances. First, where actions had been taken by officers and third parties in reliance upon an administration ending other than by winding up of the company or deed of company arrangement. Secondly, where, as in this case, all parties acted on the basis that the company has validly entered a deed of company arrangement or gone into liquidation.

In the first example, the court said that ‘reinstatement of the administration may well be inconsistent with the rights which were created in the intervening period.’ However, in this case, the orders would not adversely affect any rights, in fact they ‘might be said…to operate to perfect the rights which the parties to the transaction intended to create’. The court held, more generally, that even if the orders would not perfect rights, section 447A should not be read down.

In the circumstances, the court determined that it was not necessary to make any decision in relation to the relationship between section 1322 and section 447A.

The court dismissed the appeal.

(C) APPOINTMENT OF A RECEIVER OR LIQUIDATOR?
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

Avonwood Homes Pty Ltd [2000] VSC 216, Supreme Court of Victoria, Mandie J, 5 May 2000, judgment revised 25 May 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/may/2000vsc216.html>"

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

Avonwood Homes Pty Ltd and two other companies ("Avonwood") applied for the appointment of a receiver and manager to their assets and undertakings, as they had clearly become insolvent. Avonwood relied on section 37(1) of the Supreme Court Act under which the court has power to appoint a receiver and manager where it considers it is ‘just and convenient’.

Avonwood also sought orders that:

(a) While a receiver and manager was appointed, a proceeding in a court could not be initiated except with the receiver’s written consent or with the leave of the court.

(b) The receiver and manager not be required to provide security.

Avonwood submitted that the perception created by the appointment of a provisional liquidator, or a liquidator, would be detrimental to the sale of the companies’ assets and that appointment of a receiver and manager would better secure the assets of the companies (primarily building contracts).

Justice Mandie found that given the publicity surrounding Avonwood’s financial position, the affidavits as to Avonwood’s insolvency and the industry’s knowledge of this fact, any party who was interested in buying all of Avonwood’s building contracts would be well aware of the position of the company. Consequently, there would be no difference in perception arising from appointment of a receiver or liquidator and the perception created by appointment of a liquidator rather than a receiver and manager was an irrelevant consideration.

The court held that:

(a) In general, a receiver ought not to be appointed once companies are insolvent.

(b) The statutory avenues under the Corporations Law should not be disregarded nor should the court step in and use its powers to appoint the receiver unless there is ‘no reasonable or satisfactory alternative’.

(c) The Corporations Law provides two methods for dealing with insolvent companies, which have built-in protections for the company and for unsecured creditors and their equality of treatment. The need for the additional orders sought by Avonwood to effect such protection and to dispense with the usual requirement that a receiver provide security, were further reasons to prefer the normal Corporations Law procedures.

Fortified by Avonwood’s failure to produce financial statements, Justice Mandie found there would be no advantage in appointing a receiver. In the circumstances, there was no significant detriment which would be caused by following the provisions of the Corporations Law and there was no overriding reason why they should not be followed.

Justice Mandie adjourned the application sine die but refused the relief sought. Avonwood then successfully applied for a provisional liquidator to be appointed.

(D) SERVICE BY REGISTERED POST
(By Stephen Magee)

Rams Developments Pty Ltd v Allen [2000] SASC 133, Supreme Court of South Australia, Burley J, 30 May 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2000/may/2000sasc133.html>"

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

This decision deals with the tortured issue of service under the Corporations Law.

A statutory demand was sent by registered post to a company. It was addressed to the company's registered office. At the post office (for reasons unexplained), it was put into the company's PO box. From there, it was collected by one of the company's directors. The director took it to the registered office. There, the envelope was opened (two days after the director had collected it from the post office).

This being a statutory demand, the date of service was, naturally, critical. There were a number of possible events that could arguably be said to have constituted service:

(a) when the demand was placed in the PO box;

(b) when the demand was picked up by the director; and

(c) when the envelope was opened.

Burley J held that the demand was served when it was collected by the director.

His Honour held that the collection by the director constituted personal delivery to a director of the company under section 109X(1)(b).

He dismissed possibility (a), because section 109X(1)(a) requires delivery to the registered office. He held that delivery to a post office box does not satisfy this requirement:

"In this case there has not been effective service by registered post in the sense that the document is taken to the registered office of the corporation and, if someone is in attendance there, a signed receipt is obtained by the postal employee when the document is delivered. Nor has there been an attempt to deliver the document to the registered office in circumstances where, there being no one in attendance, a card has been left requesting the occupant of the premises to collect the document from the post office."

To hold that service occurred when an envelope was actually opened would undermine the statutory demand scheme; it would effectively allow a company to determine the date of service - if any:

"If the director chooses not to open mail received on a given day, that cannot delay effective service until such time as the envelope is actually opened. To hold otherwise would leave it open to corporations to argue that there has been no effective service until the mail is actually opened. By this means the commencement of the rigorous time limit of 21 days provided for in section 459G of the Law could be deferred for indefinite periods of time."

COMMENT

This decision points up the unsatisfactory state of the Corporations Law in this area.

In the course of his judgment, Burley J comments on the contradictory state of both the legislation and the case law. To a large extent, of course, the case law merely reflects the confusion of the legislation.

Section 109X(1)(b) refers to "delivering a copy of the document personally to a director". It arguably stretches the terms of the statute to apply them to a situation where a director collects, from a PO box, a piece of mail addressed to the company. When a director collects mail addressed to his or her company, the director is doing so qua agent of the company, so that it is difficult to see how there is an element of "delivering personally" to that director.

His Honour's interpretation of section 109X(1)(b) appears to draw on the decisions of O'Bryan J in Racecourse Totalizators Pty Ltd v Hartley Cyber Engineering Pty Ltd (1989) 7 ACLC 902 and of Senior Master Mahoney in Re Amanatidis Holdings Pty Ltd (1991) 9 ACLC 507. Burley J summarises Racecourse as standing for the proposition that "a demand sent by security post which was collected from the post office by a director would only prove service upon one director". This summary of Racecourse is very similar to that of Senior Master Mahoney in Amanatidis. However, it is arguable that this interpretation overstates O'Bryan J's conclusion. It is possible to read O'Bryan J's judgment as falling short of a positive statement that collection by a director constitutes personal service on that director.

The real problem in this case was that the document, although addressed to the company's registered office, was diverted to its PO box - a situation obviously not envisaged by the drafters of the statute. However, if one surveys the case law in this area, it is largely a collection of fact situations that didn't fall within the neat boundaries of the statute. Decisions such as the one in this case are no more than a reflection of the problems faced by the courts when trying to shoehorn those facts back into the constraints of the legislation.

(E) ADMINISTRATOR’S DUTY TO CHECK VALIDITY OF OWN APPOINTMENT
(By Stephen Magee)

DCT v Portinex/Silindale/Dalvale No.2 [2000] NSWSC 557. Supreme Court of New South Wales, Austin J, 15 June 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/june/2000nswsc557.html>"

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

To what extent, if any, does an administrator have to check the validity of his/her appointment?

The Commissioner of Taxation had challenged a deed of company arrangement, on the grounds, inter alia, that the administrator's appointment had been invalid. Austin J held that the appointment had not been valid, but dismissed the application. He made curative orders and declarations under section 447A and section 1322, effectively validating the administrator's appointment.

In a subsequent costs hearing, it was argued that there should be no costs order against the Commissioner on the validity of appointment issue. This, it was said, was because an administrator is under a duty to ensure that his/her appointment is valid.

Austin J held that there was such a duty, but that it had been fulfilled in this case. His Honour's judgment is of interest for his analysis of the issue and his holding that the duty arises at two points in an administration: on the administrator's appointment and during the course of the administration.

(1) On appointment

Immediately after appointment, an administrator must satisfy himself or herself that the resolution of the directors under section 436A authorising the appointment appears on the face of the minute which records it to be a valid resolution (or if there is not yet any minute of the resolution, that the facts and circumstances appear on their face to amount to a valid resolution). Additionally, the administrator should satisfy himself or herself that the instrument of appointment appears on its face to be valid.

However, this does not mean that, upon appointment, an administrator has to trawl back through the records of the company to ensure that there is no defect prior to the resolution of appointment, if the resolution appears ex facie to be valid.

(2) Course of the administration

During the course of the administration, the administrator has a duty to follow up lines of inquiry that might call into question the validity of his/her appointment. It appears from His Honour's reasons that such a duty would only arise if the administrator were put on inquiry.

5. TAKEOVERS PANEL DECISIONS

EDITOR’S NOTE: The new Takeovers Panel commenced operation on 13 March 2000. The following article discusses the first two decisions of the Panel.

(By Nicole Calleja - Legal Adviser and Nigel Morris - Director, Corporations & Securities Panel)

(A) AIF’S BID FOR INFRATIL

(1) The parties

The target, Infratil Limited (Infratil) is a listed investment company which specialises in infrastructure projects, such as power companies, airports and tollways.

The bidder, Australian Infrastructure Fund Limited and Hastings Fund Management Limited (as responsible entity for Australian Infrastructure Fund) (collectively AIF) is a listed infrastructure fund, but set up as a dual entity which issues "stapled" securities, each one being a share in Australian Infrastructure Fund Limited and a unit in the Australian Infrastructure Fund. Stapled securities are frequently structured to have particular tax benefits. AIF invests in very similar projects to Infratil. For instance, they both have investments in Perth Airport.

(2) Background and structure of the bid

The consideration offered by AIF is two AIF stapled securities for every five Infratil shares. AIF suggests that there will be significant synergies, and a re-rating of an enlarged merged entity.

AIF served its bidder’s statement on Infratil on 10 April. Infratil then raised a number of concerns with AIF regarding the content of its bidder’s statement. Following discussions between the bidder and the target, the bidder lodged a revised bidder’s statement on 26 April which met some, but not all, of Infratil’s concerns. Under Australian Securities and Investments Commission (ASIC) Class Order 00/344, AIF would ordinarily have to wait 14 days after lodging the amended bidder’s statement before it could dispatch the bidder’s statement to Infratil’s shareholders. AIF applied to ASIC to shorten this period, but ASIC declined the application when Infratil advised it was in the process of applying to the Takeovers Panel for a declaration of unacceptable circumstances.

(3) The applications

There were two applications made. On 1 May, AIF applied under s 656A of the Corporations Law for review of ASIC’s decision not to shorten the time for dispatch of the bidder’s statement. On 2 May, Infratil sought a declaration under s 657A of the Corporation Law that unacceptable circumstances existed in relation to the bid, because of deficiencies in the disclosure in the bidder’s statement concerning the merits of investing in the stapled securities and concerning AIF’s intentions.

(4) The process

A Panel was appointed as soon as an application was received. The Panel members for both applications were Brett Heading (President), Alice McCleary (Deputy President), and Jenny Seabrook.

(5) Section 656A review

The application for review of ASIC’s decision was dealt with first. The application was received on 1 May, and on 3 May the Panel affirmed ASIC’s decision. The ASIC decision was at least in part based on not wanting to remove the substance of the application for a declaration of unacceptable circumstances from the Panel before the Panel had a chance to consider the matter.

The review of the ASIC decision took less than 48 hours. In part the Panel decided to affirm ASIC’s decision because it believed it could consider and decide the substantive application within the period for which the bidder’s statement was already restrained by the ASIC class order.

(6) Section 657A application

Infratil applied on 2 May for a declaration that insufficient disclosure in AIF’s bidder’s statement constituted unacceptable circumstances. Infratil’s main concerns were that there was a lack of information in relation to:

- the historical and projected earnings and distribution performance of AIF;

- future earnings and distributions of AIF (absent the acquisition of Infratil);

- the nature and tax implications of AIF distributions, and the availability of capital gains tax rollover relief;

- the trust structure of the bidders as opposed to the company structure of Infratil;

- the effect of the bid on AIF, including the future prospects of AIFL and AIF; and

- a projected balance sheet and profit and loss statement (on a merged basis) for AIFL and AIF before and following the Infratil acquisition.

A brief was circulated to parties on 5 May inviting them to make written submissions. The Panel reviewed the submissions and resolved to conduct a conference on 8 May, the matter concluded the following morning.

The major issue of discussion was whether AIF could give any forecast of its earnings and distributions which are technically determined by the report of an independent valuer who assesses the earnings and value of AIF’s investments. Small differences in the long term interest rate and other variables chosen by the independent valuer can make major differences in the earnings and available distributions of AIF.

The Panel accepted this argument but said that despite this, the bidder’s statement was defective because of the absence of comparable earnings figures. The Panel and the parties devised a compromise for AIF to give Infratil shareholders better information to make an assessment of the prospects of AIF by ensuring that the bid remains open until after AIF publishes its 30 June 2000, half yearly distribution. The Panel also required that additional information be provided in a supplementary document accompanying the bidder’s statement in order to rectify other deficiencies which the Panel identified. This included a pro-forma consolidated balance sheet for the merged entity using AIF’s balance sheet and a set of figures provided by Infratil in a similar form to AIF’s trust-based balance sheet.

The Panel accepted AIF’s argument, in this particular case, that requiring AIF to incorporate the new information into a new bidder’s statement would involve unwarranted additional printing costs and delay. In any event it was considered that the additional material would stand out more clearly if in a separate document and was sufficiently cross referenced to the original bidder’s statement.

(B) SMORGON’S BID FOR EMAIL

(1) The Parties

The target, Email Limited (Email) is a public listed company comprising a steel distribution business, a metering business, a security products business and a major appliances business.

The bidder, Smorgon Distribution Limited (Smorgon) is a wholly-owned subsidiary of Smorgon Steel Group Limited (SSGL), a listed public company. Smorgon was created specifically to be the acquisition vehicle for the Email shares.

(2) Background and structure of the bid

Smorgon is keen to integrate Email’s steel distribution business into its own steel operations. Smorgon is confident it can find buyers for Email’s metering business and Email’s security products business. However, Smorgon says it does not have the requisite expertise to run Email’s appliances business. Accordingly, Smorgon decided to "spin-off" Email’s appliances business and leave it in the hands of the Email’s shareholders.

Smorgon decided that it would pay $1.85 for the steel distribution, metering, and security products businesses of Email. In relation to Email’s appliances business, it proposes to issue to Email shareholders convertible, redeemable appliance preference shares (CAPs) in Smorgon. SG Hambros was commissioned by Smorgon to value the appliances business. Hambros came up with a range of 87 cents to $1.21. The value attributed to the CAPs was the midpoint of Hambros’ range ($1.04).

On 30 April Smorgon purchased 5.4% of Email’s ordinary shares on market for prices up to $2.89. This effectively "locked in" a minimum price of $1.04 for the CAPs, in order for s 621(3) to be complied with.

(3) The application

Smorgon lodged and served its bidder’s statement on 2 May. Email’s application to the Panel was received on Friday 12 May. Email sought various interim and final orders, as well as a declaration of unacceptable circumstances. Email alleged that certain aspects of the structure of the bid did not comply with the Corporations Law and that the disclosure in the bidder’s statement was inadequate. In particular, Email submitted that the bid would not comply with s 621(3) and that the bidder’s statement did not comply with s 710 and contained misleading statements.

(4) The process

(a) The Sitting Panel’s decision on the interim issues

The same day that Email’s application was received, a Panel was appointed comprising Annabelle Bennett SC (President), Michael Tilley (Deputy President) and Karen Wood (Sitting Panel). The Sitting Panel met by phone a number of times on Monday and Tuesday (15 and 16 May). On Wednesday 17 May, the parties were asked to provide additional information. That same day the Sitting Panel decided (after Smorgon offered to include some clarifying material in its bidder’s statement) to allow the bidder’s statement to be dispatched.

(b) The amendments proposed by Smorgon

These amendments:

- gave firmer form to the expression of intention to convert the CAPs (ie Smorgon must use all reasonable endeavours to achieve the conversion);

- provided for the appliance business to be sold, if it could not be spun off;

- provided for the redemption price to reflect the price for which the appliance business had been sold; and

- stated that it is Smorgon’s intention to redeem the CAPs, if they cannot be converted by 30 September 2002.

That same day Email applied for a review of the Sitting Panel’s decision under s 657EA of the Law. Therefore, the Sitting Panel ordered that despite its finding, Smorgon must not dispatch its bidder’s statement until 5.00 pm Friday 19 May, in order to allow the Review Panel an opportunity to review the decision.

(c) The Review Panel’s decision

The Sitting Panel President gave consent for Email’s application for review to proceed and on Friday 19 May a Panel comprising Brett Heading (President), Les Taylor (Deputy President) and Maria Manning (Review Panel) was appointed. The Review Panel decided that it needed more time to make the decision and so extended the order that Smorgon must not dispatch its bidder’s statement until 5.00 pm Monday 22 May.

On Monday 22 May, the Review Panel met by phone. The Review Panel was provided with some additional information which had not been available to the Sitting Panel, and while the Review Panel agreed with the policy applied by the Sitting Panel, it reached a different conclusion on the basis of the facts that were before it. Accordingly, the Review Panel ordered that Smorgon be restrained from dispatching its bidder’s statement until Friday 2 June, in order to allow the Sitting Panel to determine the substantive issues.

(d) The Sitting Panel’s decision on the substantive issues

A brief was sent to the parties on Tuesday 23 May and the parties were given until Thursday 25 May to prepare their submissions. The submissions were despatched to members on Friday 26 May.

On Monday and Tuesday (29 and 30 May), the Sitting Panel convened a conference to hear argument on the substantive issues. The Panel indicated that, based on evidence presented during the course of the conference, it considered that Smorgon’s bidder’s statement in its current form would not be acceptable, and that it would be required to send a Supplementary Statement to Email shareholders if it wanted to send its bidder’s statement in its current form. Following the Tuesday session before the Panel, Smorgon was asked to provide additional information with its bidder’s statement. The scope of this additional information was agreed on Thursday 1 June. It was decided that Smorgon would send the information in the form of Supplementary Statements to Email shareholders. The Sitting Panel accepted Smorgon’s arguments that revising its bidder’s statement to incorporate the additional information would involve unwarranted printing costs, and delay.

Smorgon undertook to provide the following information in its first Supplementary Statement which accompanied its bidder’s statement:

- a description of an amendment to the terms of the CAPs clarifying Smorgon’s obligations in the event that it is unsuccessful in effecting either conversion or exchange of the CAPs into ordinary shares in a company holding Email’s major appliances business (this amendment had been volunteered by Smorgon earlier in the process);

- a more detailed discussion of some of the potential risks relating to the CAPs; and

- an addition to the Hambros Report clarifying the possible outcomes for CAPs holders including information on the type of discount rates to be applied if the CAPs become perpetual debt securities.

Smorgon also provided an undertaking that within 5 days of release of Email’s interim final results (which occurred on Thursday 1 June) it would provide a second Supplementary Statement setting out pro forma consolidated financial information for SSGL and the bidder, on the basis that the bidder acquires all of the ordinary shares in Email, and if the Panel requires, on the basis that it acquires 50% of the ordinary shares in Email, subject to, and in a form approved by, the Panel.

On this basis, the Panel revoked the order restraining Smorgon from posting its bidder’s statement. Both Supplementary Statements have been sent to Email shareholders.

For further information on the Panel visit our website at "<http://www.takeovers.gov.au>". The reasons for decisions in relation to these matters are also posted on this site.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

J Lawrence, ‘The Economics of Market Confidence: Ac(Costing) Securities Market Regulations’ (2000) 18 Company and Securities Law Journal 171

When discussing securities market regulations, the discourse has traditionally been preoccupied with considerations of equal access to information, transparent disclosure and shareholder rights. In recent times, however, regulatory reviews performed by the Corporate Law Economic Reform Program and the Office of Regulation Review have directed attention to the need for efficient securities regulations which acknowledge the cost-benefit trade-offs inherent in any regulatory structure. Notwithstanding this growing awareness of regulatory costs, there still appears to be an overwhelming tendency when considering securities regulation to equate more stringent regulations with market maturity and, in particular, improved investor confidence. This article adopts a number of concerns in relation to the existing regulatory framework and the on-going regulatory debate. The main conclusions from this analysis are, first, that macroeconomic performance matters more than regulatory policy when it comes to establishing market confidence and, secondly, that the regulatory costs associated with securities market regulations may actually impede macroeconomic performance.

G Hughes, ‘Compulsory Acquisition of Minority Shareholders’ Interests – Still a Tyranny of the Majority?’ (2000) 18 Company and Securities Law Journal 197

In these times of economic rationalisation, corporate restructuring and increased participation in the share market by "ordinary" Australians, the law needs to carefully rationalise its approach in the area of compulsory acquisition and divestment of minority shareholders. In particular, the fundamental proprietary nature of a share and the commonly held definition of "minority" both need to be balanced against economic arguments of efficiency. This article explores the notion of fairness both from the perspective of the majority shareholder and a minority shareholder and also in terms of procedural fairness and substantive fairness. While the notion of fairness should balance the interests of all parties, it is argued that the concept of fairness presently favours the majority shareholder’s interests. It is argued that, in reality, a minority shareholder can do little to resist the expropriation wishes of a majority shareholder.

D Absolum, ‘The Castle and the Corporation: Judicial Review of Government Business Enterprises’ (2000) 28 Australian Business Law Review 99

Recent attempts to seek judicial review of decisions made by Government Business Enterprises (GBEs) have met with limited success. This article examines the nature of the current state of the law relating to judicial review of GBEs. It argues that, given the special nature of GBEs and the commercial and managerial autonomy they are given, the cautious approach adopted by the courts is appropriate but that other legal accountability mechanisms may be required. The article briefly examines these other mechanisms which include: the common law doctrine of common calling; third party enforcement of contractual obligations and licence obligations; improved information disclosure; and new developments in the common law concerning the duty of good faith in government procurement and non-delegable statutory and common law duties on government bodies.

Note, ‘Riskless Trading: Passport Options, Fund Managers and the Prudent Investor Rule’ (2000) 18 Company and Securities Law Journal 209

Note, ‘Insider Trading in Australia: When Is Information Generally Available?’ (2000) 18 Company and Securities Law Journal 213

Note, ‘Senate Disallows Part of AASB 1015 "Acquisition of Assets"’ (2000) 18 Company and Securities Law Journal 220

Note, ‘New Institutional Arrangements for Accounting-Standard Setting’ (2000) 18 Company and Securities Law Journal 221

Note, ‘The South Australian Full Court confirms the ability of directors of wholly-owned subsidiaries to act in the interests of their holding company – do we need section 187 of the Corporations Law?’ (2000) 18 Company and Securities Law Journal 223

Note, ‘One Company, Two Directors and One (Mother-In-Law) of a Fiduciary Duty’ (2000) 18 Company and Securities Law Journal 224

L Law and J Pascoe, ‘Financiers and Corporate Borrowers: Protection Versus Liability’ (2000) 11 Australian Journal of Corporate Law 219

M Whincop, ‘The Institutional Politics of Corporate Law in Australia: From Gambotto to DB Management’ (2000) 11 Australian Journal of Corporate Law 247

G Shapira, ‘"The Hand that Giveth is the Hand that Taketh Away"’ (2000) 11 Australian Journal of Corporate Law 260

Note, ‘Re Wakim – A Way Forward’ (2000) 11 Australian Journal of Corporate Law 273

Note, ‘Modern Corporate Governance’ (2000) 11 Australian Journal of Corporate Law 276

Note, ‘The Corporations Law civil penalty provisions and the lessons that can be learnt from the Trade Practice Act 1974’ (2000) 11 Australian Journal of Corporate Law 298

J Fried, ‘Insider Signalling and Insider Trading with Repurchase Tender Offers’ (2000) 67 University of Chicago Law Review 421

T Hong, ‘Corporate Governance Issues in PRC Companies’ (2000) 11 International Company and Commercial Law Review 87

G Henry, ‘Continuing Directors’ Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures’ (1999) Vol 79 No 4 Boston University Law Review

V Khanna, ‘Is the Notion of Corporate Fault a Faulty Notion? The Case of Corporate Mens Rea’ (1999) Vol 79 No 2 Boston University Law Review

H Jones, ‘Finding Clarity Amidst Chaos: Applying the Principles of the Business Judgment Rule to Mason v Wal-Mart Stores, Inc and Similar Tortious Interference Cases in Arkansas’ (1999) Vol 52 No 4 Arkansas Law Review

L O’Melinn, ‘The Sanctity of Association: The Corporation and Individualism in American Law’ (2000) 37 San Diego Law Review 101

C Bagley and K Page, ‘Replacing Corporate Directors’ Veil of Secrecy with the Mantle of Stewardship’ (1999) 36 San Diego Law Review 897

A Hansen, ‘Denmark: Practical Aspects of Setting Up Holding Companies’ (2000) 40 European Taxation 130

W Cai, ‘Private Securities Litigation in China: Of Prominence and Problems’ (1999) Vol 13 No 1 Columbia Journal of Asian Law

S Choi, ‘Regulating Investors Not Issuers: A Market-based Proposal’ (2000) 88 California Law Review 279

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email: lawlib@law.unimelb.edu.au

7. CENTRE FOR CORPORATE LAW RESEARCH REPORT

(A) POLITICAL DONATIONS BY AUSTRALIAN COMPANIES

Authors: Ian Ramsay, Geof Stapledon and Joel Vernon

Corporate political donations are of interest for several reasons including:

- a concern that commercial interests can be advanced by donating funds to political parties;

- in the case of public companies, the funds being donated are not those of the directors of the company who make the decision to donate the funds but are the funds of the company’s shareholders; and

- the UK Government has announced that it will amend its Companies Act to require that any company wishing to make a donation to a political party in the UK must obtain the prior approval of its shareholders.

This Research Report presents the results of a study of corporate political donations. The data was derived from the annual returns of the major political parties lodged with the Australian Electoral Commission for 1995/96, 1996/97 and 1997/98. The Research Report presents information regarding:

- donations by companies to each of the major political parties;

- donations by ASX-listed companies classified by industry; and

- donations by public companies and private companies.

In addition, the Report outlines the legal regulation of corporate political donations and summarises international developments in this area.

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

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RESEARCH REPORT ORDER FORM

I wish to purchase:

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@ $45 each plus $4.50 GST and $4 postage

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