**CORPORATE LAW ELECTRONIC BULLETIN  
Bulletin No 49, September 2001**

Centre for Corporate Law and Securities Regulation,  
Faculty of Law, The University of Melbourne  
(http://cclsr.law.unimelb.edu.au)

with the support of

The Australian Securities and Investments Commission (<http://www.asic.gov.au>),  
The Australian Stock Exchange (<http://www.asx.com.au>)

and the leading law firms:

Blake Dawson Waldron (<http://www.bdw.com.au>)  
Clayton Utz (<http://www.claytonutz.com>)  
Mallesons Stephen Jaques (<http://www.msj.com.au>)  
Phillips Fox (<http://www.phillipsfox.com>)

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

ACCESS TO BULLETIN

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

<http://cclsr.law.unimelb.edu.au/bulletins/>

CHANGE OF EMAIL ADDRESS

Subscribers who change their email address should notify the Centre for Corporate Law at "cclsr@law.unimelb.edu.au" in order that they may be unsubscribed and resubscribed with their new email address.

COPYRIGHT

Centre for Corporate Law and Securities Regulation 2001. All rights reserved. You may distribute this document. However, it must be distributed in its entirety or not at all.

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#1.recentcorporatelaw)  
(A) [Reporting requirements reduced for small business](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28A%29reportingrequirements)  
(B) [Improving prudential regulation of superannuation funds](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28B%29improving)  
(C) [Insurance sector reforms](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28C%29insurance)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#2.recentasic)  
(A) [ASIC releases policy proposal paper on financial requirements](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28A%29asicreleases)  
(B) [Revised timetable for FSR publications](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28B%29revisedtimetable)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#3.recentasx)  
(A) [Managed funds transaction processing service](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28A%29managedfunds)  
(B) [ASX Business Rules](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28B%29asxbusinessrules)  
(C) [ASX Listing Rules](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28C%29asxlistingrule)

4. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#4.recentcorporatelawdecisions)  
(A) [Statutory derivative action - joining the company as defendant](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28A%29statutory)  
(B) [Liability for insolvent trading - 'good reason' excuse](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28B%29liability)  
(C) [Section 411 - proposed scheme of arrangement - role of court on a hearing under section 411(1) - content of explanatory statement and expert's report - factors and reasoning relevant to valuation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28C%29section)   
(D) [Insolvency - winding up - meaning of transaction in section 588FE - voidable transactions - unfair preferences](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28D%29insolvency)  
(E) [Shareholder value](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28E%29shareholdervalue)  
(F) [Ansett's law](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#%28F%29ansett)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#5.recentcorporatelawjournal)

6. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#6.archives)

7. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#7.contributions)

8. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#8.membership)

9. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0049.htm#9.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) REPORTING REQUIREMENTS REDUCED FOR SMALL BUSINESS

On 24 September 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey and the Minister for Small Business, the Hon Ian Macfarlane announced small business reporting requirements will be reduced.

From mid-2002, nearly 1 million proprietary companies will no longer need to provide ASIC with an annual return, significantly reducing paperwork.

Under the changes small businesses:

- will no longer need to provide ASIC with an annual return. These companies will only need to alert ASIC of changes such as to their address or directors;  
- will have their ASIC fee capped at $200 for three years;  
- will be able to lodge documents over the Internet;  
- can conduct online searches of ASIC's database;  
- make payments to ASIC electronically.

ASIC will also set up a Business Advisory Board, which will include representatives of small business, to advise on its relationship with business clients in managing company information.

(1) Streamlining paperwork under the Corporations Act

Most of the following measures are discussed in detail in the consultation paper 'Simplified Lodgments and Compliance - Streamlining Paperwork under the Corporations Law', Corporate Law Economic Reform Program Proposals for Reform: Paper No 7, available on the Treasury website at <http://www.treasury.gov.au>

The implementation of some measures is subject to the passage of enabling legislation or regulations.

(2) Abolition of company annual returns

From June 2002, companies will no longer lodge an annual return with ASIC. An Annual Fee will replace the present annual return fee. The Annual Fee will be payable on the anniversary of a company's registration or an alternative date nominated by the company and agreed by ASIC.

Companies would still need to notify ASIC of any changes in company details as they occur. However, if there are no changes, no paperwork will need to be lodged. In practice, this will reduce compliance burdens for a large number of small businesses that typically do not notify changes during the course of the year.

ASIC will also benefit from a reduced volume of returns requiring processing. The quality and integrity of ASIC's Register of Companies will be protected by the use of an Extract of Particulars. The Extract of Particulars, setting out a company's details as recorded on the Register, will be issued to all companies together with an Annual Fee invoice. This will be done electronically, except where a company lodges in paper form.

Unless ASIC is advised otherwise, payment of the Annual Fee will be taken as confirmation of details about the company as shown in the Extract. ASIC will be able to contact companies to seek confirmation of company details if it has reason to believe that these details are not up to date.

(3) Streamlining document lodgment requirements

Currently, the Corporations Act requires a separate notification form to be lodged with ASIC for each change in company details. These processes will be simplified by introducing a single, multi-purpose form.

(4) Electronic lodgment and payment

ASIC actively encourages the electronic lodgment of information. It has already achieved high rates of electronic lodgment of annual returns, electronic processing of company data and electronic searches of its database. While continuing to provide facilities for paper based lodgment, ASIC will encourage greater use of electronic lodgment and online searches of its database.

To supplement existing cash and cheque payment methods, ASIC will introduce the option of electronic payment facilities and third party agency facilities, such as those provided by many banks and by Australia Post.

(5) Creation of business advisory board

To ensure direct input from business on changes affecting them a Business Advisory Board will be established to provide ASIC with strategic advice and feedback on the initiatives and operations of its Public Information Program.

The Advisory Board will be appointed and chaired by ASIC. It will have 8-10 members drawn mainly from the business community - including small business - and professional organisations.

(6) Overhaul of fees under the Corporations Act

The schedule of fees payable by companies will be simplified, with the number of items reduced from 51 to about 30. It is proposed that fee changes would generally take effect from 1 July 2002.

With the abolition of company annual returns, an Annual Fee for companies will replace the present annual return fee. The annual fee paid by proprietary companies will be capped at $200 for three years.

Financial service providers will pay an Annual Fee rather than a fee for each document lodged with ASIC.

Fees for licence holders will be calculated on a sliding scale according to the number of representatives the licence holder maintains.

Fees for prospectuses will be changed to a differential scale according to the type of disclosure document. The existing flat-rate fee structure for lodging takeover documents will be retained, but the amount of the fee will be increased.

Fees for financial service providers, fundraising and takeover activities will continue to be monitored with a view to ensuring that they are progressively increased to a level that fully covers regulatory costs.

(B) IMPROVING PRUDENTIAL REGULATION OF SUPERANNUATION FUNDS

Legislation governing the management of superannuation funds, while generally effective, is complex and needs improvement, according to a draft report released on 19 September 2001 by the Productivity Commission.

The draft report - Review of the Superannuation Industry (Supervision) Act 1993 and certain other Superannuation Legislation - finds that while the Act does not contain extensive restrictions on competition, the costs of complying with the Act are significant. The Commission's report identifies provisions of the Act which impose significant compliance costs on fund trustees, members and others in the industry. They include complex age and employment rules against which the status of fund members must be assessed frequently by trustees. The Commission considers that the objectives of such requirements can be met in more cost effective ways. The Commission accordingly recommends a number of changes which would remove some unnecessary restriction of competition, reduce compliance costs and strengthen licensing of fund trustees.

The Commission considers that unresolved disputes between fund members and their trustees would be reviewed more cost effectively by an approved industry-operated dispute resolution scheme instead of by the present Superannuation Complaints Tribunal. It has also proposed that legislative arrangements for provision of assistance to funds affected by fraud or theft be made more transparent.

The draft report is being released to encourage further public discussion and input from participants before the Commission finalises its report to the Government later this year.

The report can also be accessed via the Internet at <http://www.pc.gov.au/>

(C) INSURANCE SECTOR REFORMS  
(By Marianne Robinson, [Phillips Fox](http://www.phillipsfox.com))

The year 2001 has already seen a series of reforms introduced that will have a major impact on nearly every part of the insurance industry. The list now includes:

- Financial Services Reform Act 2001;   
- Financial Sector (Collection of Data) Act 2001; and  
- General Insurance Reform Act 2001.

In addition to the above, the new privacy provisions in the Privacy Act 1988 (the Privacy Act) affecting private sector organisations come into effect on 21 December 2001. The Commonwealth Criminal Code also commences in December 2001. Government reviews are now underway of the Life Insurance Act 1995 and the Managed Investments Act 1998.

Regulatory reforms for the general insurance industry now have a high political currency in view of the recent HIH collapse and look to be fast-tracked. The Insurance Act Amendment Bill will bring general insurers into line with the tighter regulatory regime imposed on the life insurance industry in the 1990s. The Australian Prudential Regulation Authority's (APRA) prudential supervision of general insurers is set to become far more rigorous, with compliance standards raised, whistleblowing obligations introduced, and harsh criminal penalties imposed.

(1) Financial Services Reform Act 2001

This major reform initiative and the related Financial Services Reform (Consequential Amendment) Bill 2001 were passed with several amendments in August and the Minster for Financial Services, Joe Hockey has signaled his intention that the both laws will commence on the 11 March 2002.

In the coming months the Regulations and ASIC Policy Proposal Papers will be finalized. The reforms will mean consequential amendments to several laws including the Insurance Act, the Insurance Contracts Act and will involve the repeal of the Insurance (Agents & Brokers) Act.

(2) Financial Sector (Collection of Data) Act 2001

This Act was assented to on the 17 September 2001 and gives APRA the power to determine reporting standards that must be complied with by financial services entities. The Commonwealth Criminal Code will apply to certain offences under the Act. APRA will have the power to impose financial penalties if information is not provided in a timely manner and will pass on data collected to the RBA, for the purposes of monetary policy, and the ABS for statistical requirements. This will affect the Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995, Superannuation Industry (Supervision) Act 1993 and the Retirement Savings Account Act 1997.

(3) General Insurance Reform Act 2001

This Act was assented to on the 19 September 2001 and will sit at the top of a three tiered supervisory regime for general insurers. At the second level, APRA will set and enforce the Prudential Standards and, at the third level, it will issue Guidance Notes as to how the Prudential Standards will be applied in practice. The Guidance Notes will also deal with authorisation of new insurers and portfolio transfers for ceasing insurers.

Significantly, the Criminal Code will apply to certain offences under this Act.

APRA authorisation will still be required to carry on general insurance business and APRA is empowered under the Act to make, modify and enforce the Prudential Standards. APRA will be required to consult with stakeholders as to the technical detail in the Prudential Standards. The consultation process will include a newly created General Insurance Advisory Panel. It is intended that APRA establish Prudential Standards for liability valuation, minimal capital requirements, reinsurance arrangements and risk management.

The new emphasis will be on a process of self-assessment, supervised by APRA.

(4) Checks and balances

General insurers will be required to have an APRA-approved valuation actuary and an APRA-approved auditor. The insurer's experts are intended to act as an independent check and balance on the insurer and to this end they will have statutory 'whistleblowing' obligations. In addition, APRA can require these experts to provide relevant information to them.

Insurers may be required by APRA (at the insurer's own expense) to commission an independent actuarial liability valuation and, while the review is taking place, APRA may make directions on issues such as liability provisions.

(5) Liability valuation standard

The liability valuation standard (LVS) will require insurers to calculate insurance liabilities for each class of business and determine a central estimate for both outstanding claims liability and premium liability, as well as a risk margin to represent the inherent uncertainty of the central estimate. Where the insurance liabilities at the last reporting date are over $20 million, or if one of the classes of business is long tail and material, then the written advice of the valuation actuary will be required. These changes are likely to lead to changes in the way that insurers calculate claims estimates and the frequency of the reviews.

Responsibility for liability valuation rests with the board and senior managers. If an insurer chooses not to comply with the LVS, or wants to depart from the actuary's advice, it must note the fact in its annual accounts and must report its reasons to APRA.

APRA anticipates that the Institute of Actuaries of Australia will eventually release its own professional standards for liability valuation.

(6) Minimum capital requirements

A risk-based approach will be used for the minimum capital requirements (MCR) of each insurer. The MCR will vary depending on the scale, complexity and mix of the insurer's business. Obviously, an insurer with a large book of long tail business will have a different risk profile to one with a book of dedicated short tail business.

The base line for the MCR will be set at $5 million. There will be limits on capital that may be used to calculate MCR. APRA's written consent will be required for certain capital reductions, including, in some circumstances, payments of dividends. Information on capital adequacy will be required in the annual accounts.

Insurers will be able to use an internal model (APRA approved), the standard APRA framework, or a combination of the two, to measure MCR. APRA will have the power to require an individual insurer to alter its MCR if it believes that the MCR does not reflect the insurer's individual risk profile. A variant of the MCR will apply to foreign branches.

(7) Reinsurance management

Each insurer will require an APRA-approved reinsurance management strategy (REMS). The REMS must be periodically reviewed (at least yearly) to allow for changing conditions. Any changes or deviation from the REMS will require APRA approval and any problems with the reinsurance program, which may affect an insurer's its ability to meet current or future obligations, must be reported.

An insurer will usually be limited to ceding up to 60% of its total business written (captives 90%) in line with current guidelines.

(8) Risk management for general insurers

The risk management standard will set the prudential requirements for an insurer's internal governance and risk management controls. Governance issues will include minimum standards for the fitness and propriety of senior executives and others-for example, the auditor and valuation actuary. It will also include the auditor's and valuation actuary's routine and non-routine (ie 'whistleblowing') obligations.

The Board will be required to provide an annual declaration as to the insurer's compliance with certain obligations under the Act.

A risk management strategy (RMS) must be submitted to APRA. The RMS must be reviewed at least annually and any amendments submitted to APRA.

(9) The future

The level of reform at the moment is unprecedented and the link to the Commonwealth Criminal Code means that these reforms will have a substantial impact on the insurance sector.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES POLICY PROPOSAL PAPER ON FINANCIAL REQUIREMENTS

On 21 September 2001 ASIC released FSRB Policy Proposal Paper No 10 on Licensing: Financial Requirements. This is ASIC's tenth proposal paper on administrative issues arising from the Financial Services Reform Bill 2001 (the Bill).

This policy proposal paper canvasses proposed requirements that will apply to Australian financial service licensees depending on the functions carried out by the licensees. These include a cash flow proposal for most licensees, and a net tangible asset proposal for custodians or depositories.

A licensee regulated by APRA is not subject to ASIC's financial requirements as those licensees must satisfy APRA's financial requirements instead.

During the consultation period on this policy proposal paper, ASIC intends to consult separately on the appropriate additional financial requirements for licensees who have direct financial obligations to clients. This will typically apply to dealers who enter into financial product transactions with (rather than on behalf of) clients.

ASIC will also consult separately on financial requirements for licensees who hold more than $100,000 of client money or assets.

Public comment on this paper is open for five weeks, with written submissions due by Monday 29 October 2001. Comments should be sent to the postal or email addresses set out in the paper.

For more information:

- For an up to date ASIC publication timetable to implement the Bill, see the Supplement to ASIC's Building the FSRB Administrative Framework (released on 11 September 2001).  
- Copies of the policy proposal paper and Supplement may be obtained from the FSR page of the ASIC website at <http://www.asic.gov.au> or by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.  
- To see the FSR Bill, go to <http://www.aph.gov.au/legis.htm> then select Current Bills, then Financial Services Reform Bill 2001. Copies of the draft FSR regulations can be obtained from <http://www.treasury.gov.au>

Related information

The Government announced on 30 August 2001 that it intends that the Bill and associated legislation commence on 11 March 2002.

ASIC's earlier packages of policy proposal and process related papers were issued on 26 April 2001 and 6 June 2001.

(B) REVISED TIMETABLE FOR FSR PUBLICATIONS

On 11 September 2001 ASIC released a supplement updating ASIC's publication timetable for the administrative implementation of the FSR legislation. FSR legislation includes the Financial Services Reform Bill 2001 and Financial Services Reform (Consequential Provisions) Bill 2001.

The supplement to ASIC's Building the FSRB Administrative Framework (released in April 2001) revises the publication timetable in light of the Commonwealth Government's recent announcement that the FSR legislation will commence on 11 March 2002.

The appendix to the supplement also provides an update on the key policy issues discussed in ASIC's paper Licensing: Adapting IPS 146 to the Financial Services Reform regime, which was issued in April 2001.

Revised Timetable:

Below is a summary of the updated timetable for release of publications.

Before 1 November 2001:

Licensing & Disclosure: Transitional provisions - Guide  
Licensing & Disclosure: Transitional provisions PPP\*  
Licensing: Process Guideline: How do you get an AFS licence? (v2.0)  
Market operators PPP

Before 1 December 2001 Licensing: Organisational capacities PS

Licensing: Training of financial product advisers (PS 146)  
Licensing: External and internal dispute resolution PS  
Licensing: Discretionary Powers PS  
Licensing: Financial requirements Policy  
Licensing: Advice and deal PS\*  
Disclosure: Product disclosure Policy  
Disclosure: Discretionary powers PS  
Licensing & Disclosure: Transitional provisions Policy\*

Early 2002 (before FSR commencement)

Licensing: Discretionary powers- related instruments  
Disclosure: Discretionary powers- related instruments  
Market operators PS  
Licensing Kits

PPP - Policy Proposal Paper  
PS - Policy Statement  
Policy - the form of the policy is yet to be determined  
\* The issue of any policy on this topic is dependent on ASIC's review of the final FSR regulations.

Note: The revised timetable is subject to the issue of final regulations under the FSR legislation in the coming months.

For industry enquiries:

Email - FSRProjectOffice@asic.gov.au

3. RECENT ASX DEVELOPMENTS

(A) MANAGED FUNDS TRANSACTION PROCESSING SERVICE

The Australian Stock Exchange announced on 26 September 2001 that it will proceed with the development of a transaction processing service for unlisted managed funds. Following a year of industry consultation and feasibility analysis, ASX is confident that this project can deliver significant cost savings for the managed funds industry, by facilitating more efficient electronic transaction processing between fund managers, custodians, master funds and distributors.

The first phase of the project, to commence immediately, will be to gain industry commitment to the proposed service by ensuring that the business model and functionality meets the needs of all participants.

(B) ASX BUSINESS RULES

On 17 September 2001 ASX issued a Business Rules Guidance Note entitled "Issue and Publication by the Exchange of Management Letters". The Guidance Note sets out the practices and procedures followed by ASX in issuing and publishing management letters to its Participants.  
  
The Guidance Note explains what is meant by the term "management letter" and the form that such letter may take. The Guidance Note also discusses why management letters will be issued by ASX as a means of obtaining appropriate regulatory effect where disciplinary action under the Business Rules before an ASX peer tribunal is not warranted in the circumstances. The Guidance Note also sets out the action ASX expects of Participants once they receive a management letter.  
  
The Guidance Note sets out the amendments to the ASX Business Rules which came into operation on 1 June 2001 which authorise the Exchange to publish management letters and sets out the circumstances and method by which relevant management letters will be published.

(C) ASX LISTING RULE AMENDMENTS

ASX has released a package of listing rule amendments which take effect on 30 September 2001. This is subsequent to the Exposure Draft of proposed Listing Rule amendments released in January 2001 and a further Discussion Paper on disclosure of directors' securities transactions released in June 2001. Two Response Documents summarising submissions received and ASX's response to those submissions were released in May and August respectively. The more substantive listing rule amendments are summarised below.

(1) Person responsible for communications with ASX

A requirement has been inserted for an entity to appoint a person who is responsible for communications with ASX in relation to Listing Rule matters.

(2) Trusts

Chapter 13 which deals with trusts, has been deleted in its entirety.

(3) Employee incentive schemes

Listing rule 10.15A has been introduced to permit security holder approval of issue of securities under an employee incentive scheme to be effective for three years after the date of approval, subject to certain conditions.

(4) Requirement for proxy form

Listing rule 14.2.3 has been introduced to provide that where security holders give undirected proxies to a Chairman who has an interest in the outcome of a resolution, they are given information as to the Chairman's voting intentions. This is to ensure that they understand that the Chairman has an interest in the outcome of the resolution and, notwithstanding that interest, the security holder still wishes to give an undirected proxy to the Chairman. Transitional arrangements will assist entities preparing notices of meeting in the time period during which the amendment takes effect, by allowing them to prepare proxy forms in accordance with the listing rules prior to the amendment to introduce rule 14.2.3, provided that the meeting is held no later than 31 December 2001.

(5) Change of terms of options

Listing rule 6.23 has been amended to clarify its meaning, specifically to clarify that changes to option terms that are not permitted are not confined to the narrow legal concept of a variation of the terms of a contract, so that the letter of the listing rules better expresses the spirit of the rule. This includes that option terms cannot be amended in relation to strike price, term and amount, and that cancellation for consideration may only be effected with the approval of shareholders.

(6) Disclosure of directors' securities transactions

A requirement has been introduced for an entity to disclose information in relation to directors' holdings and interests in its securities to ASX, within five business days of the director acquiring a security holding or changing an existing holding. The information will satisfy a director's obligation to provide information under section 205G of the Corporations Act, and may be electronically lodged. The essential elements of the framework are outlined below.

- The requirement for listed entities to notify ASX of directors' transactions in securities will be effective from 1 January 2002. The rule will be introduced with the other rule amendments to come into effect but listed entities will not have to comply until that date, to give time for entities to enter into necessary arrangements.  
- The information that must be given to ASX will include details of price/consideration, the position prior to and after the transaction, the date of the transaction and whether the interest is direct or indirect.  
- The entity must notify ASX upon the appointment of a director, when there is a change in a relevant interest and upon a director ceasing to be a director.  
- Notification must be given five business days after a transaction.  
- Notification may be effected electronically through ASX Online, and a director's signature will not be required.  
- A listed entity must enter into arrangements with its directors that require a director to disclose to the entity all the information it needs to comply with the obligation to notify ASX.  
- An entity does not have to notify ASX of information which it does not have, and therefore will not be in breach of the Listing Rules in such a case.  
- A separate Guidance Note 22 has been prepared which outlines the operation of the rule framework. This includes a proforma agreement to assist and guide listed entities. ASX does not prescribe the form or content of any agreement.

(7) Guidance Notes

All of the ASX Listing Rule Guidance Notes have been re-issued in the package of listing rule amendments. Some Guidance Notes have had only had minor technical changes, corresponding to changes made as a result of the listing rule amendments and change in terminology from the Corporations Law to Corporations Act. However, several of the Guidance Notes have been extensively revised. The Guidance Notes which have been revised and the substantive changes made are briefly summarised below.

(a) Guidance Note 2 - Stapled Securities and Guidance Note 6 - Trusts

The transitional period for existing listed trusts which are prescribed interest undertakings to convert to managed investment schemes has ended. References to prescribed interest undertakings have been removed from these Guidance Notes.

(b) Guidance Note 8 - Continuous Disclosure: Listing Rule 3.1

The Guidance Note has been extensively revised to reflect current ASX policy in relation to the application of listing rule 3.1 and the continuous disclosure framework generally. The Guidance Note has also been amended to include the ASIC Better disclosure to investors guidance principles (released August 2000) together with ASX Commentary on best disclosure practice. New working examples have also been included in the Guidance Note.

(c) Guidance Note 9 - Disclosure of Corporate Governance Practices: Listing Rule 4.10.17

Former Appendix 4A, Listing Rules, which provided a list of corporate governance matters, has been inserted as an attachment to this Guidance Note.

In addition, guidelines in relation to securities trading and trading windows (if the entity has a policy), have been added to the list of corporate governance matters.

(d) Guidance Note 11 - Restricted Securities and Voluntary Escrow

The Guidance Note has been amended to reflect changes to listing rule 8.10 to enable holding locks to be applied to securities which are subject to voluntary escrow. In addition, the Guidance Note includes discussion of listing rule 3.10A requirements in relation to voluntary escrow:

- Pre-quotation disclosure of the securities subject to voluntary escrow.  
- Notification of the release of securities subject to voluntary escrow, ten business days before the securities are released.

(e) Guidance Note 14 - Company Announcements Platform

References to ASX Online have been removed from this Guidance Note. As ASX Online has become an established facility offered by ASX, a separate Guidance Note has been created, refer Guidance Note 20 - ASX Online.

(f) Guidance Note 17 - ASX Companies

The name of this Guidance Note has been amended to reflect the new name of the department which deals with listing matters. In addition, references to appeals from decisions of Companies Management conducted by the Listings Appeal Committee have been removed and incorporated into a new Guidance Note, which deals solely with appeals, refer Guidance Note 21 - Appeals.

(g) Guidance Note 20 - ASX Online

This Guidance Note is being issued for the first time. It contains details of how an entity may electronically lodge documents through the company announcements office, and discusses other features of the ASX Online facility. The origin of its contents is Guidance Note 14 - Company Announcements Platform.

(h) Guidance Note 21 - Appeals

This Guidance Note is being issued for the first time. The origin of its contents is former ASX Listings Guidance Note, refer Guidance Note 17 - ASX Companies. This Guidance Note deals solely with the appeal mechanism available to listed entities from certain decisions of Companies Management.

(i) Guidance Note 22 - Director Disclosure of Interests and Transactions in Securities - Obligations of Listed Entities

This Guidance Note is being issued for the first time. It outlines new listing rules 3.19A and 3.19B, Appendices 3X, 3Y and 3Z and ASX policy in relation to the rules, which require listed entities to disclose directors' interests and securities transactions of directors within five business days.

It is expected that the package of listing rule amendments and the Guidance Notes will be available on ASX's website at <http://www.asx.com.au> during the week ending September 28, 2001.

4. RECENT CORPORATE LAW DECISIONS

(A) STATUTORY DERIVATIVE ACTION - JOINING THE COMPANY AS DEFENDANT  
(By May Yeung, [Blake Dawson Waldron](http://www.bdw.com.au))

Talisman Technologies Inc v Qld Electronic Switching P/L [2001] QSC 324, Queensland Supreme Court, Mullins J, 7 September 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/september/2001qsc324.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) The facts and law

In this case, the Queensland Supreme Court dismissed an application by a shareholder seeking to join the company as defendant in proceedings under sections 236 and 237 of the Corporations Act 2001 (Cth), which allow a member to bring an action on behalf of the company if certain preconditions are met. The plaintiff failed because the Court was not satisfied that granting the application was in the best interests of the company, a precondition required by section 237(2)(c).

This decision is part of a larger litigation involving Talisman Technologies (first plaintiff), Saracen Financial Services Limited (the second plaintiff), Queensland Electronic Switching Pty Ltd (first defendant), Bank of Queensland Limited (second defendant and holding company of the first defendant) and Compaq Computer Australia Pty Ltd (third defendant).

These litigants were parties to a joint venture agreement ("Agreement") involving the design, construction and installation of automated teller machines ("ATM"). A joint venture company ("Company") was set up to undertake the ATM project and was also a party to the Agreement. Both the plaintiffs and defendants to this proceeding were shareholders of the Company. The project contemplated by the Agreement did not come to fruition. On 23 April 2001 the first defendant applied for the Company to be wound up on the just and equitable ground. On 24 April 2001, the first plaintiff commenced proceedings primarily seeking specific performance of the defendants' obligations under the Agreement. Due to the overlapping of issues, an order was made for the consolidation of the two proceedings on 31 July 2001.

In the present proceeding, the first plaintiff sought to have the Company joined as the fourth defendant in the consolidated proceedings by applying as a member under sections 236 and 237 of the Corporations Act 2001 (Cth) for leave to bring the proceeding on behalf of the Company. Section 237(2) provides that the Court must grant the application if:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or  
(ii) it is appropriate to grave leave even though subparagraph (i) is not satisfied.

(2) Whether it was probable that the Company would not itself bring the proceedings

Mullins J was unable to decide the issue of whether it was probable that the Company would not of itself bring proceedings because at the time of the hearing, the nature of proceedings to be considered for the purposes of section 237(2)(a) could not be identified.

Theoretically, the claims available to the Company could reflect the position of the plaintiff shareholders or the defendant shareholders. The outcome of the dispute among the shareholders would determine the nature of proceedings to be pursued on behalf of the Company. As this was not yet resolved, it was not possible to determine what claims it would be for the benefit of the Company to bring and therefore whether or not it was probable that the Company would itself bring proceedings. Accordingly, the Court could not conclude whether section 237(2)(a) was satisfied.

(3) Was the first plaintiff acting in good faith?

Mullins J held that good faith under section 237(2)(b) relates to the conduct of the applicant seeking to bring proceedings on behalf of the Company, having regard to the interests of the Company. Her Honour held that so long as an application under sections 236 and 237 can be shown to be in the interests of the relevant company, it would be no impediment to such an application if the plaintiff had an ulterior motive.

Her Honour rejected that disclosure by the first plaintiff's solicitor, Mr Simmons, of information regarding the valuation of the Company to The Australian Financial Review as demonstrating a lack of good faith. Mr Simmons was reported as saying that he had informed the second defendant's lawyers that, subject to court confirmation by expert evidence, financial modelling indicated that the joint venture was worth 6-8 times more than the original valuation. Although the defendants' solicitors received that information by letter from the first plaintiff's solicitors, it had not been incorporated into the proposed amended statement of claim, and the financial report supporting the information was still incomplete at the time of the hearing. Mullins J considered it "curious that the plaintiff's solicitor would disclose the information in those circumstances", however she decided it was not conduct contrary to good faith.

The defendants' reliance on the plaintiff's "tactical approach" to security for costs, opposition in the winding up proceeding, and pursuit of specific performance also failed to challenge good faith on the part of the plaintiff. Mullins J also dismissed the plaintiff's "evasiveness" regarding both indemnity for costs that would arise from joining the Company to the proceedings and its own asset position as irrelevant to determining the issue of good faith.

The Court stated that the outcome of the objective test under section 237(2)(c) of whether it was in the best interests of the Company that the first plaintiff be granted leave, would help determine whether the plaintiff satisfied the subjective requirement in section 237(2)(b). The Court ultimately decided that section 237(2)(c) was not fulfilled (see below). Although not strictly necessary for it to do so, the Court consequently found that the first plaintiff was acting for its own benefit rather than for the benefit of the Company in bringing the proceedings. Therefore it concluded that the first plaintiff was not acting in good faith.

(4) Whether it was in the best interests of the Company that the first plaintiff be granted leave

Mullins J confirmed that section 237(1) permits a company to be joined as a defendant (rather than as a plaintiff) in proceedings where it is necessary to join the company as defendant in order for the plaintiffs to obtain the relief sought: Keyrate Pty Ltd v Harmarc Pty Ltd [2001] NSWSC 491 (19 June 2001).

In this instance, her Honour held that the involvement and proposed incorporation of the Company into the proceedings was inconsequential to whether or not the plaintiffs achieved the primary relief pursued by them (namely, specific performance of the Agreement by the defendants). As a result of "the lack of utility" of the proceedings for the Company, her Honour concluded that it was not in the best interests of the Company that the first plaintiff be granted leave to join the Company in the proceedings.

All the preconditions under section 237(2) must be satisfied for leave to be granted. Due to the plaintiff's failure to satisfy section 237(2)(c), the Court dismissed the application without considering sections 237(2)(d) and 237(2)(e).

(B) LIABILITY FOR INSOLVENT TRADING - 'GOOD REASON' EXCUSE  
(By Caroline Gill, [Blake Dawson Waldron](http://www.bdw.com.au))

Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation [2001] NSWSC 621, New South Wales Supreme Court, Palmer J, 31 August 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/august/2001nswsc621.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The liquidator of Southern Cross Interiors Pty Ltd ("SCI") brought an action in the Supreme Court of New South Wales against the Deputy Commissioner of Taxation ("DCT"), pursuant to the Corporations Act ("CA") sections 588FA, 588FE and 588FF(1), seeking an order that the DCT had received an unfair preference.

The DCT, in its defence, claimed that the liquidator had failed to prove that the payments were insolvent transactions within the meaning of CA section 95A, and therefore voidable under CA section 588FE(2). Further, the DCT sought a declaration that the two directors of SCI over the relevant period, were liable to indemnify the DCT pursuant to section 588FGA(2), for all repayments which the DCT might be liable to make to the liquidator.

Mr and Mrs Clark were the directors of SCI during the relevant period. They argued that under a Deed of Release that they signed with the liquidator, the liquidator was prevented from bringing the action against DCT which resulted in the DCT claim against them.

Finally, it was argued that Mrs Clark had a defence to the claim by the DCT, under CA section 588FGB(5), because she did not take part in the management of the company "because of illness or for some other good reason".

(1) Was the company insolvent at the relevant time?

The DCT argued that the liquidator had failed to show that SCI was insolvent at the relevant time. Although the creditors' debts may have been due on their contractual terms, the debts were not in fact payable at that time. Palmer J rejected this argument that there was a difference in meaning between "due" and "payable" for the purposes of determining ability to pay debts when "due and payable". The judge then reviewed the authority as to when debts are payable. Palmer J rejected the suggestion that the company's debts are payable only when the creditor has actively pursued payment. The judge did, however, consider that when applying section 95A, it was possible to go beyond the strict contractual terms of the debt owed and have regard to the "commercial realities" in which the company operated although the reality that creditors will allow some latitude in time for payment does not of itself warrant a conclusion that debts are not payable at the times contractually stipulated. Importantly, Palmer J said that:

"it is for the party asserting that the company's contract debts are not payable at the times contractually stipulated to make good that assertion by satisfactory evidence."

Palmer J suggested that there should be an implied or express agreement or course of conduct that extends the stipulated payment time. The DCT provided no evidence to suggest that there had been a variation to the dates at which SCI's debts were due and payable. Therefore, Palmer J found that the debts were due for payment under the terms of the relevant contracts, and on the facts, SCI was insolvent.

(2) Deed of Release / Estoppel

Mr and Mrs Clark argued that the liquidator was prevented from bringing the action, which had resulted in a claim against them, by reason of certain provisions in the deed of release that they had signed with the liquidator. In the alternative, they claimed that the liquidator was estopped from pursuing the claim against the DCT, because of representations made by him to Mr and Mrs Clark. Mr and Mrs Clark were unsuccessful on both these arguments.

(3) Mrs Clark's Defence - Sexually Transmitted Debt

Mr Clark asked his wife to be the second director of his company, because he believed that two directors were required. He did not explain to her anything about the company. When Mr Clark became aware that it was no longer necessary to have two directors, Mrs Clark ceased to be a director. Palmer J was satisfied, on the facts, that Mrs Clark had "acted on her husband's request, relying entirely on his implied assurance that her appointment was a formality because the company needed two directors." In doing so, she believed and trusted her husband. Did this constitute a "good reason" for not taking part in the management of the company under section 588FGB(5)?

Palmer J reviewed the historical approach to the interpretation of similar sections and noted that the words "good reason" do not carry the "relative standard of measurement inherent in the words "reasonable cause" or "reasonable grounds"" which appear in other sections. Palmer J said it is proper to begin with the assumption that a person who becomes a director understands the responsibilities required if him or her. Palmer J went on to say that "any reason which the law holds sufficient, according to accepted legal principle, to excuse a person from the legal consequences of his or her acts or omissions is a "good reason" for the purposes of this defence." Examples developed in the civil law include non est factum, duress, undue influence, deceit and unconscionable conduct. Palmer J then turned to the reasoning in Yerkey v Jones (1939) 63 CLR 649, and Garcia v National Australia Bank (1998) 194 CLR 395. In Garcia, it was held that the bank's enforcement of a guarantee against a wife who had given the guarantee for her husband's business based on her relationship of "trust and confidence" would be unconscionable. In Palmer J' s opinion, a wife's failure to appreciate the reality of her responsibilities as a director in the circumstances referred to in Garcia, "may be a "good reason" for failing to participate in management for the purposes of a defence" under section 588FGB(5). Palmer J emphasised that "whether the wife has truly failed to appreciate her responsibilities and whether such failure has anything to do with trust and confidence in the marital relationship are questions of fact in each case." Palmer J found that Mrs Clark's defence under section 588FGB(5) succeeded.

(4) Comment

This case is useful for two reasons. First, Palmer J has provided a summary of the law for assessing the solvency of a company.

Secondly, the judgment is important for its interpretation of the term "good reason" for the purpose of sections 588FGB(5) and 588H(4). Following Palmer J, in future any reason for which the well defined principles of civil law may relieve people from the legal consequences of their actions may be a "good reason". In this case, Palmer J found that these specific circumstances of "sexually transmitted debt", were sufficient to constitute a "good reason" for failing to participate in management for the purposes of the section 588FG(5) defence.

(C) SECTION 411 - PROPOSED SCHEME OF ARRANGEMENT - ROLE OF COURT ON A HEARING UNDER SECTION 411(1) - CONTENT OF EXPLANATORY STATEMENT AND EXPERT'S REPORT - FACTORS AND REASONING RELEVANT TO VALUATION   
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com))

GIO Building Society [2001] NSWSC 704, New South Wales Supreme Court, Austin J, 20 August 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/august/2001nswsc704.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

GIO Building Society Limited ( the "Building Society"') applied to the Court under section 411(1) of the Corporations Act 2001 for orders convening a meeting of members to consider the proposed scheme.

The members of the Building Society are not shareholders of the Building Society, but obtain membership rights through their customer relationship. GIO Personal Investment holds all of the share capital in the Building Society, totalling $28 million. The main differences between the rights of shareholder members and other members are:

- The shareholder may transfer its share; the rights of other members are personal and end when the customer relationship ends.  
- The shareholder may vote one vote per share held; other members may only vote if certain eligibility criteria are met. According to the explanatory statement the other members are in a minority position holding less than 0.04 percent of all votes that may be cast at general meeting.

The notable congruence of membership rights is that shareholders and the other members share equally in any surplus upon winding up of the Building Society. Otherwise, the non-shareholder members have no right to economic benefits. Evidence suggested that in the event of winding up members would receive as much as $2,100 each.

The scheme proposal was that all non-shareholder memberships be cancelled in consideration of a payment, in most cases, of $100 per membership. One effect of this was said by the expert's report to be that the Building Society's business would be integrated with the AMP Bank, giving rise to various costs savings and capital management efficiencies. Consequently, the independent expert's report raised questions of valuation when it addressed the question whether the proposal was in the best interests of the members.

(2) Judgment

(a) Application of Corporations Act 2001

Although proceedings commenced on 15 July 2001, before commencement of the Corporations Act 2001 (the "Act"), they are to be treated as proceedings under the Act as a result of s 1383 of the Act.

(b) The Court's role

Justice Austin held that:

- the Court's function of approving the scheme arises under section 411(4)(b) of the Act after the members approve the proposed scheme.  
- as the first hearing under section 411(1) is ex parte, the Court's role at this stage is to review the scheme and explanatory statement (and other relevant documents such as the independent expert's report) and identify areas that require attention before distribution of the documents. The Court does not commit itself to any particular view of the scheme.  
- although the Court will not ordinarily convene a members' meeting unless the scheme document, draft explanatory statement and, in this case, independent expert's report, are cast in such terms that the Court would be likely to approve it on a hearing under section 411(4)(b), objectors are not precluded from contesting the adequacy of the documents then.

(c) Content of explanatory statement and independent expert's report

Justice Austin reiterated observations made at an earlier hearing of the application, to the effect that there were two key issues which arose in relation to the question of valuation:

- the relevance of the entitlement of members to participate in a winding up. The materials suggest this would yield $2,100 per membership on a winding up, compared to proposed consideration of $100; and  
- any special value to be derived by any person from the scheme.

(d) Relevance of the entitlement of members to participate in a winding up

Referring to Holt v Cox (1994) 15 ACSR 314, his Honour determined that "a critical question in assessing the significance of participating in the surplus on the winding up is to make an assessment of the degree of likelihood that winding up may occur in any foreseeable circumstances. In a typical commercial company, if a winding up is unlikely, that fact will normally imply that an appropriate valuation method would be discounted cash flow or some similar method - assuming there is no real market for the securities in question and perhaps even if there is".

The assessment of the degree of likelihood of winding up is a question of fact. The explanatory statement and independent expert's report should consequently:

- express a view as to the likelihood of such a winding up; and  
- give reasons for that view.

(e) Special value

Referring to the observations of McLelland J in Melcann Ltd v Super John Pty Ltd (1995) 13 ACLC 92 at the bottom of the second column of page 93 through to the first column of page 94, Justice Austin determined that there must be some special value in this instance.

The special value arose as a result of the benefits to be derived by the AMP Group (including the Building Society) should the scheme be implemented. Those benefits included the fact that the Building Society will become a wholly-owned subsidiary and will transfer its business to another location within the AMP Group. These were corporate benefits, not benefits enduring to an individual member.

Consequently, the Court, at the hearing on 29 June 2001, had indicated that evidence either by affidavit or by the valuer giving an estimate of the value to the majority shareholder and the AMP group of implementation of the scheme needed to be provided. Once the value of the advantage is available, the question is then one of the appropriate allocation of that value.

The Court noted that the draft explanatory statement and the independent expert's report were amended in the report dated 16 August 2001 to address more fully the questions of valuation raised earlier by the Court.

Finally, Justice Austin noted that various statements in the report and explanatory statement relate to potentially contentious questions of law and valuation which it "would be wrong from the Court to express any view on…beyond saying that they are not obviously erroneous, and that a reasonable valuer…might form the opinions the report expresses…[T]he Court has not purported to resolve these questions, any of which could be placed in contention if there is an objection to the approval of the proposed scheme…"

Orders were made for the convening of meetings of members.

(D) INSOLVENCY - WINDING UP - MEANING OF TRANSACTION IN SECTION 588FE - VOIDABLE TRANSACTIONS - UNFAIR PREFERENCES  
(By Stephen Taffe, [Phillips Fox](http://www.phillipsfox.com))

Bartercard Limited v Wily [2001] NSWCA 262, New South Wales Court of Appeal, Handley JA, Sheller JA and Powell JA, 16 August 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/august/2001nswca262.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The appellant, Bartercard Limited ("Bartercard"), operated a reciprocal trade exchange where members of its trading programme exchanged goods and services between themselves. Bartercard also acted as a franchisor granting franchises to selected entities to use the name "Bartercard" and draw a commission on certain transactions.

The first respondent, Mr Wily, was the liquidator of Business Barter Exchange Pty Limited ("BBX"), which was a franchisee of Bartercard under an agreement dated 1 July 1994 (the "Licence").

On 28 August 1996, BBX owed Bartercard $656,292. Bartercard could have terminated the Licence on its terms at that time. Instead, Bartercard presented BBX with various documents for execution, including:

- a termination of the Licence effective on that day;  
- a release of Bartercard by BBX and its guarantors from any future liability under the Licence;  
- a memorandum to be signed by BBX's director acknowledging that he was bound by various restraints of trade and confidentiality obligations under the Licence in consideration for Bartercard's undertaking to negotiate a transfer of BBX's lease and associated liabilities;  
- a memorandum acknowledging termination of the Licence and an agreement to allow Bartercard to set off the value of BBX's business (determined by formula) against the debt owed to Bartercard as well as forfeiting commissions to which BBX would otherwise have been entitled.

The documents were never executed, but Bartercard immediately took over BBX's business premises and continued operating the business with the existing staff in place, and with the benefit of the existing infrastructure. Announcements were made that BBX and Bartercard were co-operating fully with Bartercard.

The formula by which BBX's business was valued resulted in the attribution of $110,020 to BBX's goodwill. Bartercard set this amount off against the debt owed to it by BBX of $656,292.

BBX no longer had any source of income and ceased trading. On 17 December 1996, BBX was wound up with an estimated deficiency of $1,170,856. The debt to Bartercard was listed in the accounts at the full amount without any set off.

BBX and its liquidator issued proceedings against Bartercard claiming that by setting off the amount of goodwill against the amount owing to it by BBX, Bartercard received a credit of $110,020 which was more than Bartercard would receive if the transaction was set aside and Bartercard were to prove for that debt in the winding up of BBX.

(2) Decision at first instance

The decision at first instance was handed down by Austin J in the Supreme Court of New South Wales on 9 May 2000.

Austin J found that Bartercard could have exercised its right of termination of the Licence. Instead, Bartercard presented BBX with a package of documents, which "reflected a transaction containing several components, only one of which was the termination of the licence. The transaction included an agreed valuation…and the setting off of that agreed value against the debt owed by BBX to Bartercard." Although BBX's director did not sign the documents, he acquiesced and co-operated with the process.

Consequently, the Court held, there was "either a binding contract or else Bartercard's conduct and [the director's]…acquiescence gave rise to an equitable estoppel binding Bartercard …not to resile from the arrangement". The arrangement produced legal consequences either at law or in equity "giving one of the parties to it a benefit of the kind described in section 588FA [which] should, as a matter of legislative policy, be amenable to the application of that section", citing Re Emanuel (No 14) Pty Ltd (in liq) (1997) 24 ACSR 292.

Austin J found that the relevant events occurred during the six months ending on the relation back day and that on 28 August 1996 BBX was insolvent. Accordingly, Austin J held that the transaction by which Bartercard set off the estimated value of BBX's business against amounts owing by BBX to Bartercard was an unfair preference for the purpose of section 588FA as well as being a transaction within the meaning of section 588FE.

Austin J ordered Bartercard to pay BBX the sum of $110,020, but with leave to prove in the winding up of BBX for the whole of the debt owing to BBX.

(3) Appeal

Bartercard did not challenge Austin J's findings of primary fact. Instead it submitted:

- that due to lack of signature of various documents by BBX's director, there was no formal contract.  
- the conduct of Bartercard in taking over BBX's plant and equipment and employees was not provided for in any of the documents and was not evidence of agreement in accordance with those documents.  
- if there was a transaction for the purposes of section 588FE, the benefit it was said to have received (leased premises, plant and equipment and relief of the obligation to share member and transaction fees with BBX), was illusory and was countermanded by assumption of ongoing liabilities in respect of those benefits.  
- the only benefit it received was to rid itself of a licensee who was persistently in breach of the Licence, which was not a benefit provable in liquidation.   
- even if there was some arrangement terminating the Licence and transferring the business, the agreement to pay BBX $110,020 was not part of that arrangement. "Moreover, termination had the effect that any asset or value with respect to the business disappeared. No goodwill remained."

(4) Appeal decision

Sheller JA (with Handley JA and Powell JA agreeing) held that, largely for the reasons given by Austin J, the trial judge was correct in finding that:

- as a franchisor, Bartercard had an interest in ensuring BBX's business continue.  
- Bartercard saw fit to value the brokerage and include the valuation as part of a settlement calculation (which reduced the amount owed by BBX to $541,845), in consideration for accepting Bartercard's terms.  
- BBX's director did not object to the transfer of the plant and equipment and employees or off-set of a portion of the debt to Bartercard.  
- the proposals put by Bartercard on 28 August 2001 were carried into effect, albeit no documents were executed.  
- to renege on the price offered was unconscionable.

Accordingly, the Court of Appeal upheld Austin J's decision as to section 558FE and dismissed Bartercard's appeal.

(E) SHAREHOLDER VALUE  
(By Scott Crabb and Mark Gerus, [Clayton Utz](http://www.claytonutz.com))

Nestegg Holdings Pty Ltd v Smith [2001] WASC 227, Supreme Court of Western Australia, Master Sanderson, 27 August 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2001/august/2001wasc227.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

A recent decision of the Supreme Court of Western Australia has re-affirmed the accepted orthodoxy that shareholders have no standing to sue directors and others for wrongs done to the company in the absence of exceptional circumstances.

(1) Factual background

The proceedings arose out of the cessation of business of a company named Auschess Pty Ltd. Mr Ross Cammilleri (together with his brother Craig), Mr Bailey and Mr Smith were directors and shareholders of Auschess (through their personal companies, Nestegg Holdings Pty Ltd, Gocom Pty Ltd and Chantry Haulage Pty Ltd respectively).

Nestegg's allegation, in essence, was that Mr Smith participated in a decision to wind up Auschess without disclosing that he might involve himself in the business undertaking of the fifth defendant ("pieNetworks"). pieNetworks was a new company in which Mr Smith and Mr Bailey became shareholders after Auschess was agreed to be wound up but in which Nestegg had no shareholding or involvement. Mr Smith was alleged to have persuaded Mr Cammilleri to agree to the winding up of Auschess by making implied representations as to the viability of the business of Auschess. Mr Smith denied making any representations or acting wrongfully but, consistent with the procedure on a strike out application, the facts were assumed to be as alleged by Nestegg.

Nestegg's case was that Mr Smith and Mr Bailey (together with others) breached fiduciary duties owed directly to Nestegg in its capacity as a shareholder of Auschess.  
Unusually, after the commencement of the Nestegg Action, Nestegg and the Cammilleris sought leave under section 237 of the Corporations Act 2001 to commence separate proceedings against the same persons but in the name of Auschess. Section 237 allows for derivative actions. Subsequently, a majority of the shareholders of Auschess resolved to commence proceedings against each of the defendants in the Nestegg Action. Proceedings were commenced in the name of Auschess.

(2) The arguments

The defendants applied for the Nestegg action to be dismissed summarily on the basis that, if a viable claim existed, it could only be pursued in the proceedings by Auschess. This contention was underpinned by three propositions:

- any fiduciary duties owed by the individual defendants were plainly owed to Auschess rather than its shareholder Nestegg, as the Cammilleris appeared to have recognised in commencing an application under section 237;  
- if any wrong was committed, it was committed against Auschess; and  
- by seeking to recover an alleged diminution in the value of its shareholding, Nestegg was simply claiming the loss suffered by Auschess, and it was clear as a matter of law that no action would lie with Nestegg to do so. A fortiori, where the company itself was bringing a claim.

In support of their application, the defendants relied upon decisions made in a series of recent cases in England (especially Stein v Blake [1998] 1 All ER 724, Johnson v Gore Wood [2001] 2 WLR 72) and in New South Wales (see Brunninghausen v Glavanics (1999) 17 ACLC 1,247). These authorities supported what may be described as the orthodox position that, other than in exceptional circumstances, where a company suffers a loss caused by a breach of duty owed to it, the proper plaintiff to sue in respect of that loss is the company. To allow otherwise would be leave open the possibility of double recovery. The measure of the shareholders' loss - the diminution in the value of their shares - is reflective of the diminution of the value of the company's undertaking, which the company can recover.

This rule is not as harsh and inflexible as first appearances might suggest. While fiduciary duties are owed to a company and not its shareholders, the courts have been astute to recognise that the nature of a particular transaction between a director and shareholder may give rise to a fiduciary duty owed by the director directly to the shareholder. For example, in Brunninghausen v Glavanics the court found a fiduciary duty arose and was breached in circumstances where a director failed to disclose material information to a shareholder in the context of transaction to purchase his shareholding.

The difficulty for Nestegg in seeking to maintain its action against the directors of Auschess was that there had been no transaction between the directors and shareholders. It relied upon the decision of the New Zealand Court of Appeal in Christensen v Scott (1996) 1 NZLR 273. There, it was held that a shareholder did have a right of action for losses occasioned by a diminution in the value of the company shares.

(3) Applying English authority

Master Sanderson of the Supreme Court of Western Australia observed that Christensen v Scott has been subject to "unremitting criticism" both academic and judicial. Following the lead of the House of Lords in Johnson v Gore Wood, therefore, the Master declined to follow the decision of New Zealand Court of Appeal.

It was held that the decision in Johnson v Gore Wood "is persuasive and in conformity with established principles of company law" and should be followed in Western Australia. In particular, the Court cited passages from the reasons of Lord Bingham (at 94-95) and Lord Millett (at 120-121) with approval. The Court considered that this was a case where the proper plaintiff was Auschess, the plaintiff shareholder had no right of action independent from Auschess and any damage suffered by the plaintiff was reflective only.

(4) Derivative action costs

The decision also dealt with two procedural points regarding statutory derivative actions.   
At the hearing, the application under section 237 of the Corporations Act was withdrawn by consent.

The applicants had not given notice of the application to Auschess as required by section 237(2) although Auschess had clearly been aware of the application. It was argued that the Court should take this failure to give notice into account when considering costs, on the basis that the failure to give notice made it doubtful that leave would have been granted. The Court rejected this argument, finding that it was difficult to know what difference notice would have made to Auschess' position.

The second point was potentially more substantial. A prerequisite to a grant of leave under section 237 is that "it is probable that the company will not itself bring the proceedings". In this case, the application was made before any resolution had been put to the Board of Auschess seeking approval for the proposed action. Subsequently, such a resolution was put and passed.

Again, it was unsuccessfully argued that this was a matter that went to costs. The Court held that the applicant had had a reasonable concern that any board resolution would be voted down. While it might have been better had the application been put off until after a vote, again, it was not a matter which was decisive on the question of costs.

(F) ANSETT'S LAW  
(By Karen O'Flynn, [Clayton Utz](http://www.claytonutz.com))

Ansett Australia Limited; Rappas v Ansett Australia Limited [2001] FCA 1348, Federal Court, Goldberg J, 19 September 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/september/2001fca1348.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

The recent spate of corporate collapses will undoubtedly see some interesting legal issues come before the courts. Ansett's problems have already given rise to two novel rulings.

(1) What about the workers?

The first concerned the representation of the company's employees at a first creditors' meeting in the voluntary administration. The Federal Court was asked, in effect, to appoint unions to represent employees at that meeting.

The background facts are already well known. Ansett had thousands of employees scattered all around Australia. As creditors, they were entitled to a vote at the meeting. However, the tight statutory timetable for a first meeting and their geographical dispersal (and, presumably, their sheer numbers) meant that it was impracticable for them all to attend the meeting in person or by proxy.

Accordingly, the Court acceded to a request that the relevant unions be appointed as the employees' attorneys at the meeting under regulation 5.6.31A of the Corporations Regulations. The Court felt that this was appropriate, given that the unions had negotiated the terms of employment that presumably formed the basis of the employees' claims as creditors of the company. The order nominated a specific individual for each union, who was to act as the union representative for voting purposes.

The order also included an "opt-out" clause. Under this, a union would not act for any employees who actually attended the meeting in person or by proxy.

(2) What about the administrators?

The other issue facing the Court was how to deal with a proposal to change Ansett's administrators.

The originally-appointed administrators indicated that that they shortly intended to resign. The unions asked the Court to appoint replacement administrators.

The Court thought that it was vital that the company not be left at any point without an administrator. Accordingly, it made an order appointing new administrators, under section 449C(6) and 447A. This order was only to take effect "as and from the date and time that the [current administrators] give notice of their resignation".

One possible complicating factor was that the directors of Ansett had not indicated their attitude to the proposed change of administrators. It was they who had originally appointed the administrators; as the Court pointed out, section 449C(1) provides that, where an administrator resigns, the person who appointed that administrator may appoint a new administrator.

The Court therefore included in its order a provision giving leave to Ansett's directors to apply to vary or revoke the appointment of the new administrators, within 2 days of the order.

(3) Comment

The order appointing the unions as attorneys was made under section 447A of the Corporations Act 2001. The order appointing the new administrators was made under a combination of section 449C(6) and 447A.

The making of these orders confirms the extremely wide powers conferred on the Court by section 447A (see also "Section 447A - is there anything this little section can't do?" (<http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0040.htm>#(C)section)). Interestingly also, the orders were made by the Federal Court, in one of its first decisions since returning to the Corporations arena. The orders appear almost to have been made by consent between the parties. It will be interesting to see if contested applications for the use of s 447A bring out any arguments about the compatibility of the section with the constitutional separation of powers (an issue which was not laid completely to rest in Wakim).

5. RECENT CORPORATE LAW JOURNAL ARTICLES

K Luck, 'The End of History for Corporate Governance or Just Another Moment in Time' (2001) 19 Company and Securities Law Journal 305

There has been a growing movement predicting that corporate governance models around the world will converge towards the American model. This article examines the claims of the convergence school and argues that such claims are overstated. Corporate America today is as much shaped by politics as by market efficiency considerations. The American shareholder model also suffers from ineffective market monitoring.

Note, 'New Applications for Credit Derivatives' (2001) 19 Company and Securities Law Journal 316

Note, 'The Panel's Reluctance to Declare Circumstances Unacceptable?' (2001) 19 Company and Securities Law Journal 323

Note, 'Pinnacle 8: New Duties for Target Directors' (2001) 19 Company and Securities Law Journal 329

Note, 'Fixed Charges and Book Debts: Agnew & Bearsley v The Commissioner of the Inland Revenue' (2001) 19 Company and Securities Law Journal 334

Note, 'R v Firns - Insider Trading Update' (2001) 19 Company and Securities Law Journal 337

Note, 'Identification of De Facto and Shadow Directors Easier Said Than Done: Natcomp Technology Australia Pty Ltd v Graiche' (2001) 19 Company and Securities Law Journal 340

Journal of Corporation Law, Vol 26 No 3, Spring 2001. Articles include:

- Abolishing Veil Piercing  
- Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness  
- Mutual Fund Advisory Fees: The Cost of Conflicts of Interest  
- A General Model for Corporate Acquisition Law  
- Some Procedural Defenses for Foreign Defendants in American Securities Litigation  
- Berle and Means Reconsidered at the Century's Turn  
- Mandatory Arbitration in the Securities Industry: Efficiency at the Cost of Justice for All?

S Miller, 'What Buy-out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company?' (2001) Vol 38 No 2 Harvard Journal on Legislation

G Sinclair, 'Internet Direct Public Offerings: New Opportunities for Small Business Capital Finance' (2000) Vol 27 No 3 Manitoba Law Journal

O Akindemowo, 'Electronic Money Regulation: A Comparative Survey of Policy Influences in Australia, the European Union and the United States of America' (2001) 11 Journal of Law and Information Science 61

H Kim, 'Taking International Soft Law Seriously: Its Implications for Global Convergence in Corporate Governance' [2001] Journal of Korean Law 1

J Kim and J Kim, 'Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance' [2001] Journal Korean Law 51

A Agrawal and C Knoeber, 'Do Some Outside Directors Play a Political Role?' (2001) 44 Journal of Law and Economics 179

A Tam, 'Financial Orders Under Subsections 23(1)(b) and (c) of the Securities (Insider Dealing) Ordinance (2000) 30 Hong Kong Law Journal 22

W Blair, 'Secondary Liability of Financial Institutions for the Fraud of Third Parties' (2000) 30 Hong Kong Law Journal 74

R Art, 'Conversion and Merger of Disparate Business Entities' (2001) Vol 76 No 2 Washington Law Review

M Gruson, 'Global Shares of German Corporations and Their Dual Listings on the Frankfurt and New York Stock Exchanges' (2001) Vol 22 No 2 University of Pennsylvania Journal of International Economic Law

A Licht, 'Managerial Opportunism and Foreign Listing: Some Direct Evidence' (2001) Vol 22 No 2 University of Pennsylvania Journal of International Economic Law

J Ratner, 'Stockholders' Holding Claim Class Actions Under State Law After the Uniform Standards Act of 1998' (2001) 68 University of Chicago Law Review 1035

M West, 'Why Shareholders Sue: The Evidence From Japan' (2001) 30 Journal of Legal Studies 351

B Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 Journal of Legal Studies 459

W Sjostrom, 'Going Public Through an Internet Direct Public Offering: A Sensible Alternative for Small Companies?' (2001) 53 Florida Law Review 529

H Yuanqing, 'On Legal Duties of Securities Fund Managing Companies' (2001) No 1 Contemporary Law Studies 36

J Harris and C Caliendo, 'Who Says the Business Judgement Rule Does Not Apply to Directors of New York Banks?' (2001) 118 Banking Law Journal 493

D Schneider, 'Toward a Universal Approach to E-Finance Regulation: The SEC's Electronic Media Releases' (2001) 118 Banking Law Journal 554

M Raphael, 'Corporate Self-Regulation - The Whole Answer, Part of the Answer or no Answer?' (2001) 29 International Business Lawyer 195

G Goran, 'Merger Control Review in Romania: A Significant Issue Even for Relatively Small Transactions' (2001) 29 International Business Lawyer 229

N Meurling, 'Current Trends in the Registration and Execution of Security Documents in Indonesia' (2001) 29 International Business Lawyer 235

T Joo, 'The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis Into First Amendment Jurisprudence' (2001) 79 Washington University Law Quarterly 1

S Worthington, 'Reforming Directors' Duties' (2001) 64 Modern Law Review 439

Australian Journal of Corporate Law, Vol 13 No 1, July 2001. Articles include:

- In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance  
- Liability Trends in the USA and Their Relevance for Australian Auditors  
- Working Out the Private Offer Exemption: From Concept to Safe Harbours  
- Corporate Governance of Indonesian Banks: The Legal and Business Contexts

International Company and Commercial Law Review, Vol 12 No 4, April 2001. Articles include:

- Corporate Manslaughter is Just Around the Corner  
- Recent Cases in Involving the Commercial Agents' Regulations  
- French Commercial Law: A New Code, New Courts and New Judges?

H Emmerman, 'The Ever Increasing Influence of Mediation as a Means of Resolving Complex Commercial Disputes' (2001) Vol 50 No 4 De Paul Law Review

OBTAINING COPIES OF ARTICLES

Subject to copyright restrictions, the articles listed above are available from the University of Melbourne Law School Library by fax or post for a fee. The charges for MelbLaw Express are $3.00 per page fax within 2 hours; $2.50 per page fax same day and $2.00 per page mailed out (includes postage). This service is available 9-5, five days per week.

Please contact Sophy Kosmidis:

fax: int + 61 3 8344 5995;  
tel: int + 61 3 8344 7313, or   
email: lawlib@law.unimelb.edu.au

6. ARCHIVES

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

<http://cclsr.law.unimelb.edu.au/bulletins/>

7. CONTRIBUTIONS

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

8. MEMBERSHIP AND SIGN-OFF

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an email to: "cclsr@law.unimelb.edu.au".

9. DISCLAIMER

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