**CORPORATE LAW ELECTRONIC BULLETIN**
**Bulletin No 4, December 1997**

Centre for Corporate Law and Securities Regulation
Faculty of Law, The University of Melbourne

with the support of

The Australian Securities Commission
and the leading national law firms:

Allens Arthur Robinson Group
Blake Dawson Waldron
Clayton Utz
Corrs Chambers Westgarth
Mallesons Stephen Jaques

Editors: Kenneth Fong, Dr Elizabeth Boros and Professor Ian Ramsay

Editors’ Note: As some subscribers have experienced trouble receiving the full Bulletin, from this issue, the Bulletin will be sent out both within the body of this e-mail message and as an MS Word attachment.

This is the final issue of the Bulletin for 1997. The next issue will be published in January 1998. We take this opportunity to thank the supporters of the Bulletin, in particular the ASC, the Federal Department of Treasury and the major law firms listed above. The Editors have been very pleased with the success of the Bulletin. Since it commenced in October, the number of subscribers has grown very quickly to approximately 550 with a readership estimated at over 1,000 (as the Bulletin is distributed widely within law firms, companies, government departments and regulators). If you have any suggestions for improvements to the Bulletin, please e-mail them to (cclsr@law.unimelb.edu.au). The Editors wish all of our readers an enjoyable Christmas and a happy and prosperous new year.

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#1.RecentCorporateLaw)
(A) [CLERP Paper No 5: Electronic Commerce](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28A%29CLERPPaperNo5)
(B) [ASC Response to CLERP Paper on Electronic Commerce](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28B%29ASCresponse)
(C) [Company Law Review Bill](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28C%29CompanyLawReviewBill)
(D) [Unfair Trading - New Bill](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28D%29Unfairtrading)
(E) [ASC Draft Policy - Schemes of Arrangement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28E%29ASCdraftpolicy)

2. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#2.RecentCorporateLaw)
(A) [Greenfields Coal Company Limited v Mineral Resources Corporation, Federal Court of Australia, 28 November 1997](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28A%29Securityforcosts)
(B) [Charles Walter Laycock v Australian Securities Commission, Federal Court of Australia, 28 November 1997](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28B%29ASCnotrequired)
(C) [Otter Gold Mines Ltd v Australian Securities Commission, Federal Court of Australia, 5 November 1997](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28C%29PowerofASC)
(D) [George Iliopoulos v Australian Securities Commission and Fiona Iliopoulos v Australian Securities Commission, Administrative Appeals Tribunal , 17 October 1997](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28D%29AATsetsaside)

3. [RECENT ASC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#3.RecentASC)
(A) [Regulatory Policy Branch - Summary of Projects](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28A%29Regulatorypolicy)
(B) [Smart Card Information Kit](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28B%29Smartcard)
(C) [Alan Cameron Reappointed Chair of ASC](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28C%29AlanCameron)
(D) [ASC Chair Appointed to Joint Forum](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#%28D%29ASCchair)

4. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#4.Recentcorporatelaw)

5. [CORPORATE LAW CONFERENCES AND SEMINARS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#5.Corporatelawconferences)

6. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#6.Archives)

7. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#7.Contributions)

8. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#8.Membership)

9. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0004.htm#9.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CLERP PAPER NO 5: ELECTRONIC COMMERCE

Business and consumers will be able to harness the benefits of rapidly advancing communications technology, including the Internet, under proposals for reform to electronic commerce released on 10 December 1997 by the Treasurer. The proposals are the fifth in a series of reform papers released under the Corporate Law Economic Reform Program (CLERP).

Key proposals in the paper include:

(i) Ensuring that the Corporations Law (the Law) and associated administrative arrangements allows companies to utilise electronic means of communications with the ASC and their members, in addition to the paper-based methods currently employed;

(ii) Developing legislation to provide a more certain and robust legal framework for close-out and market netting arrangements in the financial system. This legislation will ensure that such netting arrangements will operate, notwithstanding the insolvency of a party to the arrangements; and

(iii) Amending relevant legislation to allow the use of electronic methods for the transfer of legal title to debt securities.

The electronic commerce proposals for reform also respond to Recommendations 91 and 93 of the Financial System (Wallis) Inquiry that "legislation should be implemented to allow for electronic commerce" and that "international harmonisation of law enforcement and consumer protection should be pursued." The paper also responds to the Report of the Companies and Securities Advisory Committee (CASAC) Netting Sub-Committee on the recognition of netting in the financial markets.

The Government is seeking comments from interested parties on the electronic commerce paper by 23 January 1998.

Copies of the electronic commerce reform paper are available from the AGPS and on the Treasury website (http://www.treasury.gov.au).

KEY FEATURES OF THE PROPOSED REFORMS:

(i) Enforcement

The ‘Economic Commerce’ paper notes the positive record of the ASC in responding proactively to the challenges posed by developments in electronic communications and the Internet. These include the release of consultative documents and an Information Sheet on Internet issues, and the ASC’s active participation in the work of the International Organisation of Securities Commissions (IOSCO).

- The ASC should continue its vigilance in relation to the regulatory concerns posed by developments in electronic communication and commerce, and maintain an active enforcement strategy to deal with those concerns.

- The ASC should also continue its participation in the work of IOSCO, which is addressing enforcement challenges and opportunities arising from the increasing use of the Internet.

(ii) Electronic communications

Many provisions of the Law were drafted in a pre-electronic era and do not specifically contemplate electronic communications methods being employed for communications between a company and its members and with the ASC including for the payment of fees.

Legislative amendments will be developed to:

- Ensure that the arrangements governing the lodgment and inspection of documents with the ASC are flexible enough to accommodate changes in communications technology.

- The focus will be on the information that must be lodged or may be inspected with the ASC, rather than on its format or the physical media in which it is stored.

- The Law will specify the information the ASC should obtain and permit to be inspected, while practical matters of detail, such as the methods of communication which may be used for that purpose, will be set out in regulations or in rules determined by the ASC.

- Give the ASC greater flexibility to receive documents and requests for service in electronic form. The current fee collection structure will be amended to ensure that the means and timing of fee collection accommodates electronic commerce methods.

- Facilitate electronic communication between companies and their members, as well as the retention of company records in electronic form. The Law will be amended to recognise electronic communication methods, thereby providing a more modern and technologically-neutral legislative framework.

(iii) Financial system settlement arrangements

- The paper identifies legal uncertainties surrounding the recognition of netting arrangements in the payments system and the financial system more generally. It notes the importance of addressing these concerns for the stability of the financial system. The paper outlines the reforms already announced by the Government to bring more certainty to these arrangements in the payments system to coincide with the implementation by the Reserve Bank of Real Time Gross Settlement of high value transactions in that system.

- The paper also outlines concerns raised by the Companies and Securities Advisory Committee (CASAC) Netting Sub-Committee Report regarding uncertainties about contractual close-out and market netting arrangements in the financial system.

* To overcome these uncertainties, the Government will develop legislation to provide a more certain and robust legal framework for close-out and market netting arrangements. This legislation will ensure that netting arrangements will operate, notwithstanding the insolvency of a party to the arrangements.

iv) Debt securities

- Debt securities markets have been transformed by computerisation (in both information management and telecommunications), which has brought a new order of operational efficiency. However, as a consequence of a process known as dematerialisation  the shift from paper-based securities systems to electronic records  the operation efficiencies have been accompanied by some legal uncertainties.

- That uncertainty arises from two sources:

* The electronic registration of legal title to debt securities impacts on the potential negotiability of bearer securities; and
* Legal provisions imposing limitations on the assignment of securities, including those requiring that transfers only be undertaken in written form.

- Further, the Commonwealth Inscribed Stock Act 1911 and the regulations under that Act currently require that transactions and transfers of legal title in Commonwealth Government securities be settled through a paper-based system.

- The relevant legislation will be amended to redress these difficulties by allowing the use of electronic methods to be used for transfer of title to debt securities.

(B) ASC RESPONSE TO CLERP PAPER ON ELECTRONIC COMMERCE

ASC Chair Alan Cameron, in a press release dated 10 December 1997, has welcomed proposed changes to the Law designed to facilitate the use of electronic commerce. The ASC particularly welcomed changes which will allow more efficient use of communications technology in the lodgment and inspection of information about Australian corporations.

Mr Cameron noted that, ‘The ASC’s electronic lodgment program (EDGE), which allows for electronic lodgment of annual returns and other company information, has proven to be very popular with business. In 1996-97, electronic lodgments with the ASC increased by 125%, so that 35% of all lodgments now occur electronically. As well as this, full company searches are available on the Internet and 84% of all searches of the ASC database are now conducted online.’

(C) COMPANY LAW REVIEW BILL

The Company Law Review Bill was introduced into the House of Representatives on 3 December 1997. It replaces the draft Second Corporate Law Simplification Bill. Key details of the Bill were summarised in the third issue of the Bulletin (available on our Web archive - see Item 6 of this Bulletin for details on accessing the Web archive). The Managed Investments Bill was also introduced into the House of Representatives on 3 December 1997.

(D) UNFAIR TRADING - NEW BILL

(Submitted by Clayton Utz)

Much publicity has been given to the Federal Government’s recent decision to introduce measures that address small business concerns about harsh or unfair business practices. Key to the government’s proposals is the introduction of two very significant amendments to the Trade Practices Act:

(i) a new section 51AC which prohibits unconscionable conduct in commercial dealings in connection with the supply of goods and services, and

(ii) a new provision permitting industry codes to be made enforceable through the Trade Practices Act with remedies for breach to include damages, injunctions, setting aside or variations of agreements, and compensation.

In summary, the key features of the amendments are:

(i) from 1 July 1998, it will be unlawful for any business to engage in unconscionable conduct in connection with the supply of any goods or services to a "business consumer";

(ii) although a business consumer is generally intended to be small business, the new law may be used by anyone who is not a public listed company (either in Australia or overseas), or a subsidiary of a public listed company. The new law will apply only to transactions where the "price" (determined under the Trade Practices Act) does not exceed $1 million;

(iii) in determining what is "unconscionable conduct", the government has signalled it will add to the Act’s existing provisions and allow the courts to develop the concept. To some extent this is to be based upon existing section 51AA, the consumer provision (section 51AB) and common law, but clearly there will be potential for business to use the new provision in ways not available under the existing law;

(iv) the obvious categories of business intended to benefit from the provision include franchisees, commercial tenants, borrowers from banks and other lending institutions, and any business which acts as a distributor or licensee for a large supplier. However, the new law could be used to challenge any harsh or unfair tactics in commercial negotiations or contract terms that are "unfair".

Predicably, the Bill contains a long shopping list of factors which must be taken into account. However, none of these is necessary or sufficient for an action to succeed. These factors include:

(i) acting in good faith;

(ii) preparedness to negotiate;

(iii) relative strengths of bargaining position;

(iv) imposing unreasonable and unnecessary terms;

(v) using undue influence or pressure, or unfair tactics;

(vi) overcharging or discriminating in pricing;

(vii) failing to observe applicable industry codes;

(viii) failure to disclose intended conduct which would or might affect the interests of the business consumer.

The Bill does not adopt the test of prohibiting "unfair conduct" which was advanced by the House of Representatives Standing Committee report in May this year. However, much reference to the findings of that report is made in the Bill’s explanatory materials.

Interestingly, the Bill proceeds on the basis that the victim in all cases will be the acquirer of goods or services, not the supplier. There seems to be no ability for a small supplier to complain of unfair tactics or oppressive conduct by a large customer to whom it supplies goods or services. There also seems to be no scope under the Bill for a competitor to use the new provision to attack conduct (such as unfair competition) by a rival competitor.

The most effective way of preventing claims under new section 51AC will be to require that contracting parties have the benefit of their own legal and financial advice before they commit to significant transactions.

The Bill will be capable of being used in a wide variety of situations. It will no longer be a simple matter, resting solely on contractual rights, to terminate a distribution agreement or to close a retail account, particularly where the distributor or customer claims that its business is heavily dependent upon continued supply.

The Bill has also opened up the vexed area of price discrimination and whether it will in effect be unlawful to discriminate between similar types of resellers or other customers on matters of price, credit terms or other aspects of the trading relationship.

Directors and others should also be aware that it is not possible to contract out of the new Bill.

It is difficult to predict if the Bill, if enacted, will produce a flood of actions. The ACCC will be given a budget to bring early test cases and to demand undertakings from firms to change the conduct or contract terms. We expect that the provision will often be pleaded in commercial business related litigation and that it will be some years before sufficient principles emerge from the Court’s interpretation of the law to lay down real guidelines. Section 51AC is certainly likely to add to the length and cost of commercial litigation.

(E) ASC DRAFT POLICY - SCHEMES OF ARRANGEMENT

The ASC has released for public comment a draft policy which recommends that schemes of arrangement should have a similar level of disclosure and investor protection to takeovers. Written submissions should be addressed to Nigel Morris, Regulatory Policy Branch, ASC, GPO Box 5179AA, Melbourne, Vic 3001, telephone (03) 9280 3583; fax (03) 9280 3339.

It is stated in the draft policy statement that the ASC has a significant role in schemes of arrangement. It is to assist the court to review the content of scheme documents, review the nature and functioning of the scheme, and in many cases, represent the interests of investors and creditors where the ASC may be the only party before the court other than the applicant. The ASC has a role in ensuring that all matters which are relevant to the court’s decision are properly brought to the court’s attention before it calls meetings or before it confirms a scheme.

The following are some of the matters covered in the draft policy statement:

Time for review - The ASC must have reasonable opportunity to examine the terms of the proposed scheme and draft explanatory statement and to make submissions to the court. Adequate time is especially important in the case of very large or complex schemes.

Compliance with the law - The ASC will examine the scheme document to ensure that it complies with the provisions of section 411 of the Law. It is preferable that a precise termination date for a scheme be specified in the scheme documents.

False, misleading or deceptive material - Scheme documents must not contain any material that is false or misleading. The draft policy statement refers to a number of judicial decisions emphasising the need for candour and completeness in the disclosure of information in scheme documents.

Avoidance of takeover provisions - The court may not approve a scheme unless either it is satisfied that the scheme is not a takeover avoidance device or the ASC provides a statement in writing that it has no objection to the scheme.

Scheme to remove minority shareholders - A scheme is one of a number of methods which may be used to remove minority shareholders. The ASC will consider whether minority shareholders are adequately informed and fairly treated. This will involve examining whether:

(i) all relevant information has been disclosed to minority shareholders;

(ii) the consideration to be received by minority shareholders is fair, in so far as fairness is determined by minority shareholders receiving reasonable and equal opportunity to share in the benefits which will flow to the majority shareholder by virtue of the scheme proceeding; and

(iii) there is equity (but not necessarily identity) in the treatment of different classes.

The draft statement refers to the High Court decision in Gambotto v WCP Ltd (1995) 182 CLR 432 and states that although it was concerned with a different process, it provides a useful guide for review of fairness and disclosure in cases where minorities are to be expropriated. Whether the consideration offered is fair will depend on factors such as the company’s assets and liabilities, the market value of the company’s securities, past and likely future dividends and the nature of the corporation and its likely future. In addition, following the decision of the Supreme Court of New South Wales in Melcann Ltd v Super John Pty Ltd (1995) 13 ACLC 92, any special benefit that will be obtained by the majority shareholder following the acquisition of the minority shareholders’ shares will also be relevant in determining whether the consideration is fair.

The proponents of an expulsion scheme should consider disclosing the following matters in the explanatory statement: the purpose of the scheme; the reasons for rejecting alternative means of achieving that purpose; the reasons for concluding that the consideration will be fair to those affected; information regarding the current and historical market prices of the shares; the net book value of the assets; the value of the company both as a going concern and on liquidation; any reports or appraisals prepared in relation to the scheme; either possible capital gains tax implications or advice to members to seek taxation advice; any special benefit that will accrue to the majority shareholder following acquisition of minority shareholders’ shares; and any other material information known to the proponent or directors and relevant to making a decision on the proposed scheme.

The proponents of an expulsion scheme should also consider providing an independent expert’s report if one is not already required under section 411(13) or Schedule 8.

Other disclosure issues include:

(i) a clear and prominent statement of, and comparisons of, the advantages and disadvantages of proceeding with or rejecting the scheme; and

(ii) identification of scheme participants, including different classes of participants as a scheme must be considered and voted upon by each separate class of participant affected by the scheme.

Solvency of company subject to a scheme - The ASC will consider whether the continuation of the business of a company following a scheme may result in a breach of the Law by the directors or the company, such as a breach of section 588G.

Scheme involving other prescribed procedures - A scheme cannot be used to do a thing for which a specific procedure is laid down by the Law, although it can often be combined with that procedure. Examples of situations where the Law provides a specific power or procedure are:

(i) changing the status of a company - section 167;

(ii) amending the memorandum of a company - section 171;

(iii) changing a company’s name; and

(iv) reducing the capital of a company - section 195.

Share splitting - The ASC has made public statements on its views on share splitting devices in the context of takeovers. The ASC considers that similar devices employed by proponents or opponents of a scheme would likewise be objectionable.

Taxation considerations - Where the ASC believes that a scheme of arrangement may involve a significant reduction in the taxation position of the company which is the subject of the scheme, or the scheme’s proponents, the ASC may require evidence that the applicant has informed the Australian Taxation Office of the proposed scheme.

Full details of the draft policy statement are available on the Website of the ASC, the address of which is (http://www.asc.gov.au/).

2. RECENT CORPORATE LAW DECISIONS

(A) SECURITY FOR COSTS - WHETHER RELEVANT CREDIBLE TESTIMONY

Greenfields Coal Company Limited v Mineral Resources Corporation, Federal Court of Australia, 28 November 1997, Goldberg J, VG 3215 0f 1997, Fed No 1323/97.

Section 1335(1) of the Law provides that "where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, requires sufficient security to be given for those costs and stay or proceedings until the security is given".

The applicant company had brought proceedings against the respondents alleging a number of matters including breach of fiduciary duty in the case of those respondents who were former directors of the applicant. There were also allegations that a number of the respondents had breached the insider trading provisions of the Law. In October 1997 the respondents filed a notice of motion seeking an order that the applicant provide security for the respondents’ costs in the sum of $159,184.

Goldberg J held that it was appropriate in the circumstances for the applicant to provide security for the respondents’ costs. In the course of his judgment, Goldberg J made the following observations:

(i) It is not necessary that the respondents succeed in establishing a likelihood or probability that the applicant is either presently insolvent or will be insolvent at the time of the legal proceedings.

(ii) Although relevant credible evidence may exist that the corporation will be unable to pay the costs of the defendant if successful in its defence, this only satisfies the threshold test. The court must then consider whether it should exercise its discretion in favour of ordering security.

(iii) Goldberg J noted that there has been debate in the authorities as to whether a court in considering an application under section 1335 should approach its task on the basis that its discretion is unfettered and without any predisposition or bias in favour or against the grant of an order for security. Goldberg J preferred to follow those authorities which held that the court’s discretion is unfettered.

(iv) The applicant argued that it was seeking to enforce standards of conduct; namely, directors’ duties, required under the Law. Because of this element of public interest in the claim, the applicant argued that there is authority for the proposition that security for costs should not be awarded in such claims. Goldberg J held that the claims did not relate to effects or consequences upon members of the public generally but rather related to actions and activities involving the parties to the proceedings.

(v) Goldberg J held that it would not be appropriate to conclude that a security for costs order should be made without reference to the financial accounts and statements of the applicant.

The respondents sought security for costs for the whole of the legal proceeding including the trial. Goldberg J held that the practice of the court was for an order to be made for only part of the proceeding, it being left to the respondent to make a further application closer to trial. He considered it appropriate in the ordinary course to provide for security for costs up to just before the commencement of the final hearing of the proceedings. This amounted to a sum of $42,000 for which an order for security for costs was made.

(B) ASC NOT REQUIRED TO PROVIDE PARTICULARS IN SECTION 600 PROCEEDINGS

Charles Walter Laycock v Australian Securities Commission, Federal Court of Australia, 28 November 1997, Goldberg J, VG 401 of 1997, Fed No 1322/97.

The applicant sought judicial review of what he claimed to be a decision and conduct of the ASC which had arisen in the course of a hearing which had been held for the purposes of section 600(3) of the Law. The applicant was a director of a number of companies which had been liquidated and unable to pay unsecured creditors more than 50c in the dollar. In May 1995, the ASC served on the applicant a notice requiring him to show cause why the ASC should not serve a section 600(3) notice on him prohibiting him from managing a corporation for a period of up to five years. A hearing on the matter was held in December 1995. On the second day of the hearing, the ASC served an amended notice in which two further companies were specified as relevant bodies for the purposes of section 600. Each of the two ASC notices set out ‘Areas of Concern’ to be addressed by the applicant. The applicant sought AAT review of the validity of the issue of these notices. The AAT held that the decisions to give the notices were not reviewable as they were not determinative of legal rights but were a step along the way to determining whether or not to serve a prohibition notice.

Subsequently a further hearing was fixed for 14 May 1997, on which date the applicant handed to the ASC a document entitled ‘Request for particulars of areas of concern’; specifically the applicant requested the ASC provide the ‘usual particulars’, a term which was expansively defined, and also provide details of the basis upon which the ASC was concerned that it may be open to arrive at a conclusion that the public required protection from the applicant acting as a company director. The ASC declined the applicant’s request. In the present proceedings, the applicant claimed this failure to provide further particulars was a denial of natural justice, thereby invoking section 6(1)(a) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act); alternatively it constituted a failure to observe procedures required by law to be observed, breaching section 59(2) of the Australian Securities Commission Act, thereby invoking section 6(1)(b) of the AD(JR) Act.

The applicant argued that he was entitled to know the case which was sought to be made against him, and that he was entitled to know what matters were being considered by the ASC in considering firstly, the giving of a ‘show cause’ notice under section 600(2), and secondly, the possibility of serving a prohibition notice under section under section 600(3). Specifically, the applicant argued that because of the issue of the amended notice in relation to the two other companies following the original hearing, there was now before the ASC a new body of information which did not exist before the outset of the proceedings, and therefore the applicant did not know whether to call any further evidence or make any further submissions.

Justice Goldberg held that the relevant obligation imposed upon the ASC by the rules of natural justice is to ensure that, before reaching a decision on whether to serve a prohibition notice, the ASC has made available to the person aggrieved all the material available to it in respect of which, and upon which, it will base its decision. The ASC is also obliged to give the applicant an opportunity to be heard. Further, if the ASC becomes aware of other material not put to the person aggrieved or made available to that person, the ASC is obliged to make that material available. However, none of these obligations requires the ASC to respond to a request for particulars of the type served in this case. It was held that so long as the ASC gives the person aggrieved the opportunity to respond to material before the ASC, and to any particular matter which arises out of that material which the ASC considers relevant to the exercise of its power to issue a prohibition notice, the dictates of natural justice and the obligation cast by section 59(2)(c) of the Australian Securities Commission Act, will be satisfied. Justice Goldberg was satisfied that all relevant material had been made available by the ASC to the applicant, and that an opportunity to respond and make submissions would be provided during a hearing; hence the ASC was not obliged to respond to the applicant’s request for further particulars.

(C) POWER OF ASC TO MODIFY THE OPERATION OF THE TAKEOVER PROVISIONS OF THE CORPORATIONS LAW

Otter Gold Mines Ltd v Australian Securities Commission, Federal Court of Australia, 5 November 1997, Beaumont, Sundberg and Merkel JJ, VG 117 of 1997, Fed No 1199/97.

Otter Gold Mines Ltd appealed to the Federal Court from a decision of the AAT which had set aside a declaration made by the ASC pursuant to section 730 of the Law. The ASC declaration modified the operation of section 618 of the Law in respect of the acquisition of shares in Allstate Explorations NL by Otter.

Otter originally held 46.3 per cent of the issued capital of Allstate. A share placement by Allstate diluted Otter’s holding to 43.21 per cent. It was the policy of the ASC to consider the grant of relief from the takeover provisions in favour of a shareholder whose shareholding is involuntarily diluted so as to enable the shareholder to restore itself to its previous undiluted position in the company within 6 months of the dilution: see ASC Policy Statement 57. Upon application by Otter, the ASC granted it a modification of the operation of the takeover provisions. The modification was unclear in some respects and Otter applied for a second modification on the basis that it had had to utilise its "creep" entitlement under the law during the 6 months following the grant of the first modification to restore its original holding back to 46 per cent. This second application by Otter was granted.

Beaconsfield Gold NL, which held 38.5 per cent of Allstate, applied to the AAT to review the ASC’s decision. Beaconsfield had originally made a Part A offer for shares in Allstate in April 1996. Although Beaconsfield had acquired its 38.5 per cent pursuant to the takeover offer, it was prohibited from acquiring further shares under the takeover provisions of the Law until March 1997. The AAT set aside the decision of the ASC. One of the AAT’s reasons was that Burdekin Resources NL, which held 4.99 per cent of Allstate, had been adversely affected by the decision to make the second modification and it had not been consulted prior to the making of the decision.

The ASC, prior to granting its second modification, requested submissions from Beaconsfield. Although it was aware of Burdekin’s holding of 4.99 per cent, it did not call for or receive submissions from Burdekin. The Federal Court stated that the failure of the ASC to afford Burdekin an opportunity to be heard in relation to the second modification was treated by the AAT as a material consideration in its decision. The Federal Court held that the AAT erred in this respect. It was not relevant for the AAT to consider the failure of the ASC to receive submissions from Burdekin. The Court stated that it did not form any part of the AAT’s statutory function to determine whether the ASC’s decision ought, or ought not have been made by the ASC on the basis of the submissions and material before the ASC. Rather, the statutory function of the AAT was to determine whether the decision the subject of review was the correct or preferable one on the material and submissions before the AAT and not the ASC. Burdekin had received a full and fair hearing at the AAT review, which was a hearing de novo in respect of which the AAT was empowered to exercise all of the relevant powers and discretions of the ASC. Any failure by the ASC to hear Burdekin at the original hearing was irrelevant.

The Federal Court concluded by observing that, although Otter succeeded in its appeal, the ASC should consult with and seek submissions from parties who may be adversely affected by a decision it is proposing to make to modify the takeover provisions of the Law. Whilst such parties may have a right to a re-hearing before the AAT, substantial harm can occur not just to those parties, but to the public, in the interim period. The Federal Court stated that being aware of Burdekin’s acquisition of a 4.99 per cent interest in Allstate in a market from which Beaconsfield and Otter were excluded in the short-term, it was "clearly unwise" of the ASC not to inform Burdekin of the application by Otter. The Court refrained from saying that the ASC was under a duty to afford Burdekin an opportunity to be heard in relation to the second modification. The Court stated that it was not necessary to determine this "vexed and difficult question" for the purpose of determining the present case.

(D) AAT SETS ASIDE SECTION 600(3) PROHIBITION NOTICES

George Iliopoulos v Australian Securities Commission and Fiona Iliopoulos v Australian Securities Commission, Administrative Appeals Tribunal , 17 October 1997, Deputy President G L McDonald, V 97/821 and V97/822, AAT No 12224A.

The applicants applied to the AAT for review of decisions of the ASC prohibiting each of Mr and Mrs Iliopoulos from managing a corporation for a period of four years, pursuant to the ASC’s powers under section 600(3) of the Law.

The applicants were directors of three companies involved in the building industry, each of which was liquidated and each of which returned less than 50c in the dollar to its creditors.

The applicants submitted that two of the companies operated profitably until the recession which severely affected the building industry from late 1989. This left those companies unable to recover outstanding debts owed to them for work performed, and they were wound up in 1991.

The applicants then became directors of the third company which sought to rebuild, from scratch, the businesses of the two failed companies. However this third company ran into difficulties owing to a union black ban, the union claiming that previous employees of one of the failed companies had not received just entitlements at the time of its liquidation. The applicants claimed that as a result of the black ban, suppliers would not provide material on credit, and another company refused to pay for work performed. A winding up order was made in 1992, and the company was eventually dissolved in 1994. Amongst its liabilities was $70,000 owing for group tax.

The AAT accepted that the failure of the two earlier companies had been principally caused by the downturn of business in the building sector, rather than any culpable behaviour on the part of either of the applicants as directors of those companies. Had they been the only two companies in respect of which a section 600 notice had been issued, the AAT would have been satisfied that it would be inappropriate to prohibit the applicants from managing a corporation.

However the situation with regard to the company owing group tax was a complicating factor. The AAT considered the accrual of this debt pointed to the conclusion that monies which should have been paid into revenue were, in fact, being used to sustain the business during a period of financial difficulty, though the AAT accepted the applicants’ denials of insolvent trading. The AAT accepted the union black ban had had adverse effects, and was a factor beyond the control of the applicants. However this did not absolve applicants from their failure as directors to ensure the company promptly remitted its group tax. This was a serious matter and warranted the ASC seriously considering a period of prohibition. However the AAT considered there were countervailing factors which warranted the setting aside of the ASC’s decision, principally the applicants’ success in operating a new business in the wake of the previous failures, and the applicants’ genuine attempts to repay outstanding debts, including selling the family home. The AAT stated the applicants now understood their responsibilities as directors and had not personally benefited from the failures of the three companies to the detriment of creditors. Hence the AAT found it was not appropriate for a prohibition order to be issued to protect the public; the decision of the ASC was set aside and the matter was remitted to the ASC with the direction that it was not appropriate to prohibit the applicants from participating in the management of a corporation.

3. RECENT ASC DEVELOPMENTS

(A) REGULATORY POLICY BRANCH - SUMMARY OF PROJECTS

Following is a summary of projects undertaken by the Regulatory Policy Branch (RPB) of the ASC. At this stage, RPB is not seeking external views regarding material and papers mentioned below. However, comment will be sought and appreciated at a later date.

(i) FSI Implementation
Single licensing regime

The Financial Services Inquiry Report recommends that the Australian Corporations and Financial Services Commission (ACFSC) establish a single licensing regime for all financial intermediaries with a common set of rules. It also recommends that the ASC and Insurance and Superannuation Commission (ISC) proceed with their harmonisation work to implement the single regime as soon as possible.

An issues/preliminary position paper is being prepared that proposes steps that may be taken to implement the new regime prior to the introduction of the ACFSC legislation, having regard to differences in the current regulatory regimes for securities, insurance, deposit taking institution, friendly society etc intermediaries and discussions held to date with industry associations, practitioners and consumer associations.

Adviser Competencies

A review of the national competencies assessment framework has been completed and it is likely to be proposed that standards and assessment framework for advisers’ personal competencies be developed in consultation with industry and consumer associations and the ASC. This project is being undertaken jointly with the ISC.

(ii) Collective Investments

RPB has continued to provide the Business Law Division (BLD) of the Treasury with comments on versions of the draft Bill, and the Bill has now been tabled in Parliament. Many of the comments have been well received by Treasury.

(iii) IOSCO - International Organisation of Securities Commissions

Most of the IOSCO Working Parties held their meetings during the past month prior to the IOSCO Annual Conference in Taipei, which was held from 2 to 7 November 1997. The IOSCO Presidents' Committee and the Executive and Technical Committees all met during the course of the Annual Conference. The Joint Forum on Financial Conglomerates also met.

(iv) Citing Experts in Prospectuses

The period for public comment on the draft revised Practice Note on Citing Experts in Prospectuses has finished. However, an extension of time for comment until the end of November was made so that stakeholders from the mining exploration and credit rating industries could provide comments on the proposed amendments, referring to use of statements relating to mining tenements and the use of credit ratings respectively.

(B) SMART CARD INFORMATION KIT

ASC Chair Alan Cameron has launched the Consumer Credit Legal Centre and the Electronic Money Information Centre’s ‘Smart Cards - Consumer Information Kit’.

The Kit addresses and explores the issues raised by the trend towards electronic commerce and the cashless society, and highlights the need for all consumers to educate themselves about these significant trends. The Kit also highlights the fact that electronic commerce is not limited to the Internet, but covers a range of transactions and messages communicated electronically. It also covers the use of micro computer chips capable of storing and processing data, such as Smart Cards.

Mr Cameron noted that while the ASC does not have responsibility for consumer credit issues under the Uniform Credit Code, the implementation of the Wallis Inquiry recommendations will see the ASC, as the Australian Corporations and Financial Services Commission (ACFSC), have responsibility for consumer protection and regulation in the financial services sector. As such the ACFSC will focus on developing new, or ensuring compliance with existing, industry codes of practice. It will also assist in developing a referral service for consumer dispute resolution schemes.

(C) ALAN CAMERON REAPPOINTED CHAIR OF ASC

The Chair of the ASC, Mr Alan Cameron, has been reappointed for a term of 3 years. Mr Cameron will lead the ASC in carrying out its ongoing functions and ensure that the transition to it becoming the Australian Corporations and Financial Services Commission next year occurs as smoothly as possible.

(D) ASC CHAIR APPOINTED TO JOINT FORUM

Mr Alan Cameron, in addition to being reappointed Chair of the ASC, has been appointed Chair of the Joint Forum on the Supervision of Financial Conglomerates, the international group which brings together banking, insurance and securities supervisors from around the world. Mr Cameron’s appointment was confirmed during the Annual Meeting of the International Organisation of Securities Commissions (IOSCO). Mr Cameron is the immediate past Chair of IOSCO’s Executive Committee. Increasing globalisation of the world’s financial markets led the Basle Committee on Banking Supervision, the International Association of Insurance Supervisors and IOSCO to establish the Joint Forum in 1995. Both the ASC and the Australian Insurance and Superannuation Commission are members of the Joint Forum, which is currently developing principles for the supervision of financial conglomerates.

In accepting his appointment, Mr Cameron said: ‘My appointment recognises the ASC’s contribution and the fact that Australian regulators have been at the forefront of developing co-operative arrangements.’

4. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Ian M Ramsay and Richard Hoad, ‘Disclosure of Corporate Governance Practices by Australian Companies’ (1997) 15 Company & Securities Law Journal 454

It is mandatory for listed companies whose reporting periods end on or after 30 June 1996 to disclose their main corporate governance practices in place during the reporting period: ASX Listing Rule 4.10.3. This study seeks to determine the extent to which Australian listed companies are disclosing their corporate governance practices by examining the latest available annual reports of 268 listed companies.

(B) Jenny Baker, ‘Are the Objects Stated in Section 243A of the Corporations Law Achieved by Part 3.2A?’ (1997) 15 Company & Securities Law Journal 471

The 1980s witnessed a series of corporate collapses, a large number of which were characterised by related party transactions. The siphoning off of company resources to corporate control related parties evidenced the need for strict legislative control in order to protect and preserve company assets for the benefit of shareholders and creditors. The essential aim of Part 3.2A of the Law is to protect company resources from erosion by unscrupulous related parties. This article first examines the inadequacies of the Law prior to the enactment of Part 3.2A, and then reviews the reform process which led to the enactment of Part 3.2A, focusing on the provisions of the Public Exposure Draft Bill (PED) released in February 1992, the extent to which the PED overcame existing inadequacies, and the changes made to the PED in response to criticisms made of a number of its provisions. Part 3.2A is then examined in the light of the objectives sought to be achieved and comparisons made with the pre-existing Corporations Law and the PED as originally released. The author concludes that in redrafting the PED, the legislature was more concerned with keeping the business community on side. In relation to the objectives sought to be achieved, the author concludes that a number of the provisions of Part 3.2A undermine the objectives sought to be achieved, leaving open avenues for self dealing and therefore failing to adequately protect company resources for the benefit of shareholders and creditors.

(C) Paul Latimer, ‘Compensation of Investors for Failure of a Securities Industry Licensee’ (1997) 15 Company & Securities Law Journal 495

This article is prompted by the ASC’s recommendations in its November 1995 report, ‘Good Advice’ that securities industry licensees should maintain professional indemnity insurance as a condition of their licence rather than the current requirement for a security bond. The article reviews means of compensation for investors for pecuniary loss caused by failure of licensed participants in the securities industry, and seeks to identify the alternatives and to analyse the legal constraints and practical problems of each. It highlights the shortcomings of security bonds as a means of compensation for pecuniary loss, and supports the ASC’s recommendation of securities industry licensee professional indemnity insurance for compensation of investors. It is hoped these recommendations will be carried forward in further reforms in the wake of the Wallis Report of 1997.

(D) Peter Clifford and Robert Evans, ‘Non-Executive Directors: A Question of Independence’ (1997) 5 Corporate Governance 224

The authors have conducted a study using the recent changes in disclosure requirements in accordance with Australian Accounting Standard AASB 1017: Related Party Transactions to provide a detailed description of the non-executive director. Adopting a three scale classification system for directors, the authors found that 35% of non-executive directors were involved in transactions with their companies which could threaten their independence. These directors, in combination with other directors, typically corporate officers, would constitute a majority of the board. Therefore, while companies appear to comply with current recommendations for having a majority of non-executive directors on the board, these companies are in fact controlled by internal management. The authors also examine the composition of audit committees.

(E) Report: ‘The Effectiveness of Australian Independent Directors’ (1997) 5 Corporate Governance 239

This report focuses on the findings made in a recently published book, ‘Future Direction - The Power of the Competitive Board’ by Ivor Francis. Francis conducted a survey of directors of both listed and unlisted companies on matters such as the number of formal board meetings held each year, the average length of those meetings, the style of board meetings and the interaction between directors and non-board managers. The report reproduces some of the findings made in Francis’s book and his comments on those findings.

(F) Stephen Bottomley, ‘From Contractualism to Constitutionalism: A Framework for Corporate Governance’ (1997) 19 Sydney Law Review 277

The author considers it necessary to redefine the approach to corporate governance from a contractual paradigm in a way that issues such as representation, participation, separation of powers and the validity of majority rule are recognised, and to acknowledge the political dimension of corporate organisation. The author argues that by paying insufficient attention to political and constitutional theory, corporate lawyers have produced a one-dimensional view of corporate governance issues, and he suggests that by using a political perspective, a richer analytical basis for studying and responding to corporate governance issues is achieved. The author calls this approach ‘corporate constitutionalism’, which has 3 key features: dual decision making; deliberative decision making; and the separation of powers.

(G) Michael J Whincop, ‘A Relational and Doctrinal Critique of Shareholders’ Special Contracts’ (1997) 19 Sydney Law Review 314

The author examines alterations to articles of association and the impact of Bailey’s case ((1995) 184 CLR 399) where the High Court used the device of a ‘special’ contract between a member and the corporation in order to find that a change to the articles did not affect the member. The author uses relational contract theory to interpret and analyse the High Court’s approach.

(H) David Sugarman, ‘Reconceptualising Company Law: Reflections on the Law Commission’s Consultation Paper on Shareholder Remedies: Part 2’ (1997) 18 Company Lawyer 274.

This is the second and concluding part of Professor Sugarman’s response to the UK Law Commission’s consultation paper, ‘Shareholder Remedies’. Part One of this article appeared in the previous edition of Company Lawyer.

(I) Sandra K Miller, ‘Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French "Close Corporation Problem"’ (1997) 30 Cornell International Law Journal 381

The author compares the different methods and remedies available for dealing with minority shareholder disputes within private corporations in the German, English and French jurisdictions. She explores the feasibility of harmonising the relevant laws within the European Community and recommends strategies to improve existing approaches to private corporation shareholder dispute resolution.

Company and Securities Law Journal - CLERP Special Issue

The June 1998 issue of the Company and Securities Law Journal will be a special issue dealing with the ‘Fundraising’ and ‘Takeovers’ reform proposals of the Corporate Law Economic Reform Program (CLERP). Contributions which deal with the issues raised in those two CLERP papers, or related issues, are invited.

In order to avoid duplication, potential contributors are asked to contact the General Editor, Professor Robert Baxt (tel 03 9614 1011), for advice on selection of topics. Articles should not exceed 7,000 words; notes can be of any length, and should be submitted by Friday 27 February 1998, to the Production Editor, Company and Securities Law Journal, LBC Information Services, 50 Waterloo Road, North Ryde, NSW 2113. The usual Guidelines for Contributors (found on the inside-back page of each issue of the Company and Securities Law Journal) will apply.

Note: Abstracts of articles published in the Company and Securities Law Journal are reproduced in this Bulletin with the permission of LBC Information Services.

5. CORPORATE LAW CONFERENCES AND SEMINARS

(A) The South Australian Chapter of The Australian Institute of Judicial Administration - Perspectives On White Collar Crime Toward 2000.

The Seminar will be opened by The Honourable Justice Olsson, Immediate Past President of the Australian Institute of Judicial Administration. The keynote address will be given by the Attorney-General of Australia, The Honourable Daryl Williams QC AM MHR. The seminar will be held on Friday, 27 February 1998 from 8.45am - 5.00pm, at The University of South Australia, City West Campus, North Terrace, Adelaide. Enquiries should be directed to Mr Phil Hocking, Secretary, on 08 8204 0188.

(B) 1998 Corporate Law Teachers’ Conference

Can corporations — particularly multi-national corporations — be true citizens of the societies in which they operate? How much influence should a corporation be accorded in its dealings with government and society at a time of widespread privatisation?

These are two of the principal questions to be addressed by the judges, practitioners, government officials and academics who will converge on the Law School at Flinders University for the 1998 Corporate Law Teachers’ National Conference next February.

The focus of the conference will be the ethics of the relationship between corporations and society, which is reflected in the conferences’ two themes — The Corporation as Citizen, and Teaching Best Practice in Corporate Lawyering.

Other issues to be examined include the implications of privatisation for the relationship between government entities and corporations, and whether a contractarian approach to corporate regulation sufficiently protects the interests of non-shareholders.

The conference will run from February 9 to 11, and papers will be presented by eminent academics in the field, among them authors of texts on corporate law from Australia and overseas. Other speakers will include South Australian Chief Justice John Doyle, Justice John Von Doussa and Justice Paul Finn of the Federal Court, and South Australia’s Auditor-General, Mr Ken Macpherson.

There also will be displays of recent publications by representatives of legal publishing firms.

Full registration, including the conference dinner, is $275; flexible registration is available to permit attendance at single sessions.

For details of the conference program and information regarding registration, please contact Professor Suzanne Corcoran, Flinders University School of Law, GPO Box 2100, Adelaide 5001, South Australia. Telephone: (08) 8201 3539. Fax: (08) 8201 3630, E-mail: suzanne.corcoran@flinders.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://www.law.unimelb.edu.au/corporat/email/aindex.htm".

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 e-mail 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.