**CORPORATE LAW ELECTRONIC BULLETIN**
**Bulletin No 51, November 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/Bulletin0051.htm#1.recentcorporatelaw)(A) [Inquiry into early access to superannuation benefits](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#A.inquiry)
(B) [APRA asks for industry comment on cross-sectoral reports](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28B%29apra)
(C) [New prudential standards for general insurance companies](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28C%29new)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#2.recentasic)
(A) [ASIC releases policy statements and guidance paper for FSR legislation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#A.asicreleasespolicy)
(B) [ASIC releases new class order regarding continuously quoted securities](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28B%29asicreleasesnew)
(C) [ASIC calls for comment on options for investment funds takeover relief](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28C%29asiccallsfor)
(D) [ASIC releases draft policy statement on financial requirements](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28D%29asicreleasesdraft)
(E) [ASIC releases policy proposal paper on Australian market licences](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28E%29asicreleasespolicyproposal)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#3.recentasx)
(A) [Changes agreed for quarter end trading](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28A%29changesagreed)

4. [RECENT TAKEOVERS PANEL MATTERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#4.recenttakeovers)
(A) [Panel allows dispatch of Normandy target's statement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28A%29panelallows)

5. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#5.recentcorporatelawdecisions)
(A) [Insolvent trading and the liability of directors](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28A%29insolventtrading)
(B) [The criminal liability of corporations](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28B%29thecriminal)
(C) [The court's power to approve acquisition and award costs](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28C%29thecourtspower)
(D) [Liability to pay unpaid capital and validity of appointment of administrator](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28D%29liability)
(E) [Asserting a Quistclose trust against liquidators](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28E%29asserting)
(F) [Ability of HIH liquidators to assist the HIH Royal Commission](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28F%29ability)
(G) [Deed of company arrangements and creditors' meetings](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28g%29deedof)
(H) [Can a pre-emptive right be exercisable before it exists?](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#%28H%29cana)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#6.recentcorporatelawjournal)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#7.archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#8.contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#9.membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0051.htm#10.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) INQUIRY INTO EARLY ACCESS TO SUPERANNUATION BENEFITS

On 16 November 2001 the Chair of the Senate Select Committee on Superannuation and Financial Services, Senator John Watson released the Committee's Discussion Paper on early access to superannuation benefits.

The Discussion Paper considers the effectiveness and efficiency of the current rules governing early access to superannuation benefits on existing compassionate and severe financial hardship grounds. Responses to the Discussion Paper are invited from members of the public, superannuation funds and interested groups. A copy of the paper is available on the Committee's website at:

<http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm>

As the Senate has asked the Committee to report by 31 January 2002, responses to the Discussion Paper are sought by 7 December 2001.

For further details contact:

Sue Morton
Secretary
Tel: (02) 6277 3433
Email: super.sen@aph.gov.au

(B) APRA ASKS FOR INDUSTRY COMMENT ON CROSS-SECTORAL REPORTS

On 12 November 2001 the Australian Prudential Regulation Authority (APRA) announced it was seeking feedback on two reports that have been jointly released by the Basel Committee on Banking Supervision (Basel Committee), the International Association of Insurance Supervisors (IAN), and the International Organization of Securities Commissions (IOSCO). The reports are the product of work by the Joint Forum, which draws on regulators from the three parent bodies.

The first report covers cross-sectoral comparisons of risk management practices and regulatory capital. The second deals with similarities and differences in the core principles for effective supervision, developed by the three parent committees for their respective sectors.

The documents are available from the websites of the BIS (<http://www.bis.org>), IAIS (<http://www.iaisweb.org>) and IOSCO (<http://www.iosco.org>).

(1) Risk management practices and regulatory capital

APRA actively participated in the work of the Risk management practices and regulatory capital report. A Joint Forum working group of supervisors from across the banking, insurance and securities sectors was asked to examine risk management and capital regulation to gain a better understanding of current industry practices in all three sectors. The working group has drawn on interviews with market participants, rating agencies and analysts, as well as on its own regulatory experience.

The main sections of the report focus on: differences in core business activities; similarities and differences in risk management tools; approaches to capital regulation in the three sectors; and cross-sectoral risk transfers and investments.

(2) Core principles

The Core principles report was developed by a working group that was asked to compare the core principles issued by the Basel Committee, the IAIS and IOSCO by identifying common supervisory principles and practices, and understanding differences where they arise.

While each sector worked independently in drafting its core principles, there was a great deal of similarity in the approaches taken; in all cases, the process involved extensive and broad consultations within the sector. While the group found a number of differences between the core principles of the various sectors, there was also was much common ground among them. Importantly, there was no evidence of underlying conflict or contradiction between the three sets of core principles at the highest levels.

The deadline for industry feedback is 29 March 2002. Please send comments to:

Wayne Byres
APRA
GPO Box 9836
Sydney NSW 2001

(C) NEW PRUDENTIAL STANDARDS FOR GENERAL INSURANCE COMPANIES

On 5 November 2001 the Australian Prudential Regulation Authority (APRA) released the latest versions of its proposed new Prudential Standards for general insurance companies in Australia.

Six Prudential Standards have been released. These cover:

- Liability Valuation -to ensure reliable and consistent valuation of insurance liabilities, and promote the provision of actuarial advice to management and Boards;
- Capital Adequacy -to ensure insurers maintain a minimum level of capital commensurate with the risk profile of their businesses;
- Reinsurance Arrangements -to ensure that an insurer has in place sound and prudent reinsurance arrangements;
- Risk Management - to promote strong corporate governance, access to appropriate independent expertise and systems for identifying, managing and monitoring risks;
- Transfer and Amalgamation of Insurance Business - to provide details on the requirements necessary to facilitate the transfer of business between insurers; and
- Assets in Australia -to define 'assets inside Australia' for the purposes of meeting the requirements of the Insurance Act 1973.

Along with the General Insurance Reform Act 2001 (which amends the Insurance Act), the versions of the new Prudential Standards represent the complete set of prudential requirements that general insurers will need to meet under the new regime. However, it will be necessary to make some further changes to the format and drafting of the Standards. This is to ensure the Prudential Standards are fully aligned with the detail of the amended Insurance Act, and will be in a form acceptable to Parliament. (The Prudential Standards are disallowable instruments, and must be tabled in Parliament before they can come into effect.)

It is important to note there is no intention that the process of producing the final version of the Prudential Standards will introduce new or amended requirements over and above those contained in the Standards released on 5 November 2001. As a result, there is no reason for insurers to await the release of the final versions of the Prudential Standards before beginning to assess their compliance with the new regime and to implement necessary changes to their arrangements.

The new Prudential Standards are scheduled to come into effect from 1 July 2002. All companies will need to comply with the Prudential Standards at that time, unless they have previously agreed transitional arrangements with APRA. APRA has recently written to all insurers reminding them of the need to assess whether they are in compliance with the new framework in sufficient time to ensure that any actions they need to take can be completed before the new Prudential Standards formally come into effect.

For further information, contact:

Wayne Byres
General Manager, Risk Analysis & Research
Australian Prudential Regulation Authority
Tel: (02) 9210 3146

Craig Thorburn
General Manager, Technical Advice & Support
Australian Prudential Regulation Authority
Tel: (02) 9210 3381

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES POLICY STATEMENTS AND GUIDANCE PAPER FOR FSR LEGISLATION

On 28 November 2001 ASIC released six policy statements and one guidance paper on the implementation of the financial services reform (FSR) legislation.

These papers set out how ASIC will approach the administration of the new financial services licensing and financial product disclosure provisions under the FSR legislation.

The issue of these papers is part of ASIC's effort to provide as much guidance as is possible before commencement of the FSR legislation on 11 March 2002.

The guidance paper is Licensing: The scope of the licensing regime: Financial product advice and dealing - An ASIC guide.

The policy statements (PS) are:

- PS 146 Licensing: Training of financial product advisers
- PS 164 Licensing: Organisational capacities
- PS 165 Licensing: Internal and external dispute resolution
- PS 167 Licensing: Discretionary powers and transition
- PS 168 Disclosure: Product disclosure statements (and other disclosure obligations)
- PS 169 Disclosure: Discretionary powers and transition

ASIC also plans to issue further process-related publications, such as the AFS Licensing Kit, in early February, 2002.

Copies of the new guidance paper and policy statements may be obtained from the FSR page of the ASIC web site on www.asic.gov.au, by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.

To obtain the FSR legislation, go to <http://scaleplus.law.gov.au>. Copies of the FSR regulations, contained in the Corporations Amendment Regulations 2001 (No.4), can be obtained from www.treasury.gov.au/fsr\_regs.

Related information:

By proclamation on 8 October 2001, 11 March 2002 was fixed as the day on which the markets licensing provisions of the FSR legislation will commence.

The FSR legislation comprises the Financial Services Reform Act 2001 and the Financial Services Reform (Consequential Provisions) Act 2001.

Treasury announced in October 2001 that further regulations to implement the FSR legislation are planned for issue before 11 March 2002. ASIC will review these regulations and, if necessary, amend any details of its policy statements and guidance papers.

ASIC's earlier packages of policy proposal and process related papers were issued on 26 April 2001, 6 June 2001, 11 September 2001, 21 September 2001, 25 October 2001, 2 November 2001 and 16 November 2001.

Information on these papers, and previous media releases in relation the FSR legislation are available on ASIC's website at <http://www.asic.gov.au>.

For further information contact:

Ian Johnston
Executive Director Financial Services Regulation
ASIC
Tel: (03) 9280 3607
Mobile: 0408 543 687

(B) ASIC RELEASES NEW CLASS ORDER REGARDING CONTINUOUSLY QUOTED SECURITIES

On 27 November 2001 ASIC released a new class order which enables disclosing entities with quoted securities to continue to provide what is commonly known as a 'transaction specific prospectus'.

The new class order [CO 01/1455], applies to entities that would otherwise be unable to issue the transaction-specific prospectus following recent amendments to the Corporations Act 2001 (the Act).

ASIC also noted that some entities with quoted securities may need individual relief to continue to use such disclosure documents.

(1) Amendment of the Act

The definition of 'continuously quoted securities' in section 9 of the Act was amended by the Financial Services Reform Act 2001 (the FSR Act) recently. The amendment means that securities offered by a body covered by an order under section 340 or 341 in the last 12 months can no longer be regarded as continuously quoted securities.

Class order [CO 01/1455] modifies this definition of continuously quoted securities, and will enable securities to be included despite the fact that they are offered by bodies covered by certain class orders made under section 340 or 341 of the Act.

The class order [CO 01/1455] recognises that the amendment has the effect of excluding from the definition of continuously quoted securities some securities for which minor and technical accounting relief has been provided.

(2) Disclosure requirements of continuously quoted securities

The term 'continuously quoted securities' is used only in section 713 of the Act. This section regulates disclosure of offers for the issue or sale of continuously quoted securities of a body.

Section 713 takes into account the fact that continuously quoted securities are subject to ongoing disclosure requirements. Therefore, an offer of continuously quoted securities under section 713 requires less information in a disclosure document than an offer of securities that have not previously been quoted.

The ongoing disclosure requirements for continuously quoted securities are set out in the continuous disclosure requirements of the Act and the Australian Stock Exchange (ASX) Listing Rules.

The purpose of the recent legislative amendment was to ensure that bodies with substantial exemptions from the Act's ongoing disclosure requirements relating to financial audits and reports could not use a section 713 prospectus.

Having regard to that purpose, ASIC has provided relief to ensure that, where only minor and technical accounting relief has previously been provided, a section 713 prospectus can still be used.

(3) The relevant class orders

The following class orders, made under section 341, cover disclosing entities. However in ASIC's view, the class orders do not reduce the quality of information a body is required to disclose and make publicly available under the Act or the ASX Listing Rules.

Where a body is covered by these class orders and has no other relief from section 340 or 341, ASIC's relief will mean that a section 713 prospectus may still be used. Where other class orders or individual instruments provide relief from section 340 or 341, bodies will only be able to offer securities as continuously quoted securities under section 713 if they have a specific exemption from ASIC.

98/100 Rounding in financial reports and directors' reports
98/101 Members of companies, registered schemes and disclosing entities who are uncontactable
98/104 Dual lodgement relief
98/105 Authorised trustee corporations - trust liabilities
98/107 NSW workers compensation statutory funds
98/109 Victorian workers compensation statutory funds
98/110 Australian banks - related party balances and transactions
98/111 Half-year balance sheet format of certain financial institutions
98/1416 Comparative information in financial reports
98/1867 Macquarie Bank, Westpac Banking Corporation and BNP Pacific
(Australia), and their related bodies corporate - auditor indebtedness
98/1868 Macquarie Bank and related bodies corporate - auditor indebtedness
98/1869 Westpac Banking Corporation and related bodies corporate - auditor indebtedness
98/1999 ANZ and related bodies corporate - auditor indebtedness
98/2000 National Australia Bank and related bodies corporate - auditor indebtedness
98/2001 National Australia Bank, State Bank of NSW and related bodies corporate - auditor indebtedness
98/2395 Transfer of information from the director's report
99/90 Concise reports
00/2449 ASX Electronic Lodgement Facility - relief from paper form lodgement

(4) Applications for specific relief

The new class order [CO 01/1455] does not enable bodies that have received individual exemptions or modifications to take advantage of the provisions of section 713.

If a body has received specific relief made under section 340 or 341 or another section listed in the definition of continuously quoted securities, but has substantially complied with its disclosure obligations, then it may apply for specific pro forma relief (see ASIC pro-formas 160 and 161).

For further information contact:

Allan Bulman
Assistant Director Corporate Finance
ASIC
Tel: (03) 9280 3307
Mobile: 0411 549 014

(C) ASIC CALLS FOR COMMENT ON OPTIONS FOR INVESTMENT FUNDS TAKEOVER RELIEF

On 23 November 2001 ASIC released a discussion paper on relief for investment funds from the takeover and substantial holding provisions of the Corporations Act.

Two common issues outlined in relief applications are that the takeover prohibition may prevent the fund from investing in companies where the group has holdings in the company near the takeover threshold of 20 per cent; and that the investment fund may incur additional costs because substantial holding disclosure signals the fund's investment moves to other traders.

The paper's aim is to generate discussion on options, which could include ASIC exemptions, legislative change, or no change. "Some of these options amount to significant regulatory changes. It may be more appropriate that they are implemented by law reform and we are seeking comments on that point", ASIC Director Corporate Finance, Richard Cockburn said. "While Australia has one of the lowest takeover and substantial holder notification thresholds in the world, we are seeking views from a wide range of parties as to whether the benefits from liberalising the regime as it applies to investment funds, including superannuation, would justify any change", he said.

The discussion paper can be obtained from the Policy and Practitioners/Takeovers page of the ASIC website at <http://www.asic.gov.au>.

Comments on the paper are due by the end of 2001 and should be directed to:

Andrew Fawcett
Regulatory Policy Branch
ASIC
GPO Box 5179AA
Melbourne Vic 3001
Fax: (03) 9280 3306
Email: andrew.fawcett@asic.gov.au.

For further information contact:

Richard Cockburn
Director Corporate Finance
ASIC
Tel: (03) 9280 3201
Mobile: 0411 549 034

(D) ASIC RELEASES DRAFT POLICY STATEMENT ON FINANCIAL REQUIREMENTS

On 16 November 2001 ASIC released a draft Policy Statement on Licensing: Financial Requirements.

This draft policy statement deals with financial resources requirements for financial service providers under the Financial Services Reform Act 2001.

The draft policy statement was developed following public consultation on FSRB Policy Proposal Paper No.10 on Licensing: Financial Requirements, and after consultation with industry bodies about the requirements for licensees who hold substantial amounts of clients' money, or who enter into transactions directly with their clients.

ASIC is releasing the policy in draft form to facilitate another round of public consultation. Additionally ASIC will meet with industry bodies to explore the practical impact of some of the proposed requirements.

The draft policy statement addresses proposed requirements that will apply to Australian financial service licensees depending on the functions carried out by the licensees.

These include a cash flow requirement for most licensees, a net tangible asset requirement for custodians or depositories and requirements for liquid assets for licensees who hold client assets or enter into transactions directly with clients.

A licensee regulated by APRA is not subject to ASIC's financial requirements as APRA sets any financial requirements for those entities.

(E) ASIC RELEASES POLICY PROPOSAL PAPER ON AUSTRALIAN MARKET LICENCES

On 2 November 2001 ASIC released FSR Policy Proposal Paper No. 11 on Australian market licences: Australian operators.

This policy proposal paper describes ASIC's role in the licensing of new markets and supervising market operators' compliance with their obligations under the legislation, and details how ASIC will approach that role.

It sets out ASIC's preliminary views on when an Australian market licence will be required, how ASIC proposes to interpret the obligations of market licensees whose principal place of business is Australia, and how ASIC proposes to deal with applications for an Australian market licence by an Australian operator.

3. RECENT ASX DEVELOPMENTS

(A) CHANGES AGREED FOR QUARTER END TRADING

On 19 November 2001 ASIC announced that it welcomed the adoption of measures by the SFE Corporation Limited (SFE) and the Australian Stock Exchange Limited (ASX) to fine-tune the settlement price methodology for index futures contracts and to continue to introduce improvements to the quarter end closing mechanism.

The changes, which will be adopted from December this year, follow extensive discussions between ASIC, ASX, SFE and a number of market participants after the introduction of interim measures for the end of the September 2001 quarter in an attempt to reduce the risk of the undesirable situation which occurred at the close of trading for the June 2001 quarter.

While market participants varied in their views about the best way to deal with these matters, there was widespread support for the decision made in September to break the link between the closing price on the ASX and the settlement price of futures contracts. The changes announced will bring Australian markets broadly into line with practice in a number of international markets, including many US markets, in the methodology adopted for calculation of the settlement price on its futures contracts. A closing auction is also now a common feature in international stock markets.

(1) Description of changes to the settlement price methodology

For the December quarter and succeeding quarters, the settlement price of SFE's index contract will be calculated on the basis of a Special Opening Quotation of the S & P ASX 200 Index price on the last trading day of the quarter.

The Special Opening Quotation will use the first traded price of each component stock on the expiry day to calculate the Index price. In the event that any component stock does not trade on the expiry day, the price will be the last traded price of that stock.

The SFE index contract will continue to trade up until midday on the last trading day of the quarter. SFE will publish information every half hour from 10.30am until the close of trading on the expiry day, giving an indicative Index price and identifying the market capitalisation percentage of the Index stock which have traded up to that point.

The SFE have released a circular to their market providing full details of the proposed changes.

While all existing SFE index contracts will continue to expire on the last day of the month or as previously advised, new contracts commencing with the June 2003 contract, will expire on the third Thursday of the contract month. The settlement price will continue to be calculated on the basis of the Special Opening Quotation on the expiry day.

Also for the December quarter, ASX will revert to the Closing Single Price Auction (CSPA) rather than the Random Close adopted in September, for the calculation of the closing price of securities and all indexes on its market.

Some changes to ASX's rules to increase transparency during the market opening, given the adoption of the Special Opening Quotation for the SFE Index contract, are also proposed.

ASX will continue to provide updates to its market participants on its proposed rule changes, including a program of proposed changes to the CSPA, over the coming months.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL ALLOWS DISPATCH OF NORMANDY TARGET'S STATEMENT

On 26 November 2001 the Takeovers Panel advised that it had ended the interim order under section 657E of the Corporations Act that it made on 22 November 2001. Normandy Mining is now free to dispatch its target's statement. AngloGold had applied to the Panel for an interim order concerning Normandy's target's statement in response to AngloGold's takeover bid for Normandy. AngloGold and Newmont Mining have announced competing takeover bids for Normandy.

The Panel has not required Normandy to make any further disclosure at present. However, it has required Normandy to publish a supplementary statement shortly before the AngloGold bid closes, to update Normandy shareholders. It has also required Macquarie Bank to clarify the status of the statement in the Chairman's letter at the start of Normandy's target's statement that Macquarie supported the Normandy board's rejection of the AngloGold offer. The Panel has approved the terms of Macquarie's announcement.

AngloGold had asserted that in its target's statement Normandy should have:

- quoted the implied value of a proposed takeover offer by Newmont Mining Corporation based on share prices as at the date of Normandy's target's statement ;
- set out more clearly the uncertainties and risks which AngloGold contends may be associated with Newmont's proposed offer ; and
- disclosed the terms of advice from Macquarie Bank which AngloGold asserts the Normandy Chairman has referred to in Normandy's target's statement.

The Panel considered that the factual disclosure in Normandy's target's statement in relation to these issues was adequate. However, the Panel raised a number of areas where it considered Normandy could have given fuller disclosure, and areas of disclosure for future consideration.

(1) Value of Newmont offer

AngloGold asserted that the Normandy board should have stated the implied value of the proposed offer by Newmont Mining Corporation as at the date of the Normandy target's statement when citing it as one of the Normandy board's reasons for recommending that Normandy shareholders reject the AngloGold bid.

The Panel accepted that Normandy's rejection of the AngloGold offer was primarily on the basis of the independent expert's report and the fact that the AngloGold offer did not, then, come within the fair range proposed by the independent expert.

The Panel has not required any further disclosure in Normandy target's statement. It considers that Normandy has included sufficient information about the date at which it calculated the assessed value of $1.70, and cautions about the possibility of changes in the value of the Newmont offer with share price fluctuations.

However, the Panel also considers that it would have been better practice for Normandy to have set out in its target's statement the value of the proposed bid by Newmont, based on the relevant share prices and conversion rates as at the date of the target's statement i.e. at 19 November 2001 the implied value of the proposed Newmont bid was approximately $1.46 plus 5 cents if 90% achieved, and to have given that value equal prominence with the $1.70 derived from the 13 November announcement. Fresh information is usually preferable to staler information.

(2) Macquarie recommendation

The Panel was concerned that the consent by Macquarie given in the target's statement did not refer to the statement in the chairman's letter. The Panel was concerned that the express limitations and denials in the consent given by Macquarie might appear to be contradictory to the statement in the chairman's letter.

At the request of the Panel Macquarie has written to ASX stating that Macquarie :

- consents to the use of its name in the chairman's letter;
- consents to the use of its name in the context that it has been used; and
- affirms that the statement in the chairman's letter accurately represents the advice Macquarie gave to the Normandy board concerning the AngloGold bid.

(3) Risks associated with AngloGold and Newmont bids

The Panel has not required any further disclosure in the target's statement in relation to risks associated with the Newmont bid.

However, the Panel considers that it would have been better practice for Normandy to have been more even handed in its treatment of risks associated with the AngloGold bid and the proposed Newmont bid. Normandy should have acknowledged, to the extent reasonably possible, that many of the risks that it addressed in relation to the AngloGold bid would also apply to a bid by Newmont, given that both would be scrip bids by major international gold producers. In saying this the sitting Panel recognises the limitations and qualifications that the board of Normandy would have had to put on such an assessment given the preliminary stages of the proposed Newmont bid.

However, the Panel considers that it would still have been within the competencies of the Normandy board and would have been useful information for the Normandy shareholders.

The Panel notes the benchmark for critical assessment of a takeover bid that the Normandy directors have now set. It assumes that the Normandy board will clearly apply equivalent rigor if and when it is required to put a target's statement in relation to a bid by Newmont before the Normandy shareholders.

(4) Closing of AngloGold bid

The Panel is aware, and concerned, that the AngloGold bid may close before any bid by Newmont is before the Normandy shareholders, and before any target's statement in relation to that bid is before the Normandy shareholders. In light of this, the Panel requested and obtained an undertaking from the Normandy board that it will, if the AngloGold bid appears likely to close before such a target's statement in response to a Newmont bid is given to Normandy shareholders, issue a supplementary target's statement in sufficient time for Normandy shareholders to consider it. The Panel considers that such a supplementary target's statement would need to address (based on facts, rates and prices which apply on the date of the supplementary target's statement):

- The progress of the Newmont bid arrangements and the prospects of the bid proceeding;
- The relative values of the AngloGold and the proposed Newmont bids;
- The Normandy board's recommendation concerning the AngloGold bid; and
- The board's intentions concerning the proposed Newmont bid.

(5) Timing of Supplementary Target's Statement

The Panel recognises the work involved in preparing, printing and dispatching a supplementary target's statement to the shareholders of a large company such as Normandy. Given the desirability of the target's recommendation being based on current information, such a supplementary target's statement may only be feasibly given to ASX in the time available, rather than posted to target shareholders. The Panel would expect that the supplementary target's statement be given to the stock exchange shortly after the commencement of the final week of the bid. In such a case, the target company would also need to take appropriate steps, perhaps such as appropriate newspaper advertisements, to ensure its closing recommendation is brought to the attention of target shareholders.

(6) Comparison

If the AngloGold bid is still open at the time the Normandy target's statement is given in response to a bid by Newmont, the target's statement will need to contain a careful comparison of the two bids, including the risks of the different bids. The Panel notes that the current Normandy target's statement sets a benchmark against which such comparison could be measured.

The sitting Panel in this matter was constituted by Mr David Gonski (sitting President), Ms Meredith Hellicar (sitting Deputy President) and Ms Ilana Atlas.

5. RECENT CORPORATE LAW DECISIONS

(A) INSOLVENT TRADING AND THE LIABILITY OF DIRECTORS
(By Catryn Walters, [Mallesons Stephen Jaques](http://www.msj.com.au))

Perkins v Viney [2001] SASC 362, South Australian Supreme Court, Burley J, 1 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/november/2001sasc362.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

In this case, the liquidator of LVS Meat Company Pty Ltd (a company formerly involved in the business of running an abattoir) brought an action against the defendant to recover damages for alleged insolvent trading by the company between 23 June 1993 and 13 May 1994 pursuant to sections 588G and 588M of the Corporations Law. In response, the defendant argued that he was not a director of the company as required under the Corporations Law, that he had reasonable grounds for believing that the company was and would remain solvent at the relevant time, and that in any event he should be excused from liability for acting honestly in the interests of the company (section 1317JA of the Corporations Law; now section 1317S of the Corporations Act 2001). However, the court concluded that the defendant was a director and that he was liable to account to the liquidator in the amount of $106,312 (being a quarter of the total debt incurred by the company during its period of insolvent trading).

(2) Whether the defendant was a director of LVS Meat Company Pty Ltd

The liquidator argued that the defendant was a director either on the basis that he was validly appointed to that office, or on the basis that he had occupied or acted in the position of director within the meaning of section 60(1) of the Corporations Law during the relevant period (note that this extended meaning of "director" is now found in section 9 of the Corporations Act 2001). However, the defendant claimed that he had not been validly appointed as a director as he had never signed a consent to act as such, and that he had never done more than act as an adviser to and mediator between the appointed directors of the company.

In this instance, however, the court held that the weight of evidence favoured a finding that the defendant had acted in the position of a director and was therefore a director for the purposes of the Corporations Law. In particular, the court noted that the defendant had acted as chairman of the board (a position that only a director could hold under the constitution of the company), that he had signed the minutes of directors meetings as a director would normally do, that he had instructed solicitors on behalf of the company, that he had engaged in financial dealings with the Commonwealth Development Bank on behalf of the company, and that he had been held out as a director of the company in various notices lodged with ASIC and in the company's financial statements during the relevant period of time.

(3) Whether the defendant was aware of the insolvent trading

Having established that the defendant was a director, the court was then required to consider whether the defendant (as a director) was subject to personal liability for insolvent trading by the company under sections 588H and 588M of the Corporations Law. The liquidator argued that the defendant was personally liable to account for the debts incurred by the company during the period of 23 June 1993 and 13 May 1994 on the basis that he had reasonable grounds for suspecting that the company was insolvent, or that a person in his position would have been so aware. In response, the defendant argued that he had reasonable grounds to expect that the company would remain solvent, or alternatively that he should be excused from liability on the basis that he did not take part in the management of the company during the relevant period of time (section 588H(4) of the Corporations Law).

In relation to the issue of the (in)solvency of the company and the defendant's awareness of this position, the court held that these questions should not be determined merely from the financial statements of the company but that they should be answered by reference to the range of commercial factors affecting the company. Accordingly, the court directed its attention to the following evidence concerning the company and the defendant's involvement in its operations - the monthly and annual financial statements of the company during the relevant period, minutes of board discussions of the under-capitalisation of the company, and other statements made by the defendant in board discussions and in cross-examination as to his doubts regarding the financial viability of the company. On the basis of these factors, the court adopted the view that the defendant did or should have known that there were reasonable grounds for suspecting that the company could not pay its debts as and when they fell due. As the court stated, "[i]f the evidence is reviewed as a whole, it is impossible to see how any of the directors could have done other than realize that there were grounds for suspecting that the company was insolvent or would become insolvent if further liabilities were incurred".

On the basis of the same evidence, the court also held that it was bound to reject the defendant's argument that he had reasonable grounds for believing that the company was and would remain solvent if it incurred further debts during the relevant time. Further, the court also rejected the argument that the defendant should be excused from liability under section 588H(4) for the reason that the defendant was a director under section 60(1) of the Corporations Law and was clearly concerned in the management of the company.

(4) Extent of the defendant's liability

Having determined that the defendant was personally liable for the insolvent trading of the company between 23 June 1993 and 13 May 1994, the court was required to consider the quantum of the defendant's liability.

As an initial matter, the court accepted the arguments of the defendant that particular amounts claimed by the liquidator were not "debts" for the purposes of section 588G of the Corporations Law (such as donations and voluntary payments, and amounts paid under a contract entered into before the commencement of section 588G on 23 June 1993). Accordingly, the court assessed the total debts of the company during the relevant period as $282,747.60 (rather than the liquidator's figure of over $300,000), and assessed the interest payable on this amount at $142,500.00.

Finally, in considering whether the defendant was liable for this amount in full or in part, the court was asked to consider whether the defendant had acted "honestly" within the meaning of section 1317JA of the Corporations Law, being a complete or partial defence to liability (note that this defence is now found in section 1317S of the Corporations Act 2001). On the question of honesty, the court stated that the proper test was whether the defendant had acted bona fide in the interests of the company including the unsecured creditors. After considering matters such as the defendant's contribution to suggested improvements to the business of the company and the absence of any evidence of negligence in his duties to the company, the court concluded that the defendant had acted "honestly" and that his liability should be reduced to $106,312.00 (being a quarter of the full liability inclusive of interest). In reaching this final conclusion, the court held that the particular circumstances in which the defendant became a director of the company were relevant, including the fact that he was often a mere adviser to the other members of the board who had a financial interest in the company, and that he was not remunerated for his services to the company.

(B) THE CRIMINAL LIABILITY OF CORPORATIONS
(By Adam Brooks, Herbert Geer & Rundle)

DPP Reference No 1 of 2000 [2001] NTSC 91, Supreme Court of the Northern Territory, Martin CJ, 26 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/nt/2001/october/2001ntsc91.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

In this matter a company ("Company") had been charged with an offence under section 154(1) of the Northern Territory Criminal Code which is in the following terms:

"Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person ... in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime..."

The Company allegedly failed to ensure that workers repairing the roof at its premises were using appropriate safety equipment and this failure allegedly caused serious injury to one such worker.

During the committal proceedings in relation to the alleged offence committed by the Company, the following question was reserved for the Supreme Court's consideration:

"Can a company incorporated under the Corporations Law (Cth) be charged with a dangerous omission pursuant to section 154(1) of the Criminal Code...?"

The following was noted by Martin CJ in support of the proposition that a company can be charged with a criminal offence:

(a) the Northern Territory Interpretation Act provides that a provision of an Act relating to offences shall be read as referring to body corporates as well as individuals;

(b) section 19 of the Interpretation Act provides that "person" includes a body corporate;

(c) the relevant sentencing legislation provides that where an offence committed by a body corporate is punishable by a term of imprisonment, various prescribed maximum fines apply in lieu of imprisonment.

The relevant law was summarised by Brennan J in Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477 at 514 as follows:

"...Whatever basis of liability is applied, criminal liability can be sheeted home to a corporation only upon proof that what is done or omitted to be done and the mental state with which the act was done or the omission was made are within the scope of the authority conferred by the corporation upon the person or persons on whose act, omission or state of mind the corporation's criminal liability is said to depend."

The Company submitted that section 154 of the Criminal Code could not possibly include a body corporate for the following reasons:

(a) the word "person" secondly appearing in section 154(1) could not be interpreted as including a body corporate because no danger could be caused to the life, health or safety of a body corporate;

(b) in later sub-sections of section 154 there is a reference to intoxication which could not apply to a body corporate;

(c) it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words.

Martin CJ noted that there have been a number of exceptions to the rule set out in paragraph (c) immediately above and that the presumption readily yields to the context.

Martin CJ held that where in section 154 references to "person" can sensibly include body corporate the change should be made. Accordingly, Martin CJ held that a company can be charged with a dangerous omission pursuant to section 154(1) of the Criminal Code and the section does not only apply to alleged offences committed by natural persons or individuals. Martin CJ noted that the word "person" secondly appearing in section 154(1) cannot sensibly be changed to "body corporate" but that this issue nor that raised in paragraph (ii) immediately above do not affect the primary conclusion.

The question reserved was accordingly answered in the affirmative.

(C) THE COURT'S POWER TO APPROVE ACQUISITION AND AWARD COSTS
(By Zaheed Evans, [Blake Dawson Waldron](http://www.bdw.com.au))

Pauls Limited v Elkington [2001] QCA 414 Queensland Court of Appeal, McPherson and Williams JA and Jones J, 2 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/october/2001qca414_1.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The issue in Pauls Ltd v Elkington concerned whether Mrs Milly Elkington, the appellant had acted improperly, vexatiously or otherwise unreasonably in bringing an appeal of a decision by Douglas J in Pauls Ltd v Dwyer [2001] QSC 103.

(1) Judgment at first instance

The issue in Pauls Ltd v Dwyer concerned an application pursuant to section 664F of the Corporations Law by Pauls Ltd (the applicant) for an order approving its acquisition of non reedemable $2 preference shares which it did not already own in Pauls Victoria Ltd at the price of $2.57 per share. The total number of shares sought to be acquired was 24,263.

This case centred on whether the applicant, as 90% shareholder, would bear the costs that Mrs Milly Elkington, Dr Gordon Elkington and Mr Robert Catto (the respondents) incurred in legal proceedings in relation to the applicant's application for court approval for a compulsory acquisition of the remaining preference shares unless the respondents had acted improperly, vexatiously or unreasonably.

Section 664F(4) of the Corporations Law provided that:

"The 90% shareholder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs."

Had the respondents acted improperly, vexatiously or unreasonably?

The first order for reserved costs was made on 20 October 2000 in relation to Milly Elkington's unsuccessful application to transfer the proceedings to the Supreme Court of New South Wales. The argument for the applicant was that the respondent had acted improperly, vexatiously or otherwise unreasonably in making such an application. The Court held that it was not unreasonable or improper for such an application to be made as it was not without some chance of success. Therefore the respondent had her costs reserved on 20 October 2000.

The orders for reserved costs on 10 November 2000 and 11 December 2000 are in a different category. The first dealt with the failure of the respondents to deliver a proper and compliant statement of issues and the second dealt with their failure to deliver expert reports and affidavits which were then outstanding. The Court took the view the relisting of the matter on each of those occasions was caused by the default of the respondents. Consequently Milly Elkington could not have her costs of 10 November and 11 December 2000.

A further order for reserved costs was made on 14 December 2000. This was in relation to an unsuccessful challenge to the constitutional validity of the whole of Part 6A.2 of the Corporations Law. It was argued by the applicant that the constitutional challenge was in respect of a much wider issue than the application to acquire the respondent's shares. Douglas J took the view that it was not unreasonable to make such an application, nor was it vexatious or improper.

The applicant further argued that the respondents had acted improperly, vexatiously or unreasonably in connection with the application itself in three respects:

(a) The respondents putting into issue that the applicant was a 90% shareholder of shares in Pauls Victoria Ltd, not withstanding the applicant's initial affidavit material which showed that the applicant was a 99.9% shareholder. This necessitated the respondents asking for and the applicant providing documents demonstrating that it was a 90% shareholder which required obtaining documents dating back to the 1930's. Douglas J agreed that this issue was raised unreasonably and that Milly Elkington should not have her costs in relation to the issue.

(b) The applicant submitted that the interests of all three respondents in the litigation were not discernibly different and that the respondents had acted improperly, vexatiously or unreasonably by allowing Milly Elkington to be represented by solicitors and counsel while allowing Mr Robert Catto and Dr Gordon Elkington to be self represented. Douglas J took the view that it was appropriate that only one set of legal representatives appear for all respondents.

(c) The applicant also submitted that Milly Elkington should not have been represented by two counsel at trial. Douglas J stated that this was a matter for the person assessing the costs when having regard to the degree of work done by both counsel engaged and that it was not appropriate for him to give any indication in this matter.

In light of the above, the Court in Pauls Ltd v Dwyer ordered that as between the applicant and Milly Elklington, that the applicant pay the costs of the respondent of and incidental to the application including reserved costs but the respondent not recover any costs:

- of and incidental to the application determined on 10 November 2000;
- of and incidental to the application determined on 11 December 2000; and
- of and incidental to seeking disclosure of documents by the applicant that it was a 90% holder in Pauls Victoria Ltd.

(2) The appeal judgment

Milly Elkington appealed the decision of Douglas J in Pauls Ltd v Dwyer. However, her appeal was dismissed by the Queensland Court of Appeal. Ordinarily, the dismissal of an appeal would entail an order that the unsuccessful appellant pay the respondent's costs of the appeal. However, section 664F(4) once again came into consideration.

The Court of Appeal noted that the appellant's points on appeal were the same as those raised at first instance and commented that the appellant was markedly unenthusiastic about bringing the appeal to a hearing. Consequently, the Court of Appeal held that the appellant's appeal was both unreasonable and unjustifiable and therefore the appellant had acted unreasonably, if not properly or vexatiously, within the meaning of section 664F(4). The Court of Appeal ordered her to pay the costs of the respondent.

(D) LIABILITY TO PAY UNPAID CAPITAL AND VALIDITY OF APPOINTMENT OF ADMINISTRATOR
(Jennifer De Leo, [Blake Dawson Waldron](http://www.bdw.com.au))

Wright v Mansell [2001] FCA 1519, Federal Court of Australia, Finkelstein J, 29 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/october/2001fca1519.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case addressed the liability of a shareholder (Wright) to pay the unpaid capital on 750,000 executive preference shares at the demand of the company's liquidator.
The company (J Wright & Sons Pty Ltd) got into serious financial difficulties in late 1998. By April 1999 the directors were of the opinion that the company was insolvent, or likely to become insolvent. Accordingly they appointed Mansell as administrator of the company under section 436A of the Corporations Law. After a failed attempt at executing a deed of company arrangement, Mansell was appointed as administrator for a second term in October 2000. At their second meeting (convened as required by section 439A) the creditors resolved that the company be wound up with Mansell as the liquidator. Mansell settled a list of contributories, one of whom was Wright on the basis that he owed the company unpaid share capital.

Wright alleged that he was not liable for any unpaid capital on his 750,000 executive preference shares and that he should not be a contributory because:

(a) pursuant to the company's articles of association, he was not obligated to pay uncalled capital; and

(b) the company was not validly in liquidation.

(1) Liability to pay uncalled capital

The company was incorporated under the Companies Act 1938 (Vic) as a company limited by shares. By section 5(4) of the 1938 Act the memorandum of a company limited by shares was required to "state the amount of share capital with which the company proposed to be registered and the division [of that capital] into shares of a fixed amount". The liabilities that were imposed in a winding up upon each individual shareholder were contained in section 158 and, in the case of a company limited by shares, that liability was to contribute an amount sufficient for the payment of the company's debts and liabilities but no contribution was required "exceeding the amount (if any) unpaid on the shares in respect of which he is liable".

These legislative provisions were based on the fundamental policy of company law that a company must maintain its capital, and their effect was that each member who took shares from the company was required to pay, or liable to contribute to, their full nominal value.

Wright raised two arguments to support his assertion that he was not liable to pay the uncalled capital.

Firstly, he alleged that the liquidator's power to make a call was limited to the extent of the shareholder's liability. Wright argued that, on their proper construction, the articles of association imposed no liability on the holder of executive preference shares to pay any call as there was no reserve capital.

Finkelstein J stated that this argument could not be accepted. His Honour assumed (without deciding) that in respect of partly paid shares it was lawful for articles of association not to confer authority to make a call for capital, however it could not be suggested that this absence of authority could impair the power of a liquidator. Any argument that it did would be met with the answer that the power of a liquidator to make a call is statutory.

Secondly, Wright asserted that the particular rights and obligations which attached to the executive preference shares never included the obligation to pay a call. Finkelstein J commented that acceptance of this submission would produce the result that the executive preference shares would have a floating par value. As a floating par value was inconsistent with the statutory requirements that governed the company, and because the shares did have a fixed value (identified in the memorandum of association as $2.00 each), Finkelstein J rejected this argument.

As a final comment, Finkelstein J noted that there was a more fundamental reason to reject the shareholder's construction of the articles, being that what he suggested was unlawful. To reduce the liability in respect of uncalled or unpaid capital was a reduction of capital. For example, if shares were $2.00 each with $1.00 paid up, reducing them to fully paid up shares, and thus relieving shareholders from the liability of the uncalled amount, reduced the capital of a company. Such a reduction can only be effective if relevant statutory provisions have been complied with, and the conditions for reduction cannot be satisfied in the case of an insolvent company. Prima facie, Wright was obligated to pay the uncalled capital on his shares at the demand of the liquidator.

(2) Validity of liquidation

As a secondary argument against his liability to pay uncalled capital on the 750,000 executive preference shares that he held, Wright asserted that:

(a) the company was not in liquidation;

(b) the liquidator (Mansell) was not its validly appointed liquidator; and

(c) not being the liquidator, Mansell did not have the power to settle a list of contributories.

Finkelstein J noted that to understand this argument, it was necessary to make reference to the Corporations Law.

An administrator of a company may be appointed by its directors (section 436A), by its liquidator or provisional liquidator (section 436B) or by the holder of a charge over its assets (section 436C). In each case the administration commences "when an administrator of the company is appointed" (section 453C(1)(a)). Not everyone can be appointed as an administrator; section 448C(1) provides that certain persons are disqualified from appointment without the leave of the court.

Finkelstein also noted the definition of officer in section 9, highlighting that the definition includes as an officer "(d) an administrator of the corporation" and "(e) an administrator of a deed of company arrangement executed by the corporation". This definition applies unless the contrary intention appears. Further, His Honour directed attention to section 448C(3) which provides that a person is to be taken as an officer, except where ASIC directs the paragraph not to apply, if the person has been an officer within the last two years. If both the definition of officer and the deeming provision in section 448C(3) were applied, then, according to section 448C(1), Mansell was an officer of the company and thus disqualified from acting as an administrator in the second administration without the leave of the court.

Wright argued that the appointment of a disqualified person could not begin an administration under section 435C, and being no administration, there could be no valid resolution to wind up the company.

Finkelstein J asserted that the first premise of Wright's argument - that Mansell was disqualified from being reappointed as administrator for a second term as he had acted as administrator of the company within the previous two years - was not supported by caselaw. He cited the case of Cussen v Signature Resorts Pty Ltd (2000) 19 ACLC 341 in which Young J considered but rejected the same submission as authority.

In relation to the second premise of Wright's argument, that the appointment of a disqualified person to the position of administrator without leave of the court was a nullity, Finkelstein again said the caselaw was against this proposition. Finkelstein restated the principles derived from Re Chillia Properties Pty Ltd (administrator appointed) (1997) 73 FCR 171 and Emmanuele v Australian Securities Commission (1997) 188 CLR 114 which established that a contravention of section 448C could be cured after the event. Failure to comply with section 448C does not invalidate the appointment of an administrator, it merely makes the persons involved in the conduct liable to a penalty.

(3) The court's decision

Finkelstein J held that Mansell had been validly appointed as an administrator for a second term, that the company was validly in liquidation, and that Wright was liable to pay the uncalled capital on his 750,000 executive preference shares at the demand of the liquidator.

(E) ASSERTING A QUISTCLOSE TRUST AGAINST LIQUIDATORS
(By Alex Vynokur, [Baker & McKenzie](http://www.bakernet.com))

Gliderol International Pty Ltd v Hall [2001] SASC 355, Supreme Court of South Australia, Nyland J, 30 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/october/2001sasc355.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

A recent decision of the Supreme Court of South Australia has restated and applied the essential criteria for establishing a Quistclose trust.

(1) Background

The proceedings in the case arose out of the liquidation of L G Zieschang & Co Pty Ltd ("the Company").

The Company was founded in 1983 and managed by Mr Zieschang senior until Mr Zieschang junior took over the management in the early 1990s. In the latter half of the 1990s the Company had started to experience financial difficulties and eventually it became unable to meet its obligations as they fell due.

The Company's accounts, as at 15 July 1998, recorded a debit balance of $54,826.76. On 16 July 1998, $90,000 was paid into the account by Mr Zieschang senior, putting the balance into credit in the amount of $35,173.24.

On 21 July 1998, the Company made a payment of $32,153.46 to Kemps Mercantile Agency Australia Pty Ltd ("Kemps"). This payment ("the transaction") was made to satisfy the debts owed by the Company to a number of creditors who were represented by Kemps, one of which was the Appellant. Subsequently, from the payment made to Kemps, the Appellant received a sum of $11,364.72.

On 1 October 1998, the Company petitioned for its own winding up due to financial difficulties. On 10 November 1998, the Company was wound up in insolvency pursuant to section 459A of the Corporations Law, as it then was ("the Law"). On the same day, Mr Hall, the Respondent to the appeal, was appointed liquidator of the Company.

(2) Decision at first instance

The decision at first instance was handed down by a magistrate sitting in the civil jurisdiction of the Adelaide Magistrates Court. The action brought in the Magistrates Court was a claim by Mr Hall that the sum of $11,364.72 received by the Appellant amounted to an unfair preference and was therefore voidable under section 588FE of the Law.

The magistrate found that the payment to Kemps was made at a time when the Company was insolvent during the relation back period, and hence that the transaction was voidable under the Law. Accordingly, the Appellant was ordered to repay to the Respondent the benefit which it has received.

In the course of the judgment, the magistrate rejected the submission that the moneys paid to Kemps were forwarded by the Company to the Appellant as trustee for Mr Zieschang senior.

(3) Appeal

On the hearing of the appeal the Appellant challenged the decision at first instance on the basis that the magistrate had erred in finding that the payment by Mr Zieschang senior to the Company was not made with intention of creating a special trust.

Hence, the grounds of appeal raised two questions:

(a) Was the $90,000 advanced to the Company impressed with a Quistclose trust (or some other equitable obligation) so that the moneys did not become the Company's property?; and

(b) If so, does the fact of that trust prevent the liquidator of the Company from recovering the funds as an unfair preference?

(4) Appeal decision

(a) Onus of proof

The Appellant submitted that as the Respondent had the onus of establishing that the payment to Kemps was an unfair preference, he was also required to prove that the moneys paid out of the Company's account came from the Company's assets, and not from moneys being held on trust by the Company.

However, His Honour found this submission to be in direct conflict with authorities which state that the onus of establishing the existence of a trust lies with the person asserting that the trust was created (Peter Cox Investments Pty Ltd (in liq) v International Air Transport Association (1999) 161 ALR 105). Thus, the Appellant had the onus of proving the existence of a trust.

(b) Quistclose trusts

It was submitted by the Appellant that the moneys paid by Mr Zieschang senior to the Company were for a specific purpose, namely, to discharge the debt owed to the creditors represented by Kemps. In this way, it was argued that the arrangement was tantamount to the trust upheld in the case of Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567. The concept of a Quistclose trust has been followed in Australia: Re Australian Elizabethan Theatre Trust (1991) 30 FCR 491; Peter Cox Investments.

In the Quistclose case, it was established that an apparent debtor-creditor relationship can incorporate a trust relationship when such a trust relationship accords with the mutual intentions of the parties.

His Honour quoted from the judgment in Re Australian Elizabethan Theatre Trust, where Gummow J said that:

"The striking feature of the Quistclose litigation was that, whilst previously it might have been thought that debt and trust were distinct and disparate norms, it was thereafter clear that in a given case the transaction under analysis might bear a dual character." (at 502)

(c) Was there a Quistclose trust in the present case?

For a Quistclose trust to be formed, it was necessary that the mutual intention of Mr Zieschang senior and the Company was that the moneys advanced by Mr Zieschang senior would only be used to pay the group of creditors represented by Kemps.

If that was the case, then a failure to apply the moneys to the purpose as intended by both parties would create a resulting trust in favour of Mr Zieschang senior, which would mean that the moneys did not form part of the Company's assets for the purposes of the liquidation.

However, his Honour found that there was no Quistclose trust in the present circumstances, because:

(i) the moneys were paid into the Company's account, and not into a separate account (according to his Honour, this was an important factor indicating that a Quistclose trust was not intended);

(ii) the $90,000 paid by Mr Zieschang senior into the Company's account was not the exact amount of the debts owed to the creditors represented by Kemps (in Quistclose, the exact amount was paid into the specified account.); and

(iii) only part of the moneys were paid to Kemps. Two other cheques were drawn from the account from the moneys contributed by Mr Zieschang senior. This was found to show that the moneys were not for the sole purpose of paying specific creditors, as was the case in the Quistclose case.

It was unnecessary for Nyland J to address the question as to whether the existence of a Quistclose trust prevented the liquidator from recovering the payment as an unfair preference.

(5) Comment

The case demonstrates that in order to establish a Quistclose trust it is necessary to show a clear intention of both parties to a lending transaction.

In the course of the judgment, Nyland J has reaffirmed that if required, equity is prepared to intervene in commercial transactions, and the extent of any such intervention will be determined by the facts before the court.

(F) ABILITY OF HIH LIQUIDATORS TO ASSIST THE HIH ROYAL COMMISSION
(By Stephen Taffe, [Phillips Fox](http://www.phillipsfox.com))

HIH Insurance Limited (in Liq) [2001] NSWSC 997, New South Wales Supreme Court, Santow J, 5 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc997.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The applicants, Anthony Gregory McGrath and Alexander Robert Mackay Macintosh, are the liquidators of HIH Insurance Limited and 19 of its subsidiaries (the 'HIH companies').

On 29 August 2001, the Governor-General appointed Justice Owen of the Supreme Court of Western Australia to conduct a Royal Commission into the reasons for, and circumstances surrounding, the collapse of the HIH Insurance Group (the 'Royal Commission').

The Royal Commission asked the liquidators to provide it with access to, or copies of, relevant documents of the HIH companies. On 21 September 2001, the liquidators were served with a Summons to appear to give evidence and to produce documents at the Royal Commission. In response to the Summons, the liquidators' legal advisers and staff of KPMG undertook a considerable amount of work to identify and collate documents requested from them by the Royal Commission.

Practice Direction No 1 issued by the Royal Commission states that prospective witnesses are expected to cooperate with the Royal Commission, to present a written statement of their evidence in chief and to attend informal conferences with lawyers assisting the Royal Commission to discuss the relevant issues.

In particular, Mr McGrath was given a document by the Royal Commission called 'Draft list of topics to be dealt with by the Liquidator and other persons from KPMG'. The document sets out topics about which the Royal Commission wants Mr McGrath or other KPMG personnel to give evidence. Mr McGrath's view is that the topics identified in that list are not all solely within his knowledge or expertise or that of his co-liquidator Mr Macintosh, and that some of the material was likely to fall within the knowledge and expertise of personnel from the firm KPMG in the United Kingdom.

This decision deals with an application by the liquidators for a direction as to whether they are justified in participating in and cooperating with the Royal Commission, and in incurring costs and expenses against the assets of the HIH companies in so doing. Mr McGrath expressed the view that, on balance, assisting the Royal Commission would assist in the beneficial winding up of the HIH companies.

(2) Santow J's observations

The main consideration for the Court was whether it is appropriate for the liquidators to spend the money of the HIH companies in participating in and cooperating with the Royal Commission. Payments out of company money by liquidators are in effect authorised by sub-section 556(1) of the Corporations Act 2001, which recognises a priority if the payments are 'properly incurred … in preserving, realising or getting in property of the company, or in carrying on the company's business' or if the payments are 'properly incurred by the liquidators'. It seems clear that the expression 'properly incurred' should be interpreted broadly.

Nevertheless, the legislative provisions must be viewed in the context of a liquidator's functions and duties, which are primarily to realise the assets of a company as soon as is practicable and to distribute the proceeds to whoever is entitled to them. In recent times, the functions and duties of a liquidator have been seen as more extensive. It was recognised in cases such as Douglas-Brown v Furzer (1994) 13 ACSR 756 and Re New Cap Reinsurance Corporation Holdings Limited [2001] NSWSC 835 that there is a public interest in the proper investigation of possible civil or criminal proceedings arising out of the insolvency of corporations. Accordingly, it is proper for the liquidators to participate in and cooperate with the Royal Commission to the extent that it is consistent with the objectives of public policy.
However, not all matters in relation to the Royal Commission will necessarily have a connection with the winding up of the HIH companies. It is not appropriate for the Court to give the liquidators an unfettered right to charge against the assets of the HIH companies the costs of anything that may in the future be requested by the Royal Commission.

(3) Santow J's orders

Santow J ordered that the liquidators of each of the HIH companies are justified in participating in, and assisting on a voluntary basis, the Royal Commission and incurring costs and expenses necessary or desirable to do so. Accordingly, the liquidators are justified in:

- cooperating with the Royal Commission;
- preparing statements of evidence in chief which the Royal Commission proposes to adduce;
- engaging lawyers to represent them at Royal Commission hearings that affect the conduct of the liquidation and/or the interests of creditors; and
- taking steps in connection with the Royal Commission that are desirable to protect the interests of creditors, to further the orderly winding up of the companies and to fulfil their statutory duties.

Santow J considered that the liquidators' participation in the Royal Commission should be on the basis that they maintain records of:

- the costs of, and expenses incurred in participating in and assisting the Royal Commission; and
- the benefits of participating in and assisting the Royal Commission, including benefits relating to costs that may be saved.

Santow J also ordered that in the event that it appears to the liquidators that their continued cooperation with the Royal Commission is or is likely to no longer be in the interests of the creditors or the beneficial winding up of the HIH companies, the liquidators are to apply for further directions.

(G) DEED OF COMPANY ARRANGEMENTS AND CREDITORS' MEETINGS
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com))

Young v Sherman [2001] NSWSC 1020, Supreme Court of New South Wales Equity Division, Austin J, 2 August 2001; 13 November 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/november/2001nswsc1020.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The plaintiff, Mr Young, sued as a representative of the partnership "Accenture"(formerly Andersen Consulting Pty Ltd). Accenture's business is the supply of consulting services in management, information technology and the implementation of systems and technologies. The second defendant was a company incorporated on 5 August 1999, that carried on the business of a procurement agent for agricultural products. It sourced products for its rural customers, endeavouring to afford its customers a more competitive rate because of the volumes of orders given to suppliers. The business operated similarly to that of a buying group. The first defendant was the administrator of the second defendant.

The directors of the second defendant approached the plaintiffs in February 2000, for assistance in raising funds for the operation and subsequent expansion of the second defendant's business, and for crystallising the value of the business through an initial public offering or trade sale. In March 2000, the directors engaged the plaintiffs to pursue funding, prepare an expansion/diversification policy for the business and develop an initial public offering/business sale strategy. According to the directors of the second defendant, the plaintiffs were aware that the remuneration for their services would come only from the proposed capital raising.

By September 2000, the plaintiffs say, it was becoming apparent to them that it would be difficult to raise equity finance for the second defendant, due to a change in the international market place for new internet companies. In the absence of raising capital, the second defendant did not have the financial capacity to pay the plaintiffs' fees.

An entity called Professional Advantage, commenced proceedings for the winding up of the second defendant, on the ground of insolvency, claiming to be owed approximately $97,000. The hearing of the application for winding up was adjourned after the appointment of the first defendant as administrator, and was eventually dismissed by consent on 2 April 2001.

The plaintiffs did not render any accounts for the various services they claimed to have provided to the second defendant, until after the appointment of the first defendant as administrator. On 12 February 2001 the plaintiffs submitted 3 tax invoices to the directors all dated 7 February 2001, totalling $536,538.20. The plaintiffs lodged an interim proof of debt for that amount and attended the first meeting of creditors. On 22 March 2001 the first defendant received 2 additional tax invoices from the plaintiffs. Consequently, the plaintiffs claimed to be owed $2,936,116.70 with respect to 5 invoices.

After his appointment as administrator, the first defendant immediately ceased to conduct the company's business. The first meeting of creditors of the company in administration was held on 16 February 2001. The only resolution passed at the first meeting of creditors was for the appointment of a committee of creditors. The second meeting of creditors was held on 8 March 2001. The first defendant's report to creditors accompanied the notice convening that meeting. In his report, the first defendant stated that he had investigated potential unfair preferences and had identified payments that may constitute unfair preferences, collectively totalling $40,000. He said that he had formed the preliminary view that there were no material transactions that would constitute uncommercial transactions or unfair loans. He said that he was not aware of any event that would constitute a breach of the directors' duties to the company and that his investigations had not revealed any transactions of a material nature with directors.

At the second meeting of creditors, the directors proposed a deed of company arrangement under which the deed administrator would seek funding for proceedings against the plaintiffs. The directors alleged that the company incurred substantial debts to Accenture/Andersens and to third party service and hardware providers (by and large retained by Accenture/Andersens on behalf of the company). The directors also alleged that these debts were incurred notwithstanding that Accenture/Andersens were aware that the company had no means to fund such expenses other than with externally obtained finance. The directors proposed that the administrator would take those proceedings on the basis that creditors would be entitled to a dividend of 110 cents in the dollar if recovery in the proceedings exceeded the debts owing to them.

Since the first defendant had not had the opportunity to consider the proposal, the meeting was adjourned to 23 March 2001. On 16 March 2001 the first defendant gave creditors a supplementary report, accompanying a notice of adjournment to 23 March. In that report, the first defendant recommended to creditors that the proposed deed of company arrangement be entered into, because it would provide a financial outcome at least equal to liquidation, and the prospect of a superior dividend, while protecting creditors by providing that if no funding was obtained within 6 months, the company would be placed in liquidation.

A meeting of creditors on 23 March 2001 was attended by representatives of 7 creditors, including the plaintiffs, and proxies were given by another 5 creditors. After the opening of the meeting, the first defendant ruled that the plaintiffs be admitted for voting purposes only in respect of their initial claim, excluding the 2 invoices of 22 March 2001. Even this amount was substantially higher than the next largest debt.

At the meeting, the representative of the plaintiffs made an offer, on a "without admissions" basis, that the plaintiffs would be prepared to grant a licence for the Australasian region for the company to utilise the website and programs that had been developed, and that the plaintiffs would negotiate in relation to the payment of their fees. The representative of the plaintiffs moved that the meeting be adjourned for the purpose of considering this proposal. There was no seconder for the motion, and the chairman allowed it to lapse.

The chairman then moved that the company enter into a deed of company arrangement in accordance with the deed proposed by the directors and outlined to creditors. The motion was declared carried on the voices. The representative of the plaintiffs then called for a poll. The result of the poll was that 10 creditors with debts valued at $483,531.30 voted in favour of the motion and the plaintiffs voted against the motion. The plaintiffs purported to vote for $2,936,116.70 on their voting paper, but the chairman admitted them to vote for $536,538.20. The chairman exercised his casting vote in favour of the motion and declared it to be carried.

The plaintiffs then proposed a motion that a Mr Gould replace the first defendant as the deed administrator. The motion was declared to have been lost on a show of hands. The plaintiffs' representative then called for a poll. The plaintiffs voted in favour of the motion and ten creditors whose debts were valued at $483,531.30 voted personally or by proxy against it. The chairman again used his casting vote this time against his own replacement as administrator, and declared the motion lost. He noted that the plaintiffs had a vested interest in seeking his replacement.

The deed of company arrangement, made between the company, the first defendant, and the two shareholders of the company, was executed by all parties and was dated 12 April 2001. Clause 12 stated that the objects of the arrangement set out in the deed of company arrangement were:

- to provide a framework for the deed administrator to obtain funding for, commence and then conduct, the proposed litigation against the plaintiffs on behalf of the company and its creditors;
- to provide for a premium dividend of $1.10 per $1 of the creditors' claims after conclusion of the litigation; and
- to provide a better return for the company's creditors and shareholders than would result from immediate winding up of the company.

(2) The proceeding

The plaintiffs filed their originating process in the present proceeding on 5 April 2001, and it was amended on 25 June 2001. They sought to attack the decisions of the meeting on 23 March 2001, to invalidate the deed of company arrangement, thereby to cause the company to move into liquidation, and to replace the first defendant as the liquidator.

His Honour was asked to consider a number of claims, the more important of which are summarised as follows:

(a) Whether the plaintiffs should have been allowed to vote for the full amount of their claim at the meeting of 23 March 2001 or alternatively whether the meeting should have been adjourned to enable the first defendant to investigate the claim

The plaintiffs proposed a motion for adjournment, but the chairman declined to put that motion, on the grounds that it had not been seconded. The defendants criticised this ruling, saying that the seconding of the motion was not necessary and the motion should have been put to the meeting. Austin J stated that in his opinion it is within the discretion of the chairman of a meeting to refuse to take a motion for adjournment, provided that the chairman acts in good faith, reasonably and for proper purposes.

His Honour added that: "The primary task of a chairman is to ascertain the will of the meeting on the matters for which it has been convened, and therefore the meeting should be conducted, in a procedural sense, with that objective in mind. While a seconder is strictly not required as a precondition to the chairman putting a procedural motion before the meeting, it is open to the chairman to regard the absence of a seconder as a consideration relevant to the exercise of his or her discretion."

Austin J held that the evidence before him provided no basis for legitimate concern that the first defendant's decision about the adjournment was taken in bad faith or for improper purposes. His conclusion, therefore, was that there was no basis for concluding the chairman wrongfully exercised his discretion by not putting the plaintiffs' adjournment motion to the meeting.

The plaintiffs also challenged the chairman's decision to admit them for voting purposes only as regards the claims made in the first three invoices (the invoices dated 7 February 2001) and not in relation to the two invoices dated 22 March 2001.

As the first defendant did not call for formal proofs of debt to be lodged prior to the second meeting of creditors, persons claiming to be creditors were required to provide "particulars". His Honour stated that as a general proposition, it is up to the claimant to provide sufficient particulars before the meeting, to enable the chairman to decide whether to accept or reject the claim for voting purposes.

Austin J stated that in his opinion, the invoices of 22 March 2001 and the informal proof of debt lodged by the plaintiffs on that day fell well short of providing adequate particulars of the plaintiffs' claim. His Honour stated that "There was, in each case, nothing more than a very broad generic description of the work followed by an assigned amount, and then a GST calculation. The lack of specificity is striking given the amount claimed, $1,924,462.10 and $475,116.40 respectively. They did not indicate what work was done, nor identify or give the number of the personnel employed to do the work, or their hourly rates, nor disclose the amount of time spent by the relevant personnel in carrying out the work. The out of pocket expenses claimed on both invoices ($475,917 and $14,558), were simply described as "out of pocket expenses" and were not itemised."

His Honour added that the very fact that the invoices were rendered the afternoon before the adjourned meeting, for work done no later than the end of January 2001, provided grounds for legitimate suspicion. Austin J therefore concluded that the first defendant's decision to reject the invoices and informal proof of debt of 22 March 2001 for voting purposes at the adjourned second meeting was a valid exercise of his discretion as chairman of the meeting, which should not be overturned by the court.

(b) Whether the first defendant was entitled to exercise his casting vote on the motions to execute the deed of company arrangement and replace him as deed administrator

As chairman of the meeting on 23 March 2001, the first defendant exercised his casting vote in favour of the motion to enter into the deed of company arrangement, and against the motion that he be replaced by Mr Gould as the deed administrator.

The chairman's casting vote, conferred by Reg 5.6.21(4), arises when a poll is taken at a meeting of creditors: Reg 5.6.21(1). His Honour stated that there was no doubt that the first defendant had the power, under this provision, to exercise a casting vote. The question was whether he did so properly.

Austin J stated that there is no general rule that the administrator should exercise the casting vote to prefer the view of the majority in value over the view of the majority in number. The approach arising out of the case law is to weigh up all relevant factors. His Honour held that: "Fundamentally, this was a case where the high value creditor had a personal interest, as a potential defendant, which was in conflict with the interests of creditors as a whole to maximise their return in the insolvent administration of the company. In these circumstances, there is no case for me to intervene as regards the resolution to enter into the deed of company arrangement".

In relation to the chairman's exercise of his casting vote against the motion that he be replaced as the deed administrator, Austin J held that it was not a case of simple self interest by an incumbent administrator seeking to use the casting vote to retain office. Having used the casting vote to ensure that the resolution to enter into the deed of company arrangement was carried, His Honour stated that it was reasonable for the first defendant to use the casting vote to defeat the replacement motion. He added that it would have been irrational not to do so, as to engage the plaintiffs' nominee as the deed administrator would be to risk undermining the deed of company arrangement.

(c) Whether the deed of company arrangement is a deed of company arrangement within the contemplation of Pt 5.3A

The plaintiffs argued that the deed of company arrangement was objectionable as, among other things, the premium distribution proposed by the deed of company arrangement was an improper and impermissible inducement, contrary to public policy. The plaintiffs also argued that the deed of company arrangement achieved a winding up by another name, in circumstances where the second defendant was clearly insolvent, but it did so without scrutiny of the directors' conduct or proper investigation of voidable transactions.

In considering these arguments Austin J stated that "The courts should be careful not to clothe deeds of company arrangement in any straight jacket that might impede their flexible realisation of the object of Pt 5.3A, and should also be careful not to substitute its judgment for the commercial judgment of creditors on a deed proposal."

Specifically, His Honour saw no basis for holding that it is improper to use the deed of company arrangement procedure to achieve an outcome that might have been achieved, perhaps less efficiently and flexibly, by the use of some other procedure such as winding up. In His Honour's opinion there is nothing in Pt 5.3A or even considerations of public policy that would justify his invalidating or striking down these arrangements just because they involve a premium distribution that could not be made in winding up.

His Honour added that he was satisfied by the evidence that the deed of company arrangement had not been proposed by the directors to protect them from scrutiny of their own conduct, or to shield a creditor who had benefited from a voidable transaction. Rather the deed of company arrangement had been proposed as an efficient means of enabling the company to realise what the directors regarded as its most valuable asset, namely its causes of action against the plaintiffs.

Austin J therefore held that the plaintiffs' originating process should be dismissed as the plaintiffs had failed to make out any substantive grounds for which they had contended.

(H) CAN A PRE-EMPTIVE RIGHT BE EXERCISABLE BEFORE IT EXISTS?
(By Stephen Magee)

Fedsure International v NSP Financial Services Group [2001] NSWSC 910, New South Wales Supreme Court, Palmer J, 16 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/october/2001nswsc910.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The shareholders in NSP Financial Services were bound by a pre-emptive rights agreement. Clause 13 set out the procedure to be followed where a shareholder wished to dispose of its shares. That procedure required the exiting shareholder to offer its shares to the other shareholders, accompanied by a proposed sale price. The other shareholders had 30 days from receipt of the offer to exercise their rights.

Clause 14 provided for the situation where a corporate shareholder underwent a change of control. In that situation, the corporate shareholder was deemed to have made an offer to sell its shares to the other shareholders. That offer was deemed to have been made on the day before control of the corporate shareholder changed. Clause 14 also set out a mechanism whereby the company's auditors were to determine the price at which the shares were to be offered to the remaining shareholders. Clause 14 then imported clause 13 mutatis mutandis.

One shareholder, Fedsure International (a subsidiary of a listed company), underwent a change of control on 5 June. A few days before and after the change of control, NSP communicated that fact to its shareholders and to its auditors (requesting a valuation of Fedsure's holding). Two months later, the auditors produced a valuation. A month later, the remaining shareholders indicated their acceptance of the deemed offer under the pre-emption agreement.

(2) The arguments and decision

Fedsure argued that the offer had long lapsed. It said that the 30 days for acceptance had started to run on 4 June (ie, the day before its change of control). Since the remaining shareholders had not purported to accept the deemed offer until September, their acceptances had come too late.

The remaining shareholders argued that clause 14's importation of clause 13 mutatis mutandis had imported the requirement that an offer to remaining shareholders had to be accompanied by an offer price. The Court rejected this. It held that the use of the past tense in clause 14 ("deemed to have made an offer") meant that there was a offer on the day before the change of control: the exiting shareholder was not required to do anything more.

This led to two further arguments by the remaining shareholders. Each was to the effect that this interpretation of the agreement would lead to strange results.

The first turned on the fact that, on the Court's interpretation, a remaining shareholder would be deemed to have been made an offer before the conditions giving rise to that offer had actually come into existence. The Court's response to this was that deeming provisions can often be contrary to reality, and that this deeming provision was one that the shareholders had contractually agreed to.

The second argument was that an exiting corporate shareholder might not be aware that it had suffered a change of control or might deliberately keep its fellow shareholders in the dark about a change of control, so that the offer could open and close without their knowing anything about it. The Court described this scenario as "extraordinary and bizarre":

- it was unreal to suggest that a subsidiary of a listed company would not know that control of the subsidiary had changed;
- it was also unreal to suggest that the directors of the other shareholders in NSP would not be aware of a change in control of a listed company's subsidiary.

The Court also said that there would, in any event, be an implied term in the shareholders agreement that any corporate shareholder would give notice of a change of control to other shareholders.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

P Ali, 'Adding Yield to Stable Portfolios: Regulating Investments in Australian Hedge Funds' (2001) 19 Company and Securities Law Journal 414

This article explains the nature of hedge funds and, in particular, the main investment strategies followed by hedge funds. It also provides an overview of the Australian hedge fund sector. The article, in contrast to the majority of the legal commentary on hedge funds, examines hedge funds from the "buy-side" perspective - it considers whether hedge funds are appropriate investments, under Australian law, for fund managers, superannuation trustees and other fiduciaries. Under Australian law, fiduciaries must act prudently when investing the funds entrusted to them. On a strict formulation of this duty of prudence, with its insistence on capital preservation, it is almost certain that fiduciaries would be barred from investing in hedge funds. However, it is likely that the Australian courts will follow the lead of the English and United States courts in recasting the prudent investor rule in terms of modern portfolio theory, thus bringing hedge funds within the universe of (potentially) permissible investments for fiduciaries. Moreover, where a fiduciary invests in a "fund of hedge funds", as opposed to directly investing in a hedge fund, a further issue arises - whether the fiduciary has breached its duty to act personally, since, in a fund of hedge funds, the fiduciary plays no part in the selection and monitoring of the underlying hedge funds. This article examines the Australian law on the delegation of investment powers by fiduciaries and considers the statutory modifications to the common law strictures on delegation.

G Walker, 'Corporate Governance in East Asia: Evidence and Justification' (2001) 19 Company and Securities Law Journal 437

Are there realistic prospects for upgrading corporate governance in East Asia or are some countries simply in the "too hard basket"? This question should resonate with Australian and international investors contemplating existing or prospective investments in the region. In this article, the author argues that such prospects are good where stakeholders understand the implications of the "law matters" thesis propounded by Rafael La Porta and colleagues, and governments appreciate the link between investor protection, financial market development, and economic growth.

Note, 'Board Size and Structure in New Zealand, 1962-2001' (2001) 19 Company and Securities Law Journal 463

Note, 'Multiple Directorships and Interlocks among New Zealand Stock Exchange Companies, 1996-2001' (2001) 19 Company and Securities Law Journal 467

Note, 'The Adequacy of Australia's Auditor Independence Regime' (2001) 19 Company and Securities Law Journal 472

P Darvas, 'From the Outside Looking In: Employees and Voluntary Administration' (2001) 29 Australian Business Law Review 409

Legal issues raised for employees where the voluntary administration procedure is applied to their corporate employer relate to their status as unsecured creditors of the corporation. The regulatory rationale and the structure and operation of the voluntary administration procedure clearly illustrate how employees' claims are only one of a variety of claims to be taken into account. The legal issue of who has ultimate liability for employees' unpaid rights and entitlements - the company or the administrator personally - may determine whether they receive any payments at all. The cases also reveal that the rationale underpinning the statutory moratorium limit the extent to which rights of redress are available to employees for termination. Therefore employees' interests as "outsiders" can never fully be met in this insolvency procedure, despite legislative and administrative action to "solve" these legal and practical issues.

A Stewart, 'Federal Labour Law and New Uses for the Corporations Power' (2001) 14 Australian Journal of Labour Law 145

M Berkahn, 'Directors' Duties to the Company and to Creditors: Spies v The Queen' (2001) 6 Deakin Law Review 360

The Company Lawyer, Vol 22 No 8, August 2001. Articles include:

- Liability for Supervisors and Depositors' Rights: The BCCI and the Bank of England in the House of Lords
- Innovative High Growth Companies: The Case Against Special Rules
- FSMA 2000: The Loss of Direct Parliamentary Control - Does That Mean a Financial Services Regulator Without Accountability?
- Australia: Collective Investments - A New Regulatory Approach for Australian Managed Investment Schemes (Part 1)

'Administration of Online Banking Services Procedures in China - Full Text Translation', China Law and Practice, Vol 15 No 7, September 2001

A Lynch, 'Equitable Compensation for Breach of Fiduciary Duty: Causation and Contribution - The High Court Dodges a Fusion Fallacy in Pilmer' (2001) 21 Australian Bar Review 173

G Burke, 'Limited Liability Companies and the Federal Securities Laws: Congress Should Amend the Securities Laws to Avoid Coverage' (2001) 76 Indiana Law Journal 749

R Ambery and S Bowmer, 'The Use of Limited Partnerships, Special Purpose Entities in Property Securitisations' (2001) 16 Journal of International Banking Law 153

A McKnight, 'Brumark: The Difference Between Fixed and Floating Charges' (2001) 16 Journal of International Banking Law 157

S Block-Lieb, 'The Logic and Limits of Contract Bankruptcy' (2001) (No 2) University of Illinois Law Review

M Freeman, 'Doing Well by Doing Good: Linking Human Rights with Corporate Self Interest' (2001) International Business Law Journal 741

Note, 'Single Financial Market Plan Fuels Wide-ranging Law Reform' (2001) Vol 13 No 16 Euro Watch

The Committee on Professional and Judicial Ethics, 'Formal Opinion 2001-02: Conflicts in Corporate and Transactional Matters' (2001) 56 The Record of the Association of the Bar of the City of New York 227

The Committee on Futures Regulation - 'Secondary and Supervisory Liability Under the Commodity Exchange Act: An Update' (2001) 56 The Record of the Association of the Bar of the City of New York 239

R Fox, 'Not So European - The Demise of the Proposed European Directive on Takeovers' (2001) 12 International Company and Commercial Law Review 175

International and Comparative Corporate Law Journal, Vol 2 No 4, 2000. Articles include:

- Corporate Governance: European Perspectives
- Comparative Corporate Governance: A German Perspective
- Board Structure in the UK and Germany: Convergence or Continuing Divergence?
- The OECD Principles on Corporate Governance: Opportunities and Risks From the Perspective of the German Corporate Governance Movement
- Factors and Trends of Change in Company Law

Case Western Reserve Law Review, Vol 51 No 3, Spring 2001. Special Symposium Issue on the Future of Private Equity Financing. Articles include:

- The Outlook for the Private Equity Market
- Company Registration and the Private Placement Exemption
- The Ambiguous Boundaries Between Public and Private Securities Markets

Australian Journal of Corporate Law, Vol 13 No 2, September 2001. Articles include:

- Directors' Duties in Corporate Groups
- Incorporation and Regulation of Non-Profit Associations in Australia and Other Common Law Jurisdictions
- Duties of Company Directors and Committee Members of Incorporated Associations
- Teaching and Integrating Recent Developments in Corporate Law, Theory and Practice
- Securities Regulation: Canadian Lessons for Australian Regulation
- Corporate Crimes: Criminal Intent and Just Restitution

Insolvency Law Bulletin, Vol 2 No 3, October 2001. Articles include:

- Tracing Funds Through Companies - Some Issues for Insolvency Practitioners
- Payroll Tax and Directors' Liabilities

Insolvency Law Bulletin, Vol 2 No 2, September 2001. Articles include:

- Directors' and Officers' Insurance and Indemnity, and Insolvent Trading
- The Purpose of Preferences - The High Court's Good Law but Bad Psychology
- Can a Court Appointed Receiver Simply Recover Their Fees Paid to the Company and Retire?

Corporate Governance: An International Review, Vol 9 No 4, October 2001. Articles include:

- Corporate Governance and Intellectual Capital: Some Reconceptualisations
- The Disclosure of UK Boardroom Pay: The March 2001 DTI Proposals
- The Relationship Between Governance Structure and Audit Fees Pre-Cadbury: Some Empirical Findings
- Corporate Governance in Argentina: The Outcome of Economic Freedom (1991-2000)
- A Meta-Analysis of Board Leadership Structure and Financial Performance

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

7. 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/>

8. CONTRIBUTIONS

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

9. MEMBERSHIP AND SIGN-OFF

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

10. 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.