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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CORPORATIONS LAW AMENDMENT (ASX) ACT 1997

The Corporations Law Amendment (ASX) Act 1997 was assented to on 16 December 1997. Under the Act, which amends the Corporations Law by inserting a new Part 7.1A titled 'The Australian Stock Exchange Limited', the Australian Stock Exchange, currently a company limited by guarantee, may convert to a public company limited by shares, on application to the ASC in the ACT.

(B) ASC INVESTIGATION INTO COBAR MINES PTY LTD

The Federal Treasurer, Mr Peter Costello, has welcomed the announcement by the ASC that it will examine the circumstances under which Cobar Mines Pty Ltd continued to trade in the lead-up to its closure and the likely payments to creditors. The closure of the copper mine has inflicted great hardship on the people of Cobar, and especially on former employees and their families.

The ASC has wide-ranging powers to act if it finds any evidence of breaches of the law on the part of the company directors and officers. It can also take action to recover penalties for such breach. The Federal Government has promised the matter will be pursued vigorously to ensure any wrongdoing is addressed.

2. RECENT CORPORATE LAW DECISIONS

(A) Gould v Brown, High Court of Australia, 2 February 1998

In November 1992 the Federal Court made an order, on the application of BP Australia Ltd, that Amann Aviation Pty Ltd ('Amman'), a company incorporated in NSW under the Companies Act 1961 (NSW), be wound up. Subsequently the liquidator applied for orders for the issue of summonses directed to named persons to attend for examination on oath or affirmation the examinable affairs of Amman. The Federal Court issued these orders in July and August 1995, pursuant to sections 596A or 596B of the Law. The appellants then moved the Federal Court for declarations that the Federal Court had no jurisdiction to make the winding up orders and no jurisdiction to order and conduct the proposed examinations and for an order setting aside the summonses issued pursuant to the liquidator's examination orders.

The appellants argued that the Federal Court had no jurisdiction to make the orders because the cross-vesting legislation was invalid on the bases that:

- whilst the Commonwealth Parliament has power, pursuant to s 77(iii) of the Constitution, to invest any court of a State with federal jurisdiction, there is no corresponding power in the Constitution for a State to invest a federal court with State jurisdiction;

- the Commonwealth's power to create federal courts and define their jurisdiction is confined under s 77(i) of the Constitution to matters which come within federal jurisdiction as set out in sections 75 and 76 of the Constitution;

- the power vested in the Commonwealth Parliament by s 77(iii) of the Constitution was intended to enable the Commonwealth Parliament to invest State courts with federal jurisdiction. It does not authorise legislation giving jurisdiction, other than federal jurisdiction, to State courts;

- it would strange if, in the absence of any such express power, State Parliaments, exercising their general legislative powers, could 'conscript' federal courts to exercise State judicial power, and even stranger, if State Parliaments could 'conscript' federal courts to exercise State non-judicial power, such as the examination powers.

The Full Federal Court rejected these arguments. It held that in the context of the co-operative scheme between the Commonwealth and the States, the Commonwealth Parliament may legislate to permit federal courts and tribunals to receive and exercise powers conferred by State Parliaments.

The Court held that, whilst Ch III of the Constitution is exhaustive in relation to the definition of federal jurisdiction that may be vested by the Commonwealth Parliament in a federal court, Ch III is silent on the question of conferral of State judicial power on federal courts; hence it did not prohibit or limit jurisdiction of that kind being conferred on federal courts.

On the issue of whether the Federal Court was vested with non-judicial power to make examination orders, issue summonses and conduct and hear examinations under sections 596A or 596B of the Law, this was properly regarded as appropriate for discharge by courts because it was incidental to the exercise of judicial power.

The appellants appealed to the High Court, which, in a decision handed down on 2 February 1998, split 3-3; hence the appeal was dismissed and the decision of the Federal Court affirmed.

Brennan CJ and Toohey and Kirby J held that the Federal Court did have jurisdiction properly vested in it by the State Parliaments to hear Corporations Law matters; Gaudron, McHugh and Gummow JJ held it did not, and it was not constitutionally possible to do so.

In a joint judgment, Brennan CJ and Toohey J held that, provided the State law which purports to invest State jurisdiction in a federal court invests only judicial power as that term is understood in the context of Ch III of the Constitution, and provided the Commonwealth agrees to the investing, there is no constitutional inhibition against its reception and exercise by the federal court.

With respect to the examination powers, Brennan CJ and Toohey and Kirby JJ held that, to the extent that the power to order and conduct examinations is available for exercise in the course and for the purposes of a winding up, it is an incident of the judicial power of winding up and has a judicial character. However they questioned whether the exercise of the examination powers in contexts other than a winding up would be valid on the basis that such an exercise would not be of a judicial power, nor a power incidental to a judicial power. Brennan CJ and Toohey J cited as an example of an exercise of a power which might not be properly characterised as judicial or incidental to a judicial power the issuing of a summons, on application of the ASC under section 596B, requiring an examinable officer of a corporation to appear for examination in relation to a takeover offer being made by his or her corporation.

On this point, Gaudron J stated that, to the extent that the power to examine witnesses conferred by Ch 5, Part 5.9 of the Law is not confined to examination by a court which has exercised or is exercising jurisdiction to make an order for the winding up of the corporation, it is not properly characterised as judicial power, and to that extent, Ch III of the Constitution precludes the conferral of that power on the Federal Court, whether by the States or by the Commonwealth. Gaudron J further questioned whether other powers in the Law might not be properly characterised as judicial, specifically:

- s 415 which requires reports with respect to proposed compromises and schemes of arrangement be made to the court;

- s 423 which empowers the court to inquire into the conduct of controllers;

- s 425 which empowers the court to fix the remuneration of receivers;

- s 438D(3) which empowers the court to direct an administrator to provide a report;

- s 441H which empowers the court to limit the powers of a receiver;

- s 444F(3) which empowers the court to limit the rights of a secured creditor;

- s 445B which empowers the court to cancel a variation of a deed of arrangement; and

- s 447A(1) which grants the court general power to make such order as it thinks fit about how Part 5.3A is to operate in relation to a particular company.

Therefore it remains unclear which powers conferred by the Law can properly be regarded as judicial and hence exercisable by the Federal Court.

More importantly, with the imminent retirement of Brennan CJ and Toohey J, two of the justices who upheld the constitutional validity of the conferral of jurisdiction to the Federal Court, the whole question of the validity of the cross vesting scheme is still open to challenge in the near future.

(B) National Futrax Pty Limited v Australian Securities Commission, No QG 3016 of 1996, Federal Court of Australia, Finn J, 27 November 1997

National Futrax Pty Ltd ('NF') sought leave under O4 r14(2) and O9 r1(3) of the Federal Court Rules to carry on its application and to defend a cross-claim otherwise than by solicitor. The ASC was respondent and cross-claimant.

NF owns the copyright in computer software which it makes available for purchase or hire. The ASC argued that the program, when operated, provided (i) recommendations as to whether to buy, sell or hold particular shares on the ASX, and (ii) an analysis or report about securities. Hence, the ASC claimed NF:

- carried on an investment business within the meaning of section 77 of the Law, but in contravention of s 781 of the Law; and

- carried on a securities business within the meaning of s 93 of the Law but in contravention of s 780.

The ASC further claimed that NF engaged in misleading or deceptive conduct in contravention of s 995(2) of the Law and s 52 of the Trade Practices Act.

NF had been legally represented from the time its application was filed until the day the matter was set down for hearing. On that day, NF's solicitors indicated that financial arrangements, involving payment of $20,000, had to be made before the Queen's Counsel engaged for the trial would act. NF considered itself unable to meet this financial demand, and terminated the services of its solicitors.

Just prior to the hearing, the company's agent became aware that he would require the leave of the court to appear. When the matter was called on, the burden the company bore was explained to the company agent and the opportunity given to adduce evidence on its behalf in seeking leave.

Leave was sought on the basis of NF's limited financial resources. The company's sole director tendered the company's financial report for the year ending 30 June 1997. This showed an after tax profit of $99,756. Also tendered was the company's bank statement; this showed a virtually nil balance.

However, Finn J considered this evidence did little to illuminate the actual financial circumstances of the company and those standing behind it. NF was part of a group which conducted similar businesses to that of NF; the ultimate beneficiaries of the group were two family trusts, and there was no information concerning the circumstances of the group, or of the capacity or willingness of those behind the two family trusts to provide financial assistance to NF.

Applying Molnar Engineering Pty Ltd v Burns (1984) 3 FCR 68, Simto Resources Ltd v Normandy Capital Ltd (unreported, 29 June 1993, French J), and VN International Video Pty Ltd v West End HK TVB (1996) 14 ACLC 1308, Finn J was not satisfied that the applicant had shown 'sufficient reason' to justify the grant of leave; His Honour was unconvinced that NF was unable, because of financial difficulties, to arrange proper and appropriate legal representation for itself in the matter, and there was no evidence at all of the circumstances of the group to which NF belonged.

Justice Finn refused to grant the leave sought, but, since the need to seek leave arose only the day before the hearing date, His Honour adjourned the hearing of the application and cross-claim so as to afford NF a reasonable opportunity to consider obtaining appropriate legal representation; the parties were granted leave to seek a new hearing date. The ASC was also granted costs and an interlocutory injunctive relief to restrain NF from dealing with its computer software until the trial of the action.

(C) Raasay Pty Ltd v Scapa Flow Pty Ltd, No TG 3015 of 1997, Federal Court of Australia, Ryan J, 4 February 1998

The applicant, Raasay Pty Ltd ('Raasay') sought to set aside a statutory demand from a creditor, pursuant to s 459G of the Law. Were the demand not set aside, the respondent creditor, Scapa Flow Pty Ltd ('Scapa Flow'), would be entitled to seek to have the applicant wound up in insolvency and to rely on the statutory demand to establish that insolvency.

Scapa Flow claimed a debt of $147,282, which amount the applicant had recorded as a loan from the respondent. The applicant contended the existence of the debt or that the respondent was estopped from claiming the sum demanded, or that the applicant was entitled to offset an amount recorded as a debt to a law firm trading as Archer Busby ('the partnership').

Raasay was the partnership's main service company and trustee of the Raasay Unit Trust ('the Trust'). All partners were also directors of Raasay and all the units in the Trust were held by family trusts controlled by the individual partners. Mr Simon Whishaw, director and controlling mind of Scapa Flow, had been a partner in the partnership until his retirement. In accordance with normal practice, on his admission as a partner, Mr Whishaw had been appointed a director of Raasay, and a unit in the Trust was issued to Scapa Flow. On his retirement, Mr Whishaw resigned as director of Raasay, and Scapa Flow's unit in the Trust was cancelled.

The applicant adduced evidence, which was not contested, that it had:

- provided services to the partnership;

- employed all non-professional staff used by the partnership;

- accepted responsibility for general office expenses;

- received monthly fees from the partnership.

Profits made by the applicant were distributed to the unit holders in the Trust, the family trusts. Distribution of profits to the unit holders was taxed in the hands of the beneficiaries of the family trusts and it had been the practice for 15 years for distributions of profit to be lent back to the applicant by the unit holders and recorded as loans in the applicant's books. It was also the partnership's practice to calculate entitlements or liabilities or partners leaving or joining the partnership by reference to the net position of the partner, the partner's family trust, the partnership, and its service companies, including the applicant, Raasay. After Mr Whishaw's resignation, the partnership calculated his entitlements on that basis, and continued to make payments in accordance with that calculation.

Section 459H of the Law applies when an application to set aside a statutory demand has been made under s 459G, and if the court is satisfied either that there is a 'genuine dispute' between the company and the respondent about the existence or amount of the debt to which the demand relates, or that the company has an offsetting claim. Under s 459(H) the court must set aside the demand if the substantiated amount of the demand is less than the statutory minimum as defined in s 9 of the Law.

In determining whether there was a genuine dispute, Ryan J held that it was not necessary to determine the merits of the dispute; what must be shown is that the dispute is not vexatious or frivolous and that it has some substance. To demonstrate that a dispute is genuine requires evidence which shows that the dispute is based on reasonable or substantial grounds, and is not spurious, hypothetical, illusory or misconceived.

On the basis of the evidence before the court and in the absence of any evidence from the respondent, Ryan J found that a genuine dispute existed, based on reasonable and substantial grounds. The court held that Raasay Pty Ltd, Scapa Flow Pty Ltd and the partnership had conducted their affairs upon the assumption that upon the entry or exit of partners of the partnership, the obligations of Raasay to the unit holder controlled by the partner would be set off against the partner's obligations to the partnership. Each of the partners had arranged his or her affairs in reliance upon this assumption, and the commercial efficacy of the arrangement had been demonstrated. Therefore, satisfied a genuine dispute existed, and noting that the respondent was estopped from resiling from the assumption, the court granted the application to set aside the statutory demand.

(D) Peninsula Gold Pty Ltd v R G Capital Radio Pty Ltd, No G 3484 of 1996, Federal Court of Australia, Burchett J, 17 February 1998

The applicant, Peninsula Gold Pty Ltd ('Peninsula'), sought a declaration that the respondent company, R G Capital Radio Pty Ltd, formerly Sea FM Ltd, was obliged to register 199 share transfers by a date not later than 8 May 1996, and an order directing the respondent to correct its register so as to show that the date of registration was 8 May 1996.

On April 24, 1996, Peninsula purchased 4,000 shares in R G Capital Radio Pty Ltd, then known as Sea FM Ltd. On April 26 1996, another company, R G Capital Ltd, announced its intention to make a takeover bid for Sea FM Ltd. This announcement had been anticipated by Peninsula when it had made its purchase of 24 April.

The significance of Peninsula's purchase lay in the fact that under s 701(2)(c)(ii) of the Law, a takeover offeror may compulsorily acquire the remaining shares of dissenting shareholders if the offeror has acquired not less than 90% of the shares and 'at least three-quarters of the persons who were registered as the holders of shares in [the relevant] class immediately before the day on which the Part A statement was served on the target company ... are not so registered at the end of the month after the end of the offer period.'

R G Capital Ltd issued its Part A statement on 9 May 1996, so the relevant date for the purposes of s 701(2)(c)(ii) as to number of registered shareholders of Sea FM Ltd was 8 May 1996.

Immediately after its purchase of 24 April 1996, Peninsula transferred 199 parcels of 20 shares each to 199 different applicants. The effect of these share splitting transactions would have been to increase the number of shareholders in Sea FM Ltd by 199, and so potentially frustrate the application of the compulsory acquisition powers under section 701.

The 199 transfers were delivered to the share registry late on Wednesday 1 May 1996. The administrator of the share registry, Mr Butler, did not see them until 2 May 1996. Accompanying the transfers was a letter stating that Peninsula had purchased the 4000 shares 'on market', but that its purchase had not yet been recorded in Sea FM Ltd's share register, though it had been electronically recorded through CHESS on 3 May 1996. On market transfers do not involve the submission of paper transfers to the registry. However, Mr Butler sought advice from the company as to the appropriateness of registering transfers of less than marketable parcels of shares, and he noted that the transfers had not been checked and that the transferor, Peninsula, had not been registered as a shareholder. After several inquiries, on 7 or 8 May, Mr Butler was satisfied that the 199 transfers of less than marketable parcels were valid, and they were registered on 9 May 1996, a day too late for the applicant's purposes.

The applicants contended that under ASX Listing Rule 3Y(6), Sea FM Ltd was required to register the transfers within five business days of their lodgment on 1 May 1996; however their main contention rested upon ASX Listing Rule 3D(3B)(b)(i) which provides that:

'Where the securities of a company are CHESS approved securities ... the company shall not prevent, delay or in any way interfere with the registration of a paper-based transfer in registrable form of a security'.

ASX Listing Rules are given statutory force in respect of a listed company by way of s 777 of the Law.

Burchett J rejected the applicant's contention that Sea FM Ltd had delayed or interfered with the registration. His Honour held that the transfers from Peninsula were not in registrable form at the time they were lodged (1 May 1996) since Peninsula had not been registered as the holder of any shares. Burchett J cited the High Court in Maddocks v D J E Constructions Proprietary Ltd (1982) 148 CLR 104 and the Privy Council in Bermuda Cablevision Ltd v Colica Trust Co Ltd [1998] 2 WLR 82 as authority for the proposition that no person can be a shareholder until registered.

Therefore the transfers did not come into registrable form until at least Friday 3 May 1996 when the company controlling the electronic registration process recorded Peninsula as the shareholder. And Sea FM Ltd was not informed of Peninsula's registration on the electronic register until Monday 6 May 1996, and within three days of such notification, it had completed the processing of the transfers. Delay could not be seen to commence till the transfers were in registrable form. Burchett J also noted that in any case, the ASC had already exercised its discretion under section 730 of the Law to modify the provisions of section 701 so as to annihilate any effect which the 199 transfers would have had in relation to the takeover of Sea FM Ltd.

(E) Morris v Agrichemicals; re BCCI (No 8) [1997] 4 All ER 568

(Submitted by Allens Arthur Robinson Group)

In a unanimous decision, the House of Lords has weighed into the debate as to whether a bank can have a charge on a deposit with it. The House of Lords decided:

- 'flawed asset' arrangements did work and were 'perfectly good security';

- a bank can have a charge over its own deposit.

Starting with the NSW Supreme Court in 1980 (Broad v Commissioner of Stamp Duties [1980] 2 NSWLR 40), both English and Australian courts had previously held that a charge back was 'conceptually impossible'. In England, this was upheld in Re Charge Card Services Limited [1986] 3 All ER 289.

That decision was criticised, but was upheld in the present proceedings in the Court of Appeal which in turn was overruled on this point by the House of Lords. For various reasons, including difficulties in obtaining chargebacks, there were a number of alternative structures for security over cash. The most straightforward is the 'flawed asset' arrangement. A deposit is only a contractual debt owed by the bank to the customer. A flawed asset arrangement changes the terms of the debt so that it is only repayable if the customer performs the 'secured' obligation. It makes the deposit obligation conditional.

To date, Australian courts have said that a charge back is impossible. The High Court may say the same as the House of Lords. It is not definite. The short answer, in most circumstances, is to stick with flawed asset arrangements. If a flawed asset arrangement has been properly drafted, it should be effective in the customer's liquidation or administration.

One does not usually need a charge. Even without a flawed asset arrangement, in most cases (with a few exceptions which can be worked around) on a winding up, insolvency set-off is wide ranging and effective. In a voluntary administration, contractual set-off is effective.

There are a number of problems with charges even ignoring their uncertainty. One may need a charge where foreign jurisdictions are involved, for example, where the deposit is offshore or the depositor is incorporated there. It may be prudent to state expressly that in the document the flawed asset arrangement does not constitute a charge.

3. RECENT ASX DEVELOPMENTS

(A) NEW ASX GUIDANCE NOTES

(Submitted by David Cullen & John Williamson-Noble, Gilbert & Tobin)

ASX recently issued a revised guidance note on non-business and non-trading days, a new guidance note on disclosure of corporate governance practices and some proposed listing rule amendments which will (almost) sound the death knell for share certificates for listed companies.

(i) Guidance Note On Non-Business Days and Non-trading Days

This is a revised version of the guidance note issued on 3 November 1997. ASX is now declaring Monday 8 June 1998 (Queen's Birthday holiday in most states and territories) to be a non-trading day (ie SEATS closed) as well as a non-business day (ie no settlement) and Monday 28 December 1998 (Boxing Day holiday in New South Wales, Western Australia and Tasmania and Proclamation Day holiday in South Australia) to be both a non-business day and a non-trading day. This is in anticipation of both days being proclaimed public holidays in NSW.

(ii) Guidance Note On Disclosure Of Corporate Governance Practices

In 1995, ASX introduced a listing rule requiring disclosure in an entity's annual report, for annual reporting periods ending on or after 30 June 1996, of the main corporate governance practices that the entity had in place during the reporting period (former Listing Rule 3C3(j), now listing rule 4.10.3).

This new guidance note has been published to assist listed entities in preparing the statement of corporate governance practices required to be disclosed under listing rule 4.10.3. It expands and provides further insights on the indicative list of corporate governance matters set out in Appendix 4A of the listing rules.

The guidance note reiterates previous public statements by ASX to the effect that its role in the area of corporate governance is primarily to promote the disclosure of corporate governance practices adopted by listed entities and to assist in the development of these practices generally. It emphasises that ASX policy is not to require that particular practices be adopted or that entities report using a 'tick a box' approach. Each entity should make its own assessment of those practices appropriate to its particular circumstances.

Inevitably, despite these intentions, the guidance note will serve (at least to some degree) as a benchmark for appropriate corporate governance practices and their disclosure. Given the standing of ASX and the role that it has played in the corporate governance debate to date, it is submitted that this is not necessarily undesirable.

The guidance note draws together evidence on the current practices of listed companies in response to listing rule 4.10.3 and pronouncements of corporate governance best practice from Australia and overseas to highlight various matters which listed companies will usually need to consider in implementing and disclosing corporate governance practices.

- Method of Disclosure

It is preferable that the listing rule 4.10.3 disclosure is contained in a separate section of the annual report (as opposed to being combined with other sections) so that the disclosure is prominent and clear.

- Non-Executive Directors

One issue which is not explicitly identified in Appendix 4A but which is given prominence in the guidance note is the definition and important role of independent non-executive directors. While there is debate as to the most appropriate definition of 'independent' for this purpose, the guidance note adopts the criteria published by the Australian Investment Managers' Association. The resultant definition is quite narrow and excludes (for example) directors who are officers of substantial shareholders of the company, directors employed in an executive capacity by the company within the last 3 years, directors who act as professional advisers to the company and directors who are associated with a significant supplier or customer of the company.

Where smaller companies are considering the appointment of non-executive directors, the individuals selected should preferably be independent and not merely non-executives.

It is desirable for the chairperson to be someone who is not a current or past executive of the company to avoid potential conflicts of interest in management matters. Where, however, the roles of chairperson and chief executive are combined, concerns of conflicts of interest can be mitigated by having a strong independent influence on the board. This may take the form of the appointment of a lead independent director or the establishment of a governance committee of non-executive directors which has the responsibility for administering the board's relationship to management.

- Board Committees

If the company has a nomination committee, a remuneration committee or an audit committee, the annual report disclosure statement should set out, or summarise, the main responsibilities of those committees, the names of committee members and their positions in relation to the company.

Ideally, those committees should comprise a majority of non-executive directors (preferably independent directors), including a chairperson who is independent.

It is becoming virtually standard practice (other than for the smallest listed companies) to have an audit committee to oversee the preparation of the company's financial statements and to review internal controls and the nomination, independence and function of the company's auditors.

- Level of Disclosure

It may be useful for companies to provide additional details in their corporate governance statements concerning the appointment of directors, including whether the company provides potential candidates with a letter of appointment setting out directors' responsibilities and rights, whether there is a maximum fixed term (assuming re-election) for non-executive directors and whether the company has established internal performance reviews of directors offering themselves for re-election.

It may be appropriate for companies to include additional details about board composition in their corporate governance statements, including the age of each director, the qualifications and experience of directors, whether the directors act as nominees or representatives of particular shareholders, those directors who are non-executives and those who are independent of management, and information on directorships of other public companies.

It may be appropriate for companies to include additional details on remuneration matters in their corporate governance statements, including their remuneration policy for non-executive directors, whether retirement benefits are offered to non-executive directors and whether they have a policy on trading of shares in the company by directors.

- Access to External Advice

Allowing reasonable access to professional advice that is independent of company management and is available at the company's expense will assist individual directors to function more effectively. A formalised procedure or system should be adopted to govern the extent to which directors are able to obtain this independent advice.

- Code of Ethics or Conduct

It is becoming more common for companies to operate according to a code of ethics or conduct. It may be appropriate for companies to provide a statement in their annual report on the policy they have for the establishment and maintenance of appropriate ethical standards, including whether a code of ethics or conduct has been established. The guidance note also provides some advice on the way in which listed trusts, with their (current) bipartite governance structure, can comply with the requirements of listing rule 4.10.3. Trusts may report on the corporate governance practices of the management company or they may report the main factors governing the relationship between the trust and the manager (for example, the basis of the appointment and the basis upon which fees are paid).

In summary, this new ASX guidance note provides very useful assistance to listed entities seeking to adopt the most effective corporate governance practices and to disclose those practices in the most useful manner.

(B) PROPOSED LISTING RULE AMENDMENTS TO MANDATE ISSUER SPONSORED SUBREGISTERS

(Submitted by David Cullen & John Williamson-Noble, Gilbert & Tobin)

The proposed move by ASX to a 'trade date plus 3 business days' (T+3) settlement regime and the proposed listing rule amendments to accommodate this move were flagged in the previous Bulletin (see item 3(d) of Bulletin No 5).

To complement this proposal, amendments are now proposed to mandate the operation of issuer sponsored subregisters by listed entities. The amendments will remove the ability of listed entities to operate certificated subregisters except in limited circumstances. The only exception from the proposed requirement that an issuer sponsored subregister must be operated is where the laws of a foreign jurisdiction prevent the entity from operating this type of subregister in all jurisdictions (eg a Bermudan-incorporated company). If this is the case, the entity may operate a certificated subregister (although the benefits of CHESS will usually be available through the CUFS (CHESS units of foreign securities) system).

If the laws of a foreign jurisdiction prevent the entity from operating an issuer sponsored subregister in that jurisdiction, it may operate a certificated subregister in that foreign jurisdiction.

Entities with unquoted securities on issue will be required to operate a certificated subregister for those securities.

Amendments to listing rules 8.2 and 8.13 and to Appendix 8A of the listing rules are proposed to accommodate these changes.

It is proposed that a transitional period of six months will be provided to enable entities time to change systems. Any listed entities not currently operating an issuer sponsored subregister and which are proposing a reorganisation of capital in the near future may find it convenient to convert to a wholly uncertificated environment at the same time.

(C) NSW GOVERNMENT DECISION ON MARKETABLE SECURITIES DUTY FOR NZ AND PNG STOCKS

Following a submission and discussions with ASX, on 30 January 1998, the NSW Treasurer announced that concessional rates would apply to market transactions in NZ and PNG securities quoted on ASX. From 1 March 1998 the stamp duty will be reduced from 0.15% on each side of the transaction to 0.0025% on each side of the transaction.

This reduction in transaction costs should contribute to liquidity of NZ and PNG securities traded on ASX and attract new listings to Australia.

4. RECENT ASC DEVELOPMENTS

(A) COMMENTS SOUGHT ON COMPETENCIES FOR FINANCIAL ADVISERS

The ASC has released for comment a consultative paper which proposes that personal competency standards for financial advisers should be developed and implemented within the Australian National Training Authority (ANTA) framework.

The ASC believes the development of competency standards for those who give financial advice and those who supervise them is critically important to the promotion of the industry and consumer confidence in it.

Personal competencies encompass appropriate qualifications, experience and integrity. They are relevant in demonstrating that an adviser has adequate levels of qualifications, knowledge, skills and ethical attitudes, together with the ability to apply them in practice. Competency standards seek to ensure that an adviser will have the necessary knowledge and attitudes, together with the ability to apply them in practice.

The competencies being developed will be broad enough to cover all advisers, including those in stock broking, the life industry and general insurance.

Under the ASC's proposal, a Steering Committee, including representatives from the main finance industry bodies, the National Investors' Liaison Committee and the ASC will be established early this year to ensure that the standards developed are effective and appropriate.

ANTA is a federal government body responsible for developing and implementing policy for an effective national education and training system. The work on the preparation of the standards will be co-ordinated by the National Finance Industry Training Advisory Body, under the supervision of the Steering Committee.

The ASC considers that the advantages of using the ANTA framework include:

- competencies will be developed after wide industry consultation;

- the framework has been successfully used by a number of key industry organisations such as the life industry;

- it eliminates duplication of approaches to competency development;

- it will result in the awarding of nationally recognised and portable certificates of attainment.

Copies of the ASC's views are available from the ASC Infoline on 1300 300 630, or from the ASC's Home Page on http://www.asc.gov.au.

Written submissions on the proposal should be submitted by 20 March 1998 to:

John Fox   
Special Adviser - Consumer Affairs   
Office of the Chairman   
Australian Securities Commission   
GPO Box 5179AA   
Melbourne 3001

(B) RELIEF FOR COMPANIES WHICH CONTROL LIFE COMPANIES

The ASC has executed a Class Order (98/0092) which extends the relief which was previously provided in relation to the consolidation of controlled life insurance companies under Class Order 97/1013.

The new Class Order applies for the financial years ending on or after 30 September 1997 and on or before 31 December 1998. It provides relief from the following requirements of accounting standards in relation to consolidated accounts of non-life parents of life companies:

(i) the requirements of AASB 1024 'Consolidated Accounts' and the proposed revised AASB 1016 'Accounting for Investments in Associates' to adjust for dissimilar accounting policies of a controlled life company where those accounting policies are required under the Life Insurance Act 1995 (the Life Act);

(ii) the requirement of AASB 1018 'Profit and Loss Accounts' to take all profits and losses to the profit and loss account on a change in accounting policy where accounting in accordance with the Life Act is adopted in relation to controlled life companies for the first time; and

(iii) the requirement of AASB 1034 'Information to be Disclosed in Financial Reports' to categorise investment assets of a controlled life company as current or non current.

- Changes From Previous Life Order

There are three significant differences between Class Order 98/0092 and Class Order 97/1013:

(i) Class Order 98/0092 applies to the consolidation of controlled foreign life companies as well as controlled Australian life companies;

(ii) adjustments to opening retained profits are neither permitted or required by Class Order 98/0092 where relief has been previously obtained under Class Orders 98/0092, 97/1013 or 97/0171;

(iii) comparative information is required for the information required to be disclosed under conditions (l)(i), (ii) and (iii) of the order, except in the first year.

If a company adopts the relief provided by the order, it must apply the order in respect of all controlled life companies, irrespective of whether they are Australian life companies or foreign life companies.

- Further Extension Of Relief

The ASC currently intends to extend the period of relief until such time as an accounting standard dealing with accounting for life insurance business is approved by the Australian Accounting Standards Board.

The ASC will review the operation of the order during 1998 with a view to executing a replacement order at the end of 1998 or early 1999 if no accounting standard is in place. No changes to the terms of the relief are envisaged at this time.

Copies of Class Order 98/0092 are available from the ASC Digest or by contacting the ASC Infoline on 1300 300 630.

(C) FOCUS ON CONSUMER AND INVESTOR PROTECTION

The ASC has set up a specialised investor protection enforcement unit which will provide a rapid response to breaches of the law affecting consumers and retail investors. The unit is based in Sydney and was established in response to the recommendations of the Wallis Inquiry which will see the ASC become part of the larger Australian Corporations and Financial Services Commission (ACSFC). It is expected that similar units will be set up on other regions as needs and experiences dictate.

The unit's role is not only to detect and act quickly on breaches of the law, but it will also ensure compliance through surveillance of participants in the securities industry. This will include securing and recovering investors' property.

The unit will target fundraising activities outside the law and inappropriate investment advice and scams which damage retail investors.

Another ASC initiative which aims to promote a safer environment for investors is a Business Compliance Unit which has been created in Sydney.

This unit will plan and implement surveillance strategies to test, enforce and promote effective compliance with the Law by funds managers, financial conglomerates and brokers of futures and securities. It will also conduct surveillance of financial conglomerates.

The ASC sees it as important that financial institutions regulated by the ASC adequately separate their business sectors to avoid risk of market manipulation and practices which could damage investors and market integrity.

(D) VICTORIAN REGIONAL COMMISSIONER RESIGNS

ASC Victorian Regional Commissioner Bernie Mithen has announced his intention to leave the ASC after seven years service. Mr Mithen will leave his position as Regional Commissioner at the end of March. No decision has yet been taken on a replacement for Mr Mithen.

(E) AMENDMENTS TO AUDIT RELIEF POLICY

The ASC has announced amendments to its policy and Class Orders on audit relief for:

- large proprietary companies; and

- small proprietary companies controlled by foreign companies.

The amendments include:

(i) changing the term 'Professional Accountant' to 'Prescribed Accountant';

(ii) approving certain members of the National Institute of Accountants to be Prescribed Accountants for the purpose of compiling end of year financial statements under the ASC's policy and Class Orders on audit relief;

(iii) using post-nominals (eg 'CPA') to identify the members of the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia and the National Institute of Accountants who are Prescribed Accountants.

Amendments have made to the following Class Orders, Editorial Note and Policy Statement:

- Class Order 96/1850 - Audit Relief for Large Proprietary Companies and the Editorial Note;

- Policy Statement 115 - Audit Relief for Large Proprietary Companies; and

- Class Order 97/567 - Small Proprietary Companies Which are Controlled by Foreign Companies - Audit Relief.

Class Order 98/0121 amends Class Order 96/1850 and Class Order 97/567; however these two Class Orders remain in place and the numbers remain the same. Policy Statement 115 also remains in place and its number remains the same.

Copies of the amending Class Order 98/0121 can be obtained from the ASC Digest or by contacting the ASC Infoline on 1 300 300 360. Copies of the amended instruments, Policy Statement and Editorial Note can be obtained from the ASC Digest.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) James Routledge, 'An Explanatory Empirical Analysis of Part 5.3A of the Corporations Law (Voluntary Administration) (1998) 16 Company and Securities Law Journal 4

This article presents findings from an explanatory study of companies that have used Part 5.3A of the Corporations Law (voluntary administration) to deal with insolvency. The objectives of the study were to examine whether the legislation's stated objectives are being achieved, and to identify factors that are useful in predicting a successful rehabilitation outcome from the administration process. Results indicate that insolvency administrations carried out within the framework of Part 5.3A are achieving the objectives of the legislation. Further, analysis of the data obtained indicates that success in achieving the rehabilitation objective in Part 5.3A can be predicted by examining the circumstances of the company prior to insolvency administration.

(B) Tom Middleton, 'Australian Securities Commission Investigations of Fiduciaries and Proceedings Against Constructive Trustees' (1998) 16 Company and Securities Law Journal 16

The ASC's investigative and enforcement mandate extends to civil matters under the civil penalty provisions of the Corporations Law. The ASC has implied powers to investigate suspected breaches of fiduciary duty and to proceed against a limited range of constructive trustees. These implied powers are uncertain and are limited by the scope of sections 79 and 232 of the Corporations Law. The need for certainty in the law as a matter of public interest requires that the ASC be given express powers to investigate suspected breaches of fiduciary duty and to proceed against constructive trustees. The uncertainties in the law and possible reforms are discussed in this article.

(C) Vicky Priskich, 'Webb Distributors Revisited: The Interaction Between the Principle of Preservation of Share Capital in Winding Up to Claims for Misleading and Deceptive Conduct' (1998) 16 Company and Securities Law Journal 35

The article considers the specific scenario where a shareholder of a company seeks damages against the company in liquidation for misleading and deceptive conduct in relation to a contract to acquire shares in the company.

The decision of the High Court in Webb Distributors (Aust) Pty Ltd v Victoria considered the interaction of section 360 of the Companies Code and section 52 of the Trade Practices Act. The High Court concluded that the claim for damages was a claim 'due to the members in their capacity as members' and therefore the claim was postponed vis-a-vis creditors.

This article revisits the High Court's decision in light of section 563A of the Corporations Law and equivalent provisions in the Corporations Law to section 52 of the Trade Practices Act. This article argues that the result under the Corporations Law would appear to be different from that which the Court reached in Webb, but also argues that the High Court's decision in Webb is open to criticism.

(D) Laura F Spira, 'An Evolutionary Perspective on Audit Committee Effectiveness' (1998) 6 Corporate Governance 29

Following the Cadbury Committee report, most major public companies in the UK now have an audit committee. The author examines the role of the audit committee and suggests factors which should be taken into account when gauging their effectiveness.

(E) H Y Izan, Baljit Sidhu and Stephen Taylor, 'Does CEO Pay Reflect Performance? Some Australian Evidence' (1998) 6 Corporate Governance 39

The authors examine the relationship between Australian CEO remuneration and accounting and share price performance indicators. Their survey takes in figures from 1987 to 1992 inclusive. The authors conclude that there is no linkage between CEO remuneration and performance, thus supporting allegations that Australian CEOs have had, by international standards, a relatively small proportion of total compensation 'at risk'.

(F) Meryl Thomas, 'Australian Securities Commission v AS Nominees Ltd' [1998] January Journal of Business Law 50

The author examines the Federal Court's decision in ASC v AS Nominees, which she describes as 'yet another sordid tale involving the mismanagement of pension scheme funds'. The author finds especially interesting in this case the examination of trust law issues through the prism of company law.

(G) Richard York, 'Do You Want to Know a Secret; Documentary Evidence and the Privilege Against Self-Incrimination' (1998) 26 Australian Business Law Review 44

Recent years have seen judicial reassessment of the privilege against self-incrimination and its justifications, leading to the High Court's decision in Environment Protection Authority v Caltex Refining Co Pty Ltd that the privilege should not apply to corporations. This article considers the effect which this re-evaluation may have on the continued availability of the privilege against self-incrimination in relation to documentary evidence, in particular business records.

(H) Danial E Lazaroff, 'Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals' (1997) 50 Rutgers Law Review 33

Under section 14(a) of the Securities Exchange Act 1934 (US), the US Securities and Exchange Commission (SEC) has authority to promulgate any proxy rules or regulations 'necessary or appropriate in the public interest or for the protection of investors'. Pursuant to this, the SEC made Rule 14a-8 which enables certain qualifying shareholders to use management's proxy materials to place their proposals before fellow shareholders at corporate expense. This creates a vehicle to focus shareholder and management attention on socially responsible as well as profitable corporate behaviour. However the SEC has announced numerous exceptions to the rule. The author argues that the rule, as currently written and with its many exceptions, is not designed to enhance corporate democracy or promote social responsibility. The author submits some alternatives designed to give greater clarity and simplicity while promoting shareholder participation in the decision making process.

Company and Securities Law Journal - CLERP Special Issue

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

In order to avoid duplication, potential contributors are asked to contact the General Editor, Professor Robert Baxt (ph 03 9614 1011), for advice on selection of topics. Articles should not exceed 7,000 words; notes can be of any length, and should be submitted by 16 March 1998, to the Production Editor, Company and Securities Law Journal, LBC Information Services, 50 Waterloo Road, North Ryde, NSW 2113. The usual Guidelines for Contributors (found on the inside-back page of each issue of the Company and Securities Law Journal) will apply.

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6. 1998 GOVERNMENT FUNDED CORPORATE LAW RESEARCH PROJECTS

Each year, the Australian Federal Government funds a number of research projects in the area of corporate law. Most of these projects are funded through the Australian Research Council. In this section we summarise some of these projects which will receive funding in 1998. We would appreciate receiving details of others.

(i) The Effect of the Enhanced (Continuous) Disclosure Regime on the Informational Efficiency of the Australian Equity Market

Researchers: Professor Stephen Taylor and Professor Terry Walter, Department of Accounting, University of Sydney and Professor Philip Brown, Department of Accounting, University of Western Australia

Project summary: The primary aim of this project is to evaluate whether the continuous disclosure regime has resulted in the Australian sharemarket becoming better informed and more efficient.

(ii) Ethics, Regulation and Contract: Reconceiving the Small Business and its Financing

Researchers: Professor Charles Sampford and Michael Whincop, Faculty of Law, Griffith University and Denise Conroy, Faculty of Management, Queensland University of Technology

Project summary: This project aims to identify the distinctive characteristics of small and medium sized enterprises (SMEs); identify key ethical issues and possible institutional and regulatory solutions (focusing on those generated by their financing); consider how law may support effective and ethical financing and governance for SMEs; and analyse SME regulation through competing theoretical approaches.

(iii) Issues for Australia Arising from China's Accession to the World Trade Organisation

Researchers: Dr Deborah Cass and Dr Ian McEwin, Faculty of Law, Australian National University

Project summary: This project examines China's accession to the World Trade Organisation and its implications for Australia via trade dispute resolution mechanisms.

(iv) The Use and Operation of Management Banning Orders in Australia

Researcher: Helen Bird, Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne

Project summary: The project examines the use and operation of management banning orders as enforcement mechanisms against defaulting directors in Australian companies. The project involves an empirical study of management banning prosecutions against directors by the ASC during the period 1991 to 1997.

(v) Electronic Prospectuses: Devising an Appropriate Regulatory Regime

Researchers: Dr Elizabeth Boros and Professor Ian Ramsay, Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne

Project summary: In late 1996 the ASC stated that it would permit the distribution of prospectuses on the Internet. The project aims, in collaboration with the ASC, to devise a regulatory regime which will meet the three goals of (1) enabling market participants to fully exploit the capabilities of electronic commerce; (2) protecting investors; and (3) harmonising Australian law with international regulatory regimes.

For this project, the ASC will match the funds provided by the Australian Research Council.

(vi) Corporate Disclosure: An Analysis of the Role of Prospectuses in Capital Raising in Australia and New Zealand

Researchers: Professor Ian Ramsay, Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne and Mr Gordon Walker, Faculty of Law, University of Canterbury

Project summary: In 1995 $5 billion in capital was raised by companies listed on the Australian Stock Exchange using prospectuses. Yet there are major concerns that the existing law regulating prospectuses does not adequately reflect an appropriate balance of the costs and benefits associated with prospectus regulation. The project will test the actual use made of prospectuses by investors and their advisers. It will also obtain evidence on why there appears to be substantial non-compliance with the existing law regulating prospectuses.

(vii) Directors' Misconduct Decriminalised: Are the 'Civil' Sanctions in the Corporations Law Effective?

Researchers: Helen Bird and Professor Ian Ramsay, Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne.

Project summary: This project examines the effect of decriminalisation of misconduct by company directors in contravention of the Corporations Law. It involves an empirical study of prosecution and enforcement actions taken by the ASC before and since decriminalisation took effect in 1993.

This project is funded by the Criminology Research Council.

7. NEW CORPORATE LAW PUBLICATIONS

(A) CORPORATE GOVERNANCE AND THE DUTIES OF COMPANY DIRECTORS

(Edited by Professor Ian M Ramsay and published by the Centre for Corporate Law and Securities Regulation)

With the publication in late 1997 of the Federal Government's Corporate Law Economic Reform Program paper titled 'Directors' Duties and Corporate Governance' and the many court cases and legislative changes dealing with directors, the role of directors' duties has never been more important.

This publication provides detailed legal analysis of directors' duties and at the same time addresses important issues in the corporate governance debate. A particular feature of the publication is that the authors include leading judges who have been involved in major cases relating to directors' duties, well known practitioners, regulators and academics.

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'The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors', Justice Alex Chernov, Judge of the Supreme Court of Victoria.

Chapter 4

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'Directors' Duties: The Governing Principles', Chief Justice David Malcolm, Chief Justice of the Supreme Court of Western Australia.

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'The Duty of Care of Company Directors in Australia and New Zealand', Professor John Farrar, Faculty of Law, Bond University; Professorial Associate, Faculty of Law, The University of Melbourne.

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'The Duty of Care of Directors: Does it Depend Upon the Swing of the Pendulum?' Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks; Professorial Associate, Faculty of Law, The University of Melbourne.

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'The Role of Nominee Directors and the Liability of their Appointors', Justice E W Thomas, Judge of the Court of Appeal of New Zealand.

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Chapter 12

'The Perspective of the Australian Securities Commission on the Enforcement of Directors' Duties and the Role of the Courts', Alan Cameron AM, Chairman of the Australian Securities Commission.

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(B) PAPERS PRESENTED AT THE 1997 CORPORATE LAW WORKSHOP OF THE BUSINESS LAW SECTION OF THE LAW COUNCIL OF AUSTRALIA

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8. ARCHIVES

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http://www.law.unimelb.edu.au/corporat/email/aindex.htm

9. CONTRIBUTIONS

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

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