**CORPORATE LAW ELECTRONIC BULLETIN**   
**Bulletin No 11, July 1998**

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

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) COMPANY LAW REVIEW ACT 1998 (submitted by Mallesons Stephen Jaques)

The Company Law Review Act commenced on 1 July 1998. The main changes are the following:

(a) Formation of Companies

One application form to register

Memorandum of association abolished

Articles of association (now named the constitution) optional

Table A moved into main body of the law as the standard rules of internal management, which are able to be replaced by the company's constitution

No longer possible to create a company limited both by shares and guarantee

Easier to change company type

Company seal no longer required

Proprietary companies no longer required to keep registered office open to public

Public companies require only one member

(b) Company meetings

A general meeting:

- may be called by members with at least 5% of the votes that may be cast at a general meeting, but at their expense;

- must be convened at the request of 100 members irrespective of the amount paid up on their shares;

- requires at least 21 days' notice (28 days for listed companies).

Members holding 95% of the votes may agree to a shorter period, except for a meeting to remove an auditor and, for public companies, a meeting to remove a director. AGM's can be held on shorter notice only if all members entitled to vote agree;

- must be held for a proper purpose and at a reasonable time and place.

Notices of meetings and appointments of proxies may be done by fax or electronically to an electronic address.

Proxies will be easier to give and less likely to be invalid. Proxies will have the same rights as members to speak, vote and join in the demand for a poll.

A proprietary company can pass a circular resolution (a statement signed by all members contained in the resolution) for all meetings (except for meetings removing an auditor). (Currently, circular resolutions are only possible for ordinary resolutions).

The chairman of a public company must give members a reasonable opportunity to ask questions or comment on the company's management or to ask the auditors about the audit report.

The use of electronic technology to hold meetings is allowed if members have a reasonable opportunity to participate.

A body corporate can make a standing appointment of a representative, who may also be identified by office rather than name.

A statutory meeting or a statutory report following the issue of shares under a company's first prospectus is no longer required.

(c) Share capital

Par value abolished

Consequential amendments made to share capital provisions for such matters as the issue of shares, conversion of shares, redemption of redeemable preference shares, partly paid shares and dividends

(d) Capital reduction

Capital reduction no longer requires court confirmation; but it must be fair and reasonable to shareholders as a whole, must not materially prejudice the company's ability to pay its creditors and must be approved by shareholders in general meeting.

A company can buy back shares only if it does not materially prejudice the company's ability to pay its creditors

(e) Financial assistance by a company for acquiring its shares

The present general prohibition against the giving by a company of financial assistance for the acquisition of shares in the company or its holding company is relaxed.

Such financial assistance is permitted if (and only if):

- it does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors;

- it is approved by a special resolution with no votes in favour being cast by the person acquiring the relevant shares, or by a resolution agreed to, at a general meeting, by all ordinary shareholders; or

- it is exempted under new s 260C, which contains exemptions similar to those presently in s 205(8) and (9).

(f) Company controlling its own shares

The complicated rules governing a company controlling its own shares are amended, with the focus being on the company's actual control over the shares. (The meaning of control is based on the concept used in the accounting standards.)

As at present, a financial institution can take security over its shares in the ordinary course of business; but a company which is not a financial institution can only take security over its own shares for the purpose of an employee share ownership scheme approved by the company in general meeting

(g) Financial reports

Companies and managed investment schemes can send 'concise' annual reports to members. A full annual report need be sent only if required by ASIC or if requested by a member. Annual reports must be sent to shareholders within 4 months after the end of the relevant financial year. Annual reports (as well as other documents) can be lodged electronically with ASIC, subject to agreement in writing with ASIC. More than half of the items now required for inclusion in the annual return are removed.

(h) Deregistering and reregistering defunct companies

The process for deregistering a defunct company is simplified where the company has no liabilities. A party an recover from the insurer of a defunct company without having to reinstate the company's registration.

(B) CORPORATE VOLUNTARY ADMINISTRATION REPORT

Companies & Securities Advisory Committee   
Corporate Voluntary Administration Report

On 17 July 1998, the Legal Committee of the Companies and Securities Advisory Committee provided its Corporate Voluntary Administration Report to the Federal Treasurer.

Voluntary administration was introduced in June 1993, following recommendations of the Australian Law Reform Commission's Report on its General Insolvency Inquiry, known as the Harmer Report.

Voluntary administration permits an insolvent or near-insolvent company to give itself a breathing space to deal with its financial difficulties by appointing an administrator to take control of its affairs. The administrator investigates the affairs of the company and gives creditors information to help them to decide whether the company should be permitted to continue to trade or be wound up. If creditors agree, the company enters into a deed of company arrangement to either postpone or compromise creditors' debts.

The Convenor of the Legal Committee, Mr Reg Barrett, said: "Corporate insolvency requires swift action. Voluntary administration provides a convenient and practical way to achieve this. The Report's Recommendations seek to fine-tune this procedure, to make it even more useful for dealing with the affairs of companies in financial difficulties, while protecting the rights of creditors."

Some of the Report's key recommendations are to:

(a) require the company's directors to attend all creditors' meetings.

This would give creditors the opportunity to question directors about their conduct of the company's affairs. However, directors would be entitled to refuse to answer questions, given the common law privilege against self-incrimination. Currently, directors have no specific obligation to attend creditors' meetings;

(b) give an administrator the right to sell property subject to a lien, pledge or reservation of title clause, while protecting holders of these rights against loss. Currently a voluntary administration can be blocked by lienees, pledgees and reservation of title creditors refusing to permit the administrator to deal with that property;

(c) require administrators to table a statement of their personal interest at the first meeting of creditors and to disclose to creditors their past and projected fees and expenses. Currently, there are no such requirements;

(d) expressly provide that an administrator is personally liable for the wages of the company's employees who continue to provide services during the administration with the administrator's express or implied authority. Currently, an administrator's personal liability is unclear. However, administrators should not be personally liable for any entitlements (including leave entitlements) accrued before the company goes into administration. Employees should only have a claim for these entitlements against the company;

(e) require administrators and deed administrators to lodge with the Australian Securities & Investments Commission accounts of receipts and payments. Currently, they have no obligation to do so;

(f) provide that, where an application for winding up that is still on foot has been followed by a voluntary administration and subsequently by a winding up order, the court's power to set aside various transactions (for instance as being undue preferences or uncommercial transactions) should apply to any transactions after the date that the original application was filed. Currently, the relevant date (where a voluntary administration intervenes between a winding up application and a winding up order) is the date of entry into the voluntary administration. This may encourage directors to put a company into voluntary administration after a winding up application has been made, merely to limit the court's power to set aside transactions;

(g) exempt from the fundraising provisions offers or invitations to existing creditors to exchange debt for equity under a deed of company arrangement. Currently, there is no exemption from the fundraising provisions;

(h) require any company that changes its name during the course of or in the 6 months before, a voluntary administration to disclose its former, as well as its current, name on its public documents - for the period of that administration or any subsequent liquidation. ASIC has noted that companies commonly change their name, often to their Australian Company Number (ACN) only, before appointing an administrator, to minimise the potentially damaging commercial effect of having their prior name associated with a voluntary administration. This practice may mean that some creditors are unaware that a company has gone into voluntary administration, given the use of the new name in public notices.

(C) AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

On 1 July 1998 the Australian Securities Commission became the Australian Securities & Investments Commission (ASIC). In a media release dated 22 July 1998 ASIC outlined its new powers, objectives and functions.

(a) Powers and Objectives

ASIC continues to have all the responsibilities formerly held by the ASC and now has new responsibilities for consumer protection in the financial system.

ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to:

- the Australian financial system;

- the provision of financial services;

- the payments system.

This includes the function of promoting the adoption of, approving and monitoring compliance with, industry standards and codes of practice, including standards and codes in relation to the resolution of disputes between the providers of financial services and consumers (refer to s 12A of the ASIC Act).

(b) Legislation

ASIC now administers the following legislation:

- The Australian Securities Commission Act 1989 (as amended by the

Financial Sector Reform (Amendments and Transitional Provisions) Act 1998), which is now referred to as the Australian Securities and Investments Commission Act 1989 (the ASIC Act);

- The Corporations Act 1989 and Corporations Law;

- The Insurance (Agents and Brokers) Act 1984;

- The Insurance Contracts Act 1984;

- The Superannuation (Resolution of Complaints) Act 1993.

(The last three of these were previously administered by the ISC).

ASIC also exercises consumer protection-related functions under the following legislation (prudential functions under these Acts are exercised by the Australian Prudential Regulation Authority):

- The Superannuation Industry (Supervision) Act 1993 (SIS Act);

- The Retirement Savings Accounts Act 1997 (RSA Act);

- The Life Insurance Act 1995;

- The Insurance Act 1973.

(These were previously administered by the ISC).

ASIC also has responsibility for administering various Regulations made under the legislation referred to above.

(c) New Consumer Protection Powers Modelled on the Trade Practices Act

In addition to the powers already vested in the ASC, ASIC has new powers in relation to the provision of financial services modelled on the consumer protection provisions of the Trade Practices Act.

These new provisions apply to all financial services, ie the provision of financial products and the provision of services in relation to financial products. The expression 'financial product' means securities, futures contracts, life and general insurance, superannuation, retirement savings accounts and deposit-taking activities (but does not include foreign exchange contracts).

The provisions modelled on the Trade Practices Act include consumer protection provisions (eg misleading and deceptive conduct) and the unconscionable conduct provisions.

At the time of writing, the draft legislation proposes that the consumer protection jurisdiction of the Australian Competition and Consumer Commission (ACCC) in relation to the provision of financial services be removed.

(d) The Superannuation Complaints Tribunal (SCT)

ASIC now provides administrative support to the Superannuation Complaints Tribunal (SCT). The SCT is unique in the financial services industry being a statutory dispute resolution scheme. As a result of recent decisions of the Full Federal Court, the review powers of the SCT have been rendered inoperable. A number of options are being considered to ensure that superannuation fund members continue to have access to a cost-free, independent and effective dispute resolution scheme. ASIC is committed to the development of such a scheme as soon as possible.

(e) Deposit-taking Institutions: ASIC's functions

Deposit-taking institutions (DTIs) include banks, credit unions and building societies.

ASIC has the following functions in relation to DTIs :

- monitoring the Code of Banking Practice, the Credit Union Code of Practice, the Building Society Code of Practice and the Electronic Funds Transfer Code of Practice (formerly the role of the Australian Payments System Council);

- administering the consumer-related provisions of the RSA Act in relation to the provision of RSAs;

- the administration of the consumer protection provisions (modelled on the Trade Practices Act) of the ASIC Act in relation to deposit-taking activities (but not credit).

(f) What is Outside ASIC's jurisdiction?

ASIC does not have legislative jurisdiction in relation to:

- prudential regulation (of banks, insurance companies, credit unions, building societies, friendly societies and superannuation funds) - this is an APRA function;

- the actual level of bank fees;

- bank mergers and bank branch rationalisation;

- credit products (except debentures);

- the Uniform Consumer Credit Code;

- State Fair Trading Laws.

(g) ASIC's objectives

ASIC's objectives are set out in s1(2) of the ASIC Act:

'In performing its functions and exercising its powers, the Commission must strive to:

(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

(b) promote the confident and informed participation of investors and consumers in the financial system; and

(c) achieve uniformity throughout Australia in how the Commission and its delegates perform those functions and exercise those powers; and

(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and

(e) receive, process and store, efficiently and quickly, the information given to the Commission under the laws that confer functions and powers on it; and

(f) ensure that information is available as soon as practicable for access by the public; and

(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws that confer functions and powers on it."

(h) What is ASIC's expanded consumer role?

ASIC administers the regulatory system of consumer protection for the following financial products:

- securities (ie shares, debentures and prescribed interests);

- futures contracts;

- life insurance;

- general insurance;

- superannuation (including approved deposit funds and pooled superannuation trusts);

- retirement savings accounts;

- deposit-taking activities (but not credit).

ASIC's role may be contrasted with the ASC's consumer role which was confined to securities and futures.

The regulatory system of consumer protection is designed to protect:

- consumers of these financial products; and

- consumers of services provided in relation to these financial products (ie financial services) such as custodial services or advisory services.

ASIC must strive to promote the confident and informed participation of investors and consumers in the financial system (s1(2)(b) of the ASIC Act).

ASIC will strive to ensure that consumers receive adequate information to make informed decisions about financial products and services and become confident in the integrity and competence of financial product and service providers. ASIC's role is not, however, to protect consumers from all causes of loss (eg losses arising from market forces).

The main regulatory mechanisms to achieve these objectives are:

- product disclosure - the key aim is to provide consumers with sufficient information to make informed decisions to buy, sell or hold financial products;

- intermediary licensing - the key aims are to provide consumers with access to competent, honest and fair intermediaries and to provide consumers with adequate information about the financial services provided by intermediaries;

- conduct - the key aim is to protect consumers from unfair conduct in relation to the provision of financial products and services;

- investment management - the key aim is to provide consumers with access to managed investment schemes which are honestly, fairly and competently managed.

- complaints resolution - the key aim is to provide consumers with access to efficient and fair mechanisms to resolve their complaints in relation to financial products and services.

(D) LICENSING OF INVESTMENT ADVISERS: EXPLANATORY STATEMENT ON PROPOSED CHANGES TO CORPORATIONS REGULATIONS

The following explanatory statement was issued by the authority of the Treasurer on 7 July 1998.

Explanatory Statement - Statutory Rules 1998, No 161

Section 22 of the Corporations Act 1989 ('the Act') provides that the Governor-General may make regulations, not inconsistent with the Act or the Corporations Law ('the Law'), prescribing matters required or permitted by the Law to be prescribed by regulations, or necessary or convenient to be prescribed by regulations for carrying out or giving effect to the Corporations Law.

Sections 780 and 781 of the Corporations Law provide that a person who operates a securities dealing or investment advice business must be licensed by the Australian Securities & Investments Commission (ASIC) unless exempt under sections 68 and 77(4), (5) and (6). ASIC only grants licences after consideration of the requirements of the Law which relate to solvency, educational qualifications and experience, good fame and character, honesty, efficiency and fairness (s 783 and s 784). Section 786 of the Corporations Law specifies that a licence is subject to the conditions and restrictions as are prescribed.

The purpose of the proposed regulations is to prescribe certain licence conditions which give effect to the recommendations made by the Australian Securities Commission in its 1995 report: 'Good Advice: Licensing Review of Investment Advisory Services'. This report examined regulatory issues relating to investment advisers in response to criticisms regarding the standard of investment advice available and in response to developments in the financial services sector and the investment advisory industry. The regulations propose that licensees who give investment advice be required to provide retail investors with information to facilitate informed decision making. This in turn will enhance investor protection and promote market integrity and efficiency.

Details of the regulations are as follows:

(a) Proposed Regulation 1

Regulation 1 provides that the regulations commence on 1 October 1998. This will ensure that persons subject to these Regulations will have sufficient time to put systems in place in order to meet their obligations under the Regulations by the commencement date.

(b) Proposed Regulation 2

Regulation 2 provides that the regulations amend the Corporations Regulations.

(c) Proposed Regulation 3

Regulation 3 includes three new provisions which prescribe licence conditions for dealers and investment advisers.

(1) Regulation 7.3.02B -Investment Advice to Retail Investors

Subregulations (1) and (2) provide that a licensee who gives investment advice to a retail investor, must give that investor an Advisory Services Guide ('ASG'). Where the advice is given by the licensee to the investor in person, the ASG must be given either before or at the time of giving that advice. In all other cases, the ASG must be given to the retail investor as soon as practicable after giving the advice, however, if the advice is execution related telephone advice the ASG cannot be given any later than three days after the trading following the advice.

'Execution related telephone advice' is defined in subregulation ( 10) as investment advice that relates to quoted securities given by a stockbroker or other dealer as an integral part of the execution of a transfer of, or order for, those securities and for which no fee is charged in addition to the commission for the execution of the transferor order. This is intended to confine such advice to situations where execution of the order or transfer is time critical and clients' expectations match the type of service provided.

Subregulation (3) provides that an ASG will not need to be given to retail investors if one has already been given to the investor for previous advice. This, however, is qualified by subregulation (7) which requires a licensee to provide a retail investor with an updated ASG where there is a change in the information specified in subregulation (6) contained in the original guide and the relationship between the licensee and the investor is continuing or the licensee has a reasonable expectation that the investor will seek further advice. In these circumstances, the updated ASG must be given at the earliest practicable opportunity after the change.

Subregulation (3) also provides that in the case of 'general securities advice' (as defined in subregulation 7.3.02D( 10)) an ASG is not required where the advice is given to persons generally in a non-personal context (for example, by way of investment seminars, by means of brochures or newsletters or through advertisements) and at the same time the warnings specified in regulation 7.3.02D are also given.

Subregulations (4) and (5) require a licensee who provides investment advisory services to retail investors to be a member of an external complaints resolution scheme approved by the Commission and to have in place internal complaints handling procedures which are in accordance with Australian Standard AS 4269-1995.

As available financial products are becoming increasingly complex, the ASG must contain information which will allow retail investors to understand the nature of the services provided by the licensee. Proposed subregulation (6) therefore requires the ASG to contain information that a retail investor reasonably requires to:

(i) clearly understand:

- the nature of the investment advice service being offered;

- the method and extent of charges for that service; and

- his/her basic rights in relation to the licensee and representative regarding the advisory service offered;

(ii) compare the advisory service offered by the licensee to similar services offered by other licensees;

(iii) clearly identify the licensee or client adviser who is a representative of the relevant licensee who is responsible for the advice; and

(iv) utilise an external complaints resolution scheme and internal complaints handling procedures in the event of any dissatisfaction with the advisory services obtained.

The licence conditions apply where licensees are advising 'retail investors'. Subregulation (8) defines 'retail investor' as a person other than:

(i) a holder of a dealers or an investment advisers licence (or their representative) or an exempt dealer or investment adviser;

(ii) a body corporate registered under the Life Insurance Act 1995;

(iii) a bank as defined in section 5 of the Banking Act 1959 or a bank constituted by or under a law of a State or Territory;

(iv) a trustee of a superannuation fund, an approved deposit fund or a pooled superannuation trust within the meaning of the Superannuation Industry (Supervision) Act 1993 that has more than 100 members;

(v) a trustee or management company of a prescribed interest scheme which has net assets of not less than $10,000,000 and more than 100 members;

(vi) a trustee or management company of prescribed interest schemes where such trustee or management company has aggregate funds under management of not less than $50,000,000 provided in relation to each scheme under management there is:

- not less than $10,000,000 finds under management; and

- not less than 50 members;

(vii) a financial institution, building society or credit union under the Financial Institutions Codes or a friendly society under the Friendly Societies Codes and legislation;

(viii) an exempt public authority as defined in section 9 of the Corporations Law;

(ix) an investment company as defined in subregulation 7.3.12(2);

(x) a listed company or a company which is a large proprietary company at the deadline for the last financial year or at the date of receiving advice from the licensee; and

(xi) a foreign entity which, if established or incorporated in Australia, would be one of the above.

Subregulation (9) allows a person who is a holder of a dealer's licence, an investment adviser's licence, or who is an exempt dealer, an exempt investment adviser or who is a related body corporate of a listed company to request, in writing to the licensee, that the licensee treat that person as a retail investor. A person who has previously elected to be treated as a retail investor can request that he/she no longer be treated in this capacity.

(2) Regulation 7.3.02C - Personal Securities Recommendations to Retail Investors

Subregulation ( 1) provides that licensees who give personal securities recommendations to a retail investor who declines to provide sufficient personal information must warn that investor:

- that the adviser has not been able to undertake a comprehensive analysis of the investor's investment objectives, financial situation and particular needs;

- about the limitations on the appropriateness of the recommendations resulting from the absence of, or limited, personal information about the investor; and

- about the need for the investor to consider the appropriateness of the recommendations in light of the investor's own individual investment objectives, financial situation and particular needs.

(3) Regulation 7.3.02D - General Securities Advice to Investor or Prospective Investor

Subregulation (1) provides that licensees who give general securities advice to retail investors must warn the investor that:

- the advice has not been prepared by taking into account the particular investment objectives, financial situation and particular needs of any individual person; and

- as a result, the investor should, before making an investment decision on the basis of that advice, assess (either individually or through the assistance of an adviser) whether it is appropriate in light of individual investment objectives, financial situation and particular needs.

Subregulation (2) provides that if general securities advice is given in a written document, the warnings should be contained in the same document.

(E) APPOINTMENTS TO APRA

On 29 June 1998, the Treasurer announced key appointments to the new Australian Prudential Regulation Authority ('APRA'). APRA has responsibility for the prudential regulation of authorised deposit-taking institutions, insurance companies and superannuation funds. APRA commenced operations on 1 July 1998 to coincide with the commencement of the Australian Securities and Investments Commission ('ASIC').

The Federal Government has appointed Mr Donald Mercer, Dr Robert Austin and Professor David Knox to the APRA Board as independent members, each for a term of five years. Two previously announced appointments to APRA, Dr Jeffrey Cramichael as Chair-designate and Mr Graeme Thompson as the CEO-designate, are now confirmed.

The APRA Board also comprises two representatives of the Reserve Bank of Australia (Mr Ian Macfarlane and Dr John Laker) and a representative of ASIC (Mr Alan Cameron). One vacancy remains on the APRA Board. An appointment to this position will be considered in the context of the transfer from the States to the Commonwealth of responsibility for credit unions, building societies and friendly societies.

(F) SUMMARY OF KEY AMENDMENTS PROPOSED BY THE CORPORATE LAW ECONOMIC REFORM BILL

The Corporate Law Economic Reform Bill was introduced into Parliament on 2 July 1998. The key features of the new regulatory arrangements proposed by the Corporate Law Economic Reform Bill are in four main areas of the Law.

(a) Directors' duties and corporate governance

The key features of the new regulatory arrangements proposed by the Bill are:

(1) Introducing a business judgment rule, which would offer directors a safe harbour from personal liability for breaches of the duty of care and diligence in relation to honest, informed and rational business judgments.

(2) Introducing a statutory derivative action, to enable shareholders or directors of a company to bring an action on behalf of the company, for a wrong done to the company where the company is unwilling or unable to do so.

(3) Rewriting the existing duty to exercise care and diligence in subsection 232(4) to clarify that the standard of care required by the duty must be assessed by reference to the particular circumstances of the officer concerned. A breach of the duty of care and diligence will give rise to civil consequences only, and will no longer provide a basis for an offence under the Law. Criminal liability will continue to apply to breaches of the duty to act honestly.

(4) Delegation - express legislative authority will be given to the board of directors to delegate their powers, subject to any restrictions in the constitution of the company.

(5) Reliance - directors will be expressly allowed to rely on the advice or information provided by experts when making decisions, as long as the director believes on reasonable grounds that the person relied upon is reliable and competent in relation to the matters concerned.

(6) Reformulating the existing duty to act honestly in subsection 232(2) to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in what they believe to be in the best interests of the corporation and for a proper purpose. Breach of this will continue to attract both criminal and civil consequences.

(7) Clarifying the duty of directors in situations of conflict of interest to permit directors who serve on wholly owned subsidiaries to take into account the interest raised by the nominating company in certain circumstances.

(8) Recasting section 241 dealing with indemnification for legal expenses to confine the matters for which a company or related body corporate may not give an indemnity for legal expenses to legal expenses incurred:

(i) in defending or resisting a proceeding in which the person is found to have a liability for which the company may not indemnify the person; or

(ii) in defending or resisting criminal proceedings in which the person is found guilty; or

iii) in defending or resisting proceedings brought by ASIC or a liquidator for a Court order if the grounds for making the order are found by the Court to have been established; or

(iv) in connection with proceedings for relief from liability for the person under the Corporations Law in which the Court denies the relief.

(b) Takeovers

The key features of the new regulatory arrangements proposed by the Bill are:

(1) Promote a more competitive market for corporate control by:

(i) allowing a bidder to exceed the statutory threshold of 20 per cent of total voting rights to gain control of a target provided that the announcement of a full takeover bid ( the mandatory bid) immediately follows the acquisition that takes the bidder through the threshold. The bid price must be the same as, or higher than, the best price paid by the bidder for shares in the target in the previous 4 months.

(ii) modifying the compulsory acquisition rules to:

- allow all types of securities (not just shares) to be compulsorily acquired;

- allow compulsory acquisitions to take place at any time (not just following a takeover bid);

- facilitate the acquisition of the outstanding securities in a class by any person who already holds 90 per cent of the class; and

- make it easier for majority shareholders to obtain the benefits of 100 per cent ownership by providing for the acquisition of all the securities, in all classes, of a target, where overwhelming ownership of the target by the majority shareholder can be demonstrated.

(2) Improve resolution of takeover disputes by reforming the Corporations and Securities Panel (Panel) so that it, rather than the courts or the Administrative Appeals Tribunal (AAT), is the primary forum for resolving takeover matters. This will be achieved by:

(i) opening up access to the Panel to any interested party (rather than being limited to ASIC as at present);

(ii) except on the application of ASIC or another public authority of the Commonwealth, ensuring that the courts will not grant injunctions during the bid period; and

(iii) having the Panel, rather than the AAT, deal with appeals against ASIC exemption and modification decisions relating to takeovers.

(3) Extend the takeover provisions to listed managed investment schemes, so that members of these schemes will have the same rights to share in a control premium as shareholders, while responsible entities of these schemes will face the same competitive pressure to perform as company directors.

(4) Streamline the rules for off-market and market bids, including bringing together disclosure requirements into a bidder's statement (replacing the current Part A and Part B statements) and a target's statement (replacing the current Part C and Part D statements). These statements will facilitate better disclosure by replacing the checklist of content rules with a general disclosure requirement for all information material to a shareholder's decision whether or not to accept an offer.

(5) Rationalise liability provisions by ensuring that the liability regime for the contents of takeover disclosure documents is generally consistent with that applying to the proposed new fundraising rules.

In addition, provisions in the Bill will have the effect of removing the overlapping application of section 52 of the Trade Practices Act to takeover activity, and removing governmental immunity of Federal government business enterprises from the takeovers provisions.

(c) Fundraising

The key features of the new regulatory arrangements proposed in the Bill are:

(1) Small business fundraising will be facilitated by:

(i) allowing issuers to raise up to $2 million each year from up to 20 persons without issuing a prospectus or other disclosure document;

(ii) allowing issuers to raise up to $5 million under an offer information statement rather than a full prospectus. The statement will be required to disclose material information known to the issuer but it will not be necessary for the issuer to undertake the due diligence investigations required for prospectuses; and

(iii) extending the class of 'sophisticated investors' from whom an issuer can raise capital without issuing a prospectus or other disclosure document.

(2) Facilitating shorter prospectuses by reducing the volume of material provided to retail investors and providing retail investors with the information which will assist them, without unnecessary detail. Information which may be of interest primarily to professional analysts and advisers can be mentioned in the prospectus and made available on request. In addition, the Australian Securities and Investment Commission (ASIC) will be empowered to allow the use of short profile statements in suitable industries. The full prospectus will be available on request.

(3) Rationalising liability provisions by removing the overlapping application of section 52 of the Trade Practices Act and corresponding provisions in the Fair Trading Acts of the States and Territories. In addition, changes proposed to the fundraising liability regime and associated defences will provide both issuers and investors with greater certainty about their rights and obligations under the Law. A uniform defence will be available to all persons acting with reasonable care. Professional advisers and experts will only be liable to investors for statements attributed to them with their consent. The rule reversing the onus of proof for forward-looking statements will be removed.

(4) Reforming advertising restrictions to enable information to be provided to the market about a proposed offer. Advertising of securities which are already traded on the Australian Stock Exchange (ASX) will be liberalised. Advertising of securities which are not already traded on the ASX will be restricted to basic information until a disclosure document has been issued.

(5) Electronic commerce will be facilitated by enabling fundraisers to issue disclosure documents in electronic form and distribute them via any medium, including the Internet.

(6) Prospectus registration will be replaced with a 7 day 'free look' period during which ASIC, market participants, financial journalists and others will be able to examine a prospectus before fundraising is permitted.

(7) Removing governmental immunity from the fundraising provisions for fundraising by Federal government business enterprises and encouraging the States and Territories to follow suit.

The Bill will also complete the reform of the fundraising provisions by rewriting the debenture provisions in Division 4 of Part 7.12 of the Law.

(d) Accounting standards

The key features of the new regulatory arrangements proposed by the Bill are:

(1) Establishing the Financial Reporting Council as an advisory body with responsibility for the broad oversight of the Australian accounting standard setting process and for giving the Minister reports and advice on that process.

(2) Members of the FRC would be appointed by the Minister on the basis of nominations made by peak professional, business and government organisations having an interest in the standard setting process.

(3) Specific functions of the FRC would include:

(i) appointing the members of the standard setter (the Chairman of the standard setter would be appointed by the Minister);

(ii) approving and monitoring the standard setter's priorities, business plan, budget and staffing arrangements;

(iii) monitoring the development of international accounting standards and furthering the harmonisation of Australian standards with international standards; and

(iv) promoting a greater role for international accounting standards in the Australian accounting standard setting process.

(4) Reconstituting the standard setter, the Australian Accounting Standards Board (AASB) as a body corporate, thus enabling it to employ staff and acquire property in its own right.

(5) Functions of the AASB would include making accounting standards for the purposes of national scheme laws, formulating accounting standards for entities not established under national scheme laws and participating in the formulation of international accounting standards.

(6) The AASB's powers include engaging the staff and consultants needed to undertake its technical research and providing administrative support.

(7) Facilitating interpretation of accounting standards by setting out the objectives of the accounting standard setting provisions in the legislation and providing that accounting standards are to be interpreted in accordance with those objectives. In addition, each accounting standard would have to be interpreted in accordance with any 'statement of purpose' provision in the standard, so long as that statement was not inconsistent with the objectives of the standard setting provisions.

(8) A body, based on the existing Urgent Issues Group ('UIG'), would be established by either the FRC or the AASB to provide guidance on urgent financial reporting issues.

(9) Requiring a cost/benefit analysis of the impact of a proposed accounting standard to be prepared by the AASB before:

(i) making or formulating an Australian accounting standard;

(ii) providing comments on an exposure draft of an international accounting standard; or

(iii) proposing a standard for adoption as an international accounting standard.

(10) Funding - it is anticipated that funding of the new standard setting arrangements, which will be overseen by the FRC, will be provided by the Government, the Australian Society of Certified Practising Accountants and The Institute of Chartered Accountants in Australia (jointly) and preparers/users in the public and private sectors in broadly equal proportions.

(11) International harmonisation - the Minister would have the power to give the AASB a direction about the role of international accounting standards in the Australian accounting standard setting system but, before giving such a direction, would be required to consider a report from the FRC about the desirability of giving the direction.

The full text of the bill and explanatory memoranda are available from the Treasury website at: "http://www.treasury.gov.au/".

(G) GOVERNMENT SEEKS REVIEW OF SENATE AMENDMENTS TO COMPANY LAW REVIEW ACT

In a press release dated 17 July 1998, Senator Ian Campbell, Parliamentary Secretary to the Treasurer, announced that the Federal Government will ask a parliamentary committee to examine amendments to the Corporations Law passed by the Senate during the passage of the Company Law Review Act. The Treasurer has written to the Chair of the Parliamentary Joint Committee on Corporations and Securities ('PJC'), requesting the PJC examine several amendments which were made to the Company Law Review Act in the Senate. The amendments were outlined in Corplaw Bulletin 10, July 1998.

Senator Campbell claimed the amendments had been imposed on the business and investor community without consultation. Senator Campbell also said the Government believed high corporate governance standards were best achieved through Australian companies striving to achieve world's best practice rather than by following prescriptive checklists imposed by the Government.

Specifically, the Government opposes the following amendments:

(a) directors of a listed company should be elected by a proportional voting system (this was not part of the Company Law Review Act, but during the parliamentary debates, it was agreed that it be referred to the PJC);

(b) companies must report on compliance with environmental legislation (see Schedule 1, item 5 of the Company Law Review Act ('CLRA'));

(c) listed companies must disclose information which is disclosed to, or required by, foreign exchanges (s 323DA of CLRA).

According to Senator Campbell, the following matters, also referred to the PJC, have been the subject of concern expressed to the Government by the business community:

(a) companies should be obliged to report any proceedings instituted against the company for any material breach by the company of the Corporations Law, or trade practices law, and, if so, a summary of the alleged breach and of the company's position in relation to it;

(b) an application to register a proprietary company should include a copy of its constitution;

(c) listed companies must give at least 28 days' notice of a general meeting (s 249HA of CLRA);

(d) listed companies are required to disclose more information relating to proxy votes (s 251AA of CLRA).

The government has also requested that the PJC generally examine the following matters:

(a) whether listed companies should be required by law to establish a corporate governance board;

(b) whether listed companies should be required by law to establish an audit committee;

(c) whether directors and executive officers of a company should be obliged to report to the auditor any suspicion they might have about any fraud or improper conduct involving the company;

(d) whether a director of a listed company should have the power to call a meeting of members (s 249CA of CLRA);

(e) whether listed companies must specify a place, fax number and electronic address for the purpose of receiving proxy appointments (s 250BA of CLRA);

(f) whether listed companies annual reports should include:

(i) discussion of broad policy for determining the nature and amount of emoluments of board members and senior executives of the company;

(ii) discussion of the relationship between such policy and the company's performance; and

(iii) details of the nature and amount of each element of the emolument of each director and each of the five named officers of the company receiving the highest emolument (s 300A of CLRA).

Responding in a press release dated 15 July 1998, Mr Kelvin Thomson, Parliamentary Secretary to the Shadow Treasurer, said the referral to the PJC of the amendments requiring disclosure of directors' remuneration was a waste of taxpayers' funds. Mr Thomson said the PJC had already twice examined the issue of disclosure of directors' remuneration, most recently in its March 1998 report on the Company Law Review Bill, and any claim that the amendments had been imposed without consultation was 'completely wrong and misleading'.

In a press release dated 16 July 1998, Australian Democrats Spokesperson for Business, Senator Andrew Murray, said: 'To say that the amendments were introduced at the last minute and without consultation is nonsense.' Senator Murray said the amendments flowed from an Australian Democrats' minority report on the Company Law Review Bill released in March and that the Democrats strongly objected to the Government using its numbers on a parliamentary committee to attempt to overturn amendments which had already been considered and accepted by the Parliament.

(H) CAPITAL GAINS TAX ROLLOVER RELIEF FOR RESTRUCTURES OF MANAGED INVESTMENT FUNDS UNDER THE MANAGED INVESTMENTS ACT 1998

In a press release dated 28 July 1998, Senator Kemp, the Assistant Treasurer, has announced that the Federal Government has decided to amend the income tax law (effective from 1 July 1998) to provide capital gains tax (CGT) rollover relief for changes to the structure of managed investment funds that will be required under the terms of the Managed Investments Act 1998 (MIA) which recently passed the Parliament.

The MIA will make important changes to the regulation of managed investment funds to ensure greater accountability of fund managers to their investors. Central to the new arrangements will be the appointment of a single responsible entity accountable to investors for the management of their funds. This is to replace the existing arrangement of a two tier structure comprising a management company and independent trustee.

Under the new arrangements, either the management company or trustee can choose to become the single responsible entity. There is to be a two year transition period beginning on 1 July 1998 for the funds to restructure.

Managed funds will be eligible for CGT rollover relief where the following requirements are met:

- the managed investment scheme already existed when the new arrangements began on 1 July 1998;

- the transfer of the scheme's property from the trustee to the single responsible entity (or custodian) takes place in accordance with the transitional arrangements in the MIA; and

- there is no change in the underlying ownership of the scheme property. CGT rollover relief will ensure that a capital gain or capital loss is disregarded where it results from changes necessary for compliance with the MIA. It will also ensure that a managed fund's pre-CGT assets keep that status.

2. RECENT CORPORATE LAW DECISIONS

(A) Stein v Blake [1998] 1 All ER 724 (UK Court of Appeal)

Issue: Right of shareholder to bring a personal action against director for misappropriating company assets.

The defendant was a 50 per cent shareholder and sole director of a group of companies (the original companies) whose assets were transferred into the ownership of various other companies which were under the defendant's control. The plaintiff, who was the other 50 per cent shareholder in the original companies, alleged that the defendant, in breach of fiduciary duty, had misappropriated the assets by purchasing them at an undervalue, thereby depriving him of the ability to sell his shares at their fair value and causing him personal loss. He commenced litigation against the defendant.

The Court of Appeal held that the plaintiff could not bring an action in these circumstances. The loss sustained by a shareholder by a diminution in the value of his shares by reason of the misappropriation of the company's assets was a loss recoverable only by the company and not by the shareholder, who had suffered no loss distinct from that suffered by the company. Accordingly, any legal action needed to be commenced by the companies concerned and not the plaintiff.

The court noted that the plaintiff was bringing a personal action for loss allegedly suffered by him personally and was not bringing a derivative action (in which a shareholder brings proceedings on behalf of a company, asserts a cause of action vested in the company, and recovers damages for or obtains restitution to the company). No such derivative action could be brought by the plaintiff on behalf of the companies as they were in liquidation and the decision whether or not to bring proceedings in the name of the company was a matter for the liquidator. However, the plaintiff alleged that the defendant owed the plaintiff a fiduciary duty of good faith (referring to cases such as the decision of the New South Wales Supreme Court in Glavanics v Brunninghausen [1996] 19 ACSR 204 where it was held that the special facts in that case meant that a director owed a fiduciary duty to a shareholder).

However, the only conduct relied upon by the plaintiff as constituting a breach of that duty owed to him by the defendant was the misappropriation of assets belonging to the original companies so that the only loss suffered by the plaintiff consisted of the diminution in the value of his shareholding by reason of the misappropriation of the assets. Such loss would be fully remedied by the restitution of the value of the misappropriated assets to the companies. The court noted that if the plaintiff were allowed to recover for the diminution in the value of his shares, and the original companies also recovered for the misappropriation of their assets, the plaintiff would have double recovery. There was no evidence that the plaintiff shareholder had suffered a loss which was distinct from, and independent of, the loss suffered by the company. The court drew a distinction between (1) loss sustained by a shareholder by a diminution in the value of his shares by reason of the misappropriation of the company's assets, and (2) loss caused directly to a shareholder who has been induced to part with the shares at an undervalue. The shareholder has a personal cause of action to recover in respect of the second type of loss, but not the first.

(B) DB Management Pty Ltd v ASC, Southcorp Wines Pty Ltd, Batoka Pty Ltd and Winpar Holdings Ltd, No NG 939 0f 1997, Fed No 796/98, Federal Court of Australia, Whitlam J, 7 July 1998.

This was an appeal from a decision of the Administrative Appeals Tribunal ('AAT'). The AAT had affirmed a declaration of the Australian Securities Commission (ASC), made under section 730 of the Law, modifying the application of section 701 of the Law. The modification related to a takeover offer made by Southcorp Wines Pty Ltd ('Southcorp') for all shares and options over unissued shares in Coldstream Australia Ltd. The modification allowed Southcorp to compulsorily purchase all shares issued by Coldstream on the exercise of outstanding options due to expire after the offer period had closed.

Before the AAT, the applicant's principal argument was that that section 701 only applied to shares in existence either at the date of the takeover offer or allotted during the course of the offer; it was submitted that section 701 did not extend to shares coming into existence after the close of the takeover offer and that any modification by the ASC which led to such a result was not in accordance with the scope and purpose of s 701. The AAT rejected this submission, citing the NSW Court of Appeal decision in Elkington v Shell Australia Ltd (1993) 32 NSWLR 11 as authority for the proposition that section 701 had been held to be so wide as to justify an extension of its operation to shares issued after the takeover offer had expired. The AAT, in affirming the ASC's modification, found that the ASC's modification related to the same subject matter as the unmodified law, the acquisition of total ownership of all shares in a target company, and that the modification did not affect the option holders' right, as it operated only if an option holder chose to exercise the options; once the options were exercised, the option holder then was in the same position as a person who was a shareholder during the offer.

The applicant appealed to the Federal Court, seeking an order setting aside the decision of the AAT and an order remitting the matter to the AAT to be dealt with according to law.

In the Federal Court, Whitlam J agreed with the applicant's submission that Elkington v Shell Australia Ltd was not authority for the proposition that section 701 could extend to shares issued after the takeover period had expired. But Whitlam J found for the ASC on the basis that the plain purpose of s 701 was to permit an overwhelmingly successful offeror to acquire all the shares in the relevant class; the 'issue of further shares' was expressly contemplated by the actual wording of s 701(2)(b), and the object of s 701 would otherwise be defeated unless 'later issued' shares in that class could also be made the subject of compulsory acquisition.

(C) ASC v Madison Pacific Property Management Pty Ltd, No WAG 3011 of 1998, Fed No 717/98, Federal Court of Australia, Lee J, 23 June 1998

In this proceeding, the Australian Securities Commission (ASC) alleged the respondents, part of the Madison Pacific group, had contravened s 1064(1) of the Law. That section provides that no person, other than a public corporation, shall make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest. Section 9 defines 'prescribed interest' as including a 'participation interest'; this in turn is defined in s 9 to include any right to participate, or any interest, 'in any common enterprise...in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party'.

The respondents argued that they were offering to the public interests in franchises and hence, by application of regulation 7.1.02 of the Corporations Regulations, they were exempt from the prohibition found in s 1064(1).

The franchise scheme offered by the respondents related to those services usually provided by a real estate agent instructed by an owner to collect rental and carry out managerial duties in respect of a residential property occupied under a lease or tenancy agreement. The relevant properties were located in Sydney. At issue was the provision made under the scheme for an investor to appoint the third respondent, Madison Pacific Management Pty Ltd ('Madison Pacific Management'), as sole and exclusive manager of the franchised business for a period coterminous with the term of the franchise. The ASC submitted this appointment was designed to have the Madison Pacific Group conduct the business so that the investor was but a passive investor, supplying funds to be used by the Group to promote the business of Madison Pacific with the expectation on the part of the investor of a return from the efforts of the Madison Pacific Group companies. As the investor would be passive, the ASC submitted the scheme was not in fact an offer to participate in a franchise.

In determining whether the transaction offered was a franchise within the meaning of the Law, Lee J examined the definition of 'franchise' found in Regulation 1.02 of the Corporations Regulations. Paragraph (d) of that regulation defines 'franchise' to mean an arrangement between two or more persons by which it may be reasonably expected that, in carrying on the business, the franchisee is substantially dependent on goods or services supplied by the franchisor or a person associated with the franchisor.

The respondents submitted that the provision of services by Madison Pacific Management under a management agreement met this requirement, being services supplied by a person associated with the franchisor on which the franchisee would substantially depend to carry on the franchised business.

Lee J disagreed, holding that the appointment of Madison Pacific Management as sole and exclusive manager for the term of the franchise was not an arrangement within the contemplation of Regulation 1.02, paragraph (d):

'Providing for the conduct of a franchised business for the term of the franchise to be carried out by a manager associated with the franchisor tends to negate the concept of franchise embodied in the definition of that term in reg 1.02. Sole and exclusive management by a person associated with the franchisor is not a service upon which a franchisee may reasonably expect to be substantially dependent in carrying on a franchised business.'

Having determined that the offer by Madison Pacific management to conduct the franchised business as manager was not relevant to the offer of a right to participate as franchisee in a franchise, it was then necessary to determine whether such an offer constituted the offer of a prescribed interest in contravention of s 1064(1).

Lee J stated that the purpose of the provisions of Part 7.12, including s 1064, had been to protect the public from inadequately disclosed and speculative proposals to which the public was invited to subscribe, and where it was suggested the investor could expect a return from the investment.

Lee J found relevant the definition in s 9 of 'prescribed interest' as a 'participation interest', including a 'common enterprise' and the expectation of profit therefrom. Lee J applied the definition of 'common enterprise' stated by Mason J in Australian Softwood Forests Proprietary Ltd v A-G of NSW (1981) 148 CLR 121 at 133: 'An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts or profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them.'

Lee J held the common enterprise was found in the close connection of the operation of franchised business of the investor with the business of Madison Pacific Management and the expectation that the efforts of Madison Pacific Management would provide the profits to be received by either business. This was analogous to other cases where an investor and a promoter of a scheme were found to be in a common enterprise when the promoter had covenanted or was expected to use its best efforts to assist the investor to receive a return from the investment.

Editor's Note: The Managed Investments Act 1998 has repealed the provisions in the Corporations Law dealing with prescribed interests and replaced them with provisions relating to 'managed investment schemes'.

(D) Cuthbertson & Richard Sawmills Pty Ltd v Thomas, No SC 217 0f 1996, Supreme Court of the ACT, Einfeld J, 7 July 1998

The plaintiff, Cuthbertson and Richard Sawmills Pty Ltd, sought a declaration that a fixed and floating charge dated 10 November 1994 in its favour over the assets of Glenwood Cottages Pty Ltd ('new Glenwood') was valid and secured repayment of $350,000 paid by the plaintiff on behalf of new Glenwood.

The plaintiff was the parent company of the company which had previously been known as Glenwood Cottages Pty Ltd ('old Glenwood), which conducted a home building business. On 6 May 1994, old Glenwood changed its name to C & R Services Pty Ltd. The business of old Glenwood was sold to three minority shareholders of the old Glenwood. On 9 May 1994, those shareholders incorporated the new Glenwood. Pursuant to the agreement to sell the business, new Glenwood agreed to assume responsibility for all liabilities of the old Glenwood other than $1.5 million of bank debt. New Glenwood also agreed to indemnify old Glenwood in respect of all liabilities both before and after the 'Effective Date', defined as 30 April 1994.

In November 1994, a funding arrangement was set up whereby the National Australia Bank agreed to lend new Glenwood's directors a total of $350,000. This money was to be on-lent to new Glenwood. Westpac Bank guaranteed its repayment to National Australia Bank and the plaintiff indemnified Westpac Bank's obligations under this guarantee. In return, new Glenwood indemnified the plaintiff and granted, in favour of the plaintiff, a fixed charge over certain mortgaged property and a floating charge over all its other property. The charge agreement provided that the floating charge would automatically and immediately crystallise and take effect as a fixed charge upon an 'Event of Default', such as the appointment of a liquidator to new Glenwood. On 7 February 1995, the defendant was appointed provisional liquidator of Glenwood. On 1 March 1995, National Australia Bank enforced its guarantee against Westpac Bank for repayment of the $350,000. Westpac Bank duly paid and enforced its indemnity against the plaintiff. The plaintiff now claimed that sum was due to it pursuant to new Glenwood's indemnity, and sought to enforce its floating charge. The defendant advised the plaintiff that it treated the floating charge as void.

The defendant argued that, pursuant to s 588FJ of the Law, a floating charge created within six months before the relation-back day is void against the company's liquidator. Here the relation-back day was 7 February 1995, the day the application for the winding up order was filed. The plaintiff submitted the floating charge came within the exceptions set out in either sections 588FJ(2)(c) or 588FJ(3). Section 588FJ(2)(c) provides a floating charge is not void as against the company's liquidator in so far as it secures an amount of a liability under a guarantee or other obligation undertaken on behalf of, or for the benefit of, the company. Section 588FJ(3) provides a floating charge is not void as against the company's liquidator if it is proved that the company was solvent immediately after the creation of the charge.

In determining whether the charge was made 'on behalf of' the company, Einfeld J held those words must be read to mean 'in aid of' or 'in the interest of' and this required more than just that the indemnity was undertaken by the company; it was necessary to look at the substance, not merely the form, of the transactions, and to identify the purpose of the charge. Einfeld J found no benefit to the company; even had new Glenwood repaid the $350,000 to its directors, had those directors not paid that amount back to the National Australia Bank, that Bank could still call on Westpac Bank's guarantee for repayment, thus triggering new Glenwood's liability under the indemnity: 'Far from benefiting Glenwood, Glenwood was therefore potentially liable to pay the moneys twice.'

Further, new Glenwood needed money to meet its obligations under the sale agreement to discharge the liabilities of old Glenwood. As the $350,000 was used for that purpose, the loan to new Glenwood displaced an unsecured liability to old Glenwood with a secured liability to the plaintiff under the indemnity. There was no difference in principle between this arrangement and an arrangement whereby the plaintiff advanced a sum, secured by a charge, directly to new Glenwood which was then used to pay old Glenwood's debts; such a charge would have been invalidated by s 588FJ(4).

As to whether the plaintiff had shown that new Glenwood was solvent immediately after the creation of the charge, Einfeld J found that new Glenwood was insolvent at the time the charge was created and there was a strong likelihood, as actually occurred, that its losses would continue and that unpaid suppliers would cease supplying. Thus, the company's liquidation was inevitable as soon as the plaintiff ceased to provide the support needed to pay new Glenwood's trade creditors, and the funding arrangement merely delayed the day of reckoning. Hence the floating charge was void as against the liquidator.

3. RECENT ASX DEVELOPMENTS

(A) FRANKING CREDIT AND REBATE YIELDS (Submitted by ASX)

On 8 July 1998, the Australian Taxation Office released the franking credit and rebate yields on a share portfolio comprising the All Ordinaries Index ('AOI') for the 12 months ending 30 June 1998. The yields will be used as part of the package of measures to prevent franking credit trading announced by the Treasurer in the 1997-98 Budget.

The yields, calculated with the assistance of the ASX, will be used by institutional taxpayers managing large share portfolios (for example, superannuation funds and insurance companies) who make an election under proposed s 160APHR contained in Taxation Laws Amendment Bill (No 5) 1998.

The proposed section allows certain taxpayers to minimise their compliance costs by electing to adopt a franking credit or rebate ceiling instead of applying the ordinary provisions of the 45 day rule. This ceiling is calculated by reference to the yield on a benchmark portfolio of shares, namely a portfolio of the shares and other securities used to calculate the AOI which has the same value as the net equity exposure of the taxpayer.

Subject to any changes that may be made to the Bill during its passage through Parliament, the relevant yields to be used for the year ending on 30 June 1998 are:

(i) average dividend yield: 3.74%

(ii) average franking rebate yield: 1.52%

(iii) average franking credit yield: 1.52% x 64/36 = 2.70%

The resulting yield is then increased by 20% to determine the franking credit or rebate ceiling of a taxpayer.

(B) ASX LISTING RULES AMENDMENTS (Submitted by David Cullen and John Williamson-Noble, Gilbert & Tobin)

In addition to the policy amendments to the listing rules which became effective on 1 July 1998 (see Corplaw Bulletin 10, June 1998), a substantial further raft of amendments necessitated by the enactment of the Company Law Review Act ('CLRA') and the Managed Investments Act ('MIA') also became effective from 1 July 1998.

In large part the amendments reflect changes in terminology effected by this new legislation, particularly the introduction of references to 'responsible entities' in accordance with the new regime for managed investment schemes and in the periodic financial reporting rules in Chapter 4 of the listing rules. The more significant amendments to the listing rules resulting from the introduction of the CLRA and the MIA are in the following areas:

(a) Requirement To Have A Constitution

As a result of the CLRA, the Corporations Law does not now require companies to have a constitution. The listing rules will, however, still require listed entities to have a constitution given that some of the replaceable rules in the Corporations Law would otherwise be inconsistent with the listing rules. This change is effected by the introduction of new listing rule 1.1 condition 1A and by amendments to listing rules 1.1 condition 2 and 15.11.

In addition, new Appendix 15B has been inserted as an optional 'listing rules supremacy' provision for the constitution of those entities to which any replaceable rule in the Corporations Law applies. This would cover companies incorporated before 1 July 1998 that have repealed their memorandum and articles of association (constitution) and replaced them with a constitution that does not exclude the operation of all replaceable rules in the Corporations Law and companies incorporated on or after 1 July 1998 whose constitution does not exclude the operation of all replaceable rules in the Corporations Law.

A company whose constitution includes the provisions of Appendix 15A or Appendix 15B does not need to ensure its constitution is consistent with the listing rules whenever an amendment to its constitution is made.

(b) The 20 Cent Rule

The '20 cent rule' in respect of the issue or sale price of the main class of securities of an entity applying for admission to the official list and in respect of the exercise price of options will continue to apply. However, following admission, the rule will not apply to issues of securities (other than options) for which quotation is sought. This change is effected by the deletion of listing rule 2.5 condition 3. Previously, that rule prevented entities (other than no liability companies) from issuing securities for which quotation would be sought at less than 20 cents.

Listing rule 7.25 previously prevented companies from changing the par value of their quoted equity securities to an amount less than 20 cents. This prevented, for example, companies with a par value of 20 cents from effecting a subdivision of capital. The abolition of par value via the CLRA has led ASX to replace the rule with a broader rule dealing with corporate actions which would have the effect of reducing an entity's trading price below 20 cents. The rule now provides that an entity must not issue bonus securities or reorganise its capital if the effect of doing so would be to decrease the entity's trading price below 20 cents. Entities already trading below 20 cents will be prohibited from worsening this position.

Clearly, entities contemplating a corporate action which could potentially invoke new listing rule 7.25 should consult with ASX well in advance. Presumably, as with the former version of the rule, the onus will be on the entity to demonstrate to ASX that the post-corporate action trading price will be 20 cents or more.

(c) Disclosure For Registered Managed Investment Schemes

Listing rule 3.16.2 has been amended to require disclosure to ASX of the conversion of a trust to a registered managed investment scheme and to require notification of the names of the members of the scheme's compliance committee.

(d) Timing Matters In Relation To Annual Report

For disclosing entities, the Corporations Law now sets the deadline for annual reporting to members as the earlier of 21 days before the next annual general meeting after financial year end or 4 months after financial year end. Reflecting this, listing rule 4.6 has been amended to require companies to send their annual report or concise report to shareholders within 17 weeks after the end of its financial year. Previously, up to 19 weeks was allowed. This change only applies to companies with financial years ending on or after 8 July 1998.

The additional information required to be included in an entity's annual report by listing rule 4.10 (eg shareholder spread, top 20 shareholders, etc) must now be current as at a specified date that is no more than 6 weeks before the report is sent to security holders. Previously the information could be up to 8 weeks old. Again, this requirement only applies to entities with financial years ending on or after 8 July 1998.

(e) Voting Rights For Registered Managed Investment Schemes

As voting rights for registered managed investment schemes are now dealt with by sections 253C and 253E of the Corporations Law, new listing rule 6.9.2 has been introduced to provide that the 'one security one vote' rule in listing rule 6.9 does not apply to such schemes.

(f) Timetables For Corporate Actions

The removal of the requirement for returns of capital to be approved by the Court has enabled the timetable in clause 7 of Appendix 7A to be deleted. Returns of capital are now covered by the timetable applying to reorganisations of capital where no court approval is required (clause 5 of appendix 7A) and the timetable dealing with re-organisations of capital where court approval is required (clause 6 of Appendix 7A).

The abolition of par value means that certain reorganisations of capital (for example, a reduction of capital without cancellation of securities) will not require the issue of new certificates. Accordingly, the timetables in clauses 5 and 6 have been amended to reflect that, in such instances, deferred settlement trading and despatch dates will not be required.

(C) CORPORATE BOND MARKET

On 13 July 1998 ASX announced plans to open the corporate bond market to retail investors. Purusant to this, ASX has applied to ASIC for permission to alter its rules so as to allow the listing of non-government debt securities. Such securities would enable investors to invest in companies but at less risk than acquiring share equity, whilst offering higher fixed income returns than government securities.

(D) NEW ASX LISTING RULES EXEMPT MINING EXPLORATION COMPANIES FROM DISCLOSURE REQUIREMENTS (Submitted by Ellen Stoddart, Swinburne University of Technology)

The proposal to remove the requirement for mining exploration companies to lodge half-yearly reports in the format of Appendix 4B was strongly opposed by some respondents to the exposure draft of amendments to the Listing Rules [ASX October 1997]. It is regrettable that this amendment has now become operative, since insufficient justification was provided by the ASX.

Differential disclosures are, in general, undesirable, and it weakens ASX's claim to international leadership in resources reporting.

(a) Insufficient justification In the explanatory notes in the ASX Exposure Draft, it was stated that 'profit and loss information in Appendix 4B is usually not meaningful for mining exploration companies'. No evidence was provided to support this claim, or the claim that the cash-based quarterly reports [still required] are more useful. In this context, 'useful' can be taken to mean predicting share prices. Research in the United States, in relation to the oil and gas industry, has shown that there tends to be a greater statistical correlation between movements in share prices and the financial statements produced in accordance with the FASB standards rather than with other information required on proven reserves. Earlier claims that the reserve disclosures were more relevant for investors have not been validated. Whilst there are obvious differences between the information on proven reserves and cash-based quarterly reports, it is more than likely that the ASX could not sustain a claim that the information they propose to exclude is meaningless. Further, exclusion removes all possibility of research into the matter, to resolve it one way or the other.

The information provided in Appendix 4B is useful to researchers attempting to establish any hypotheses in relation to accounting and financial practices of mining companies. More details on issues specific to mining companies are required in Appendix 4B than are required by AASB 1022 'Accounting for the Extractive Industries', thus making the ASX information superior to that lodged with the ASC, especially in the matter of capitalisation of exploration and evaluation expenditure. It is unfortunate that the ASX has removed such useful information and increased the difficulty of obtaining comparable data for mining exploration and mining production companies.

(b) Differential disclosure

It is generally accepted as undesirable to establish arbitrary rules for differential disclosure, without strong reasons and clear distinctions. The ASX amendment introduces such a difference between listed mining companies in general and between Australian and overseas-incorporated companies.

Many mining 'production' companies spend more on exploration than do 'exploration' companies, and it can be difficult to establish precisely when a company moves from the 'exploration' category to the 'production' category. It is noted that elsewhere in the ASX Exposure Draft it was argued that 'removal' of the distinction between mining exploration companies and all others is desirable, in order 'to avoid debates about whether an entity is a mining exploration entity given that the definition is not objective.' [p 33] They have not accepted their own argument.

In relation to foreign mining exploration companies [incorporated outside Australia], the omission of the requirement to lodge Appendix 4B reports half-yearly is particularly significant. Note 13 to Appendix 4B states:

'ASX will accept, for example, the use of International Accounting Standards for foreign entities. If the standards used do not address a topic, the Australian standard on that topic (if one) must be complied with.'

There is no International Accounting Standard covering mining [not even oil and gas], nor is there any country overseas with a mandatory equivalent of AASB 1022. Foreign miners will no longer have to comply with AASB 1022, and there is little certainty as to what information will be disclosed or how it is calculated. Australian-incorporated companies will still be required to lodge with ASIC half-yearly financial statements that comply with AASB 1022, and the exemption will have virtually no impact on their reporting obligations. Junior foreign mining companies will have reduced reporting requirements and the market will receive less information and face greater difficulties in comparing Australian and foreign mining exploration companies.

(c) International resources reporting

It is assumed that the ASX wishes to encourage listing by foreign mining exploration companies. This aim will not be achieved by reducing information to the lowest common denominator since such action will not ultimately increase the prestige of the ASX or provide investors with any incentive to deal in ASX-listed junior miners. The ASX should have retained its information requirements in respect of mining exploration companies on the grounds that it leads the rest of the world. Retention would have accorded with the international initiatives of the ASX, as described in 'International Standards for Resources Reporting: Australia's Leadership Role' by Norman Miskelly, in 'ASX Perspectives' [3rd Quarter, 1997, pp 52-6]. With the trend to globalisation, the ASX was in a unique position to promote its disclosures as 'best practice' and work towards the implementation of an International Accounting Standard based on AASB 1022 and the improved disclosures in Appendix 4B.

(d) Conclusion

Rather than extending the exemptions for overseas-incorporated mining exploration companies, it would have been preferable if the ASX removed the pre-existing exemptions [in Listing Rules 4.3 and 4.4] from lodging annual reports in accordance with Appendix 4B. This could have been easily justified [as assisting in providing 'fixed-format' information on a regular basis to the market]; it would have removed an unnecessary difference in disclosures and provided more support for describing ASX as a world leader in the area of resources reporting.

4. RECENT ASIC DEVELOPMENTS

(A) SECURITIES AGREEMENT WITH MALAYSIA

On 8 July 1998, ASIC entered into a Memorandum of Understanding (MoU) with the Securities Commission of Malaysia.

The MoU will provide a framework for the exchange of information and investigative assistance between ASIC and Malaysia's Securities Commission in matters such as securities fraud, insider trading, market manipulation, and disclosure requirements for securities acquisitions and prospectuses. The MoU aims to enhance investor protection in Australia and Malaysia by ensuring that the investigation of breaches of securities laws are not frustrated by jurisdictional difficulties associated with cross border enforcement activities. MoUs also exist between ASIC and securities and futures regulators in the USA, UK, France, New Zealand, Hong Kong, China, Canada, Thailand, Brazil, Indonesia and Germany.

(B) ACCC AND ASIC SIGN CO-OPERATION AGREEMENT

On 17 July 1998 Australian Competition and Consumer Commission Chairman, Professor Allan Fels, and the Australian Securities and Investments Commission Chair, Mr Alan Cameron, signed an important Co-operation Agreement between the two agencies.

The Agreement follows recommendations by the Financial System Inquiry which most recently resulted in the formation of a new financial regulatory system headed by ASIC and the Australian Prudential Regulation Authority.

The passing of the Financial Sector Reform (Consequential Amendments) Act, means responsibility for primary consumer protection in the 'financial services sector' has passed from the ACCC to ASIC.

Under the Agreement, the two agencies will refer complaints to the most appropriate agency, exchanging information where that is permitted by law and, if required, undertaking joint responses to problems in the market. For example, complaints may be referred when the conduct complained of involves both financial and non-financial services or where it involves both consumer protection and competition issues.

The agency heads believe the agreement will be more than just a public affirmation of the need for the agencies to avoid duplication and reduce administration costs.

'Business and consumers reasonably expect the ACCC and ASIC to work closely together and the Co-operation Agreement signed today is a public commitment to that goal,' Professor Fels said.

'The need for this agreement was recognised before the financial sector reform legislation took effect. It signals our intention to work together closely to provide business and consumers with efficient and effective consumer protection in the financial services market.'

The administration of the competition provisions of the Trade Practices Act as they apply to financial services, will continue to be the sole responsibility of the ACCC.

Mr Cameron said ASIC would continue, and expand, the consumer protection and consumer education role it had begun as the Australian Securities Commission.

'Consumer groups have already told us they want less regulatory duplication and a financial system they can understand and use with confidence. This Agreement will streamline the consumer protection process, providing a system which is less confusing.'

Copies of the Agreement can be obtained from either the ASIC Infoline (1 300 300 630) or from the ACCC website: "http://www.accc.gov.au".

(C) ASIC POLICY STATEMENTS - IMPLEMENTING THE MANAGED INVESTMENTS ACT 1998

ASIC has released Policy Statements 130 - 136 in proof form as a guide to industry. The statements are subject to final editing prior to publication and should not be relied upon as final policy.

The policy statements deal with issues arising from the Managed Investments Act which commenced on 1 July 1998. They were developed after extensive industry consultation, and will be kept under active review by ASIC.

The policy statements cover the same seven areas covered in the Policy Proposal Papers released in April 1998. They are:

(a) Policy Statement 130 - Licensing

This Policy Statement sets out ASIC policy on:

(i) how to apply for a licence;

(ii) when a person needs a licence to carry on a securities business;

(iii) how ASIC will categorise 'kinds' of schemes for licensing purposes;

(iv) what capacity and expertise you need to show in order to obtain a licence; and

(v) what complaints resolution procedures an applicant for a licence must have.

(b) Policy Statement 131 - Financial Requirements

This statement provides guidance on the financial requirements that a responsible entity must satisfy to have a licence authorising it to operate a managed investment scheme. There is also guidance on how to calculate 'net tangible assets' for the purpose of meeting the financial requirements set out in s 748(2A) of the Law.

(c) Policy Statement 132 - Compliance Plans

This statement gives guidance on the structured and systematic process which should be undertaken in developing a compliance plan. This process should:

(i) consider the obligations under the Law and the constitution affecting the responsible entity;

(ii) identify risks of non-compliance; and

(iii) address measures designed to address those risks.

The statement includes a list of some outcomes which typically might be addressed in a compliance plan and some guidance on how compliance measures might be described in a plan.

(d) Policy Statement 133 - Scheme Property Arrangements

This statement provides guidance on the standards that custodians of scheme property should meet, what the responsible entity should do when it appoints an agent as custodian, and what should be in a compliance plan concerning the holding of scheme property. The statement also explains what relief ASIC has given from the duty to separate scheme property from other assets.

(e) Policy Statement 134 - Constitutions

Under the Law, each scheme must have a constitution which is lodged by the responsible entity when applying for registration of a managed investment scheme. Under this policy, ASIC assesses the constitution before registration.

This statement provides guidance about what the Law requires in relation to the matters that must be included in a constitution. Generally, the constitution must deal with the matters required by law with certainty and completeness.

(f) Policy Statement 135 - Transitional Issues

This statement deals with a number of issues that could arise during the transitional period, and sets out how ASIC proposes to deal with them. Issues include:

(i) when an extension of the transitional period will be permitted, eg fixed time schemes;

(ii) ratifying modifications to an approved deed;

(iii) convening of meetings within the first year of the transitional period;

(iv) the trustee's role in relation to meetings during the transitional period; and

(v) supplementary prospectus obligations when a scheme is registered.

(g) Policy Statement 136 - Discretionary Powers and Closely Related Schemes

This statement sets out which of ASIC's policy statements, practice notes, class orders and pro formas which relate to prescribed interests will continue to apply. Tables provide a list of continuing policies and superseded policies.

The statement also provides guidance on when ASIC will:

(i) provide relief from the Law;

(ii) give an extension of time to establish or reconstitute a compliance committee; and

(iii) regard schemes so closely related that they should be aggregated in determining whether some exemptions for small schemes should apply.

The proof versions are available from ASIC's website at: "http://www.asic.gov.au". Also available are proof versions of the revised ASIC licensing kit and licence application form.

Persons with urgent inquiries in relation to the licensing of a responsible entity should contact either Frank Varga (03) 9280 3221 or Pauline Vamos (02) 9911 2178.

Final versions of the policy statements should be obtained through the Centre for Professional Development (1 800 036 186) when available. They will also be available in the ASIC Digest.

(D) LIMITED RELIEF ON 28 DAYS' NOTICE PERIOD

On 21 July 1998, ASIC announced it would be lenient to those listed companies which, because of genuine logistical difficulties, are unable to comply this year with the new requirement of giving shareholders 28 days' notice of the Annual General Meeting ('AGM'). ASIC has no specific exempting powers over this area of the Law.

Senate amendments to the Company Law Review Bill at the end of June altered the period of notice shareholders in listed companies must receive of an AGM from 21 days to 28 days. This change applies to companies which had not yet called their meeting; it also applies to listed companies with 30 June 1998 balance dates.

ASIC will take no enforcement action against listed companies which are unable, for genuine logistical reasons, to comply with the 28 days' notice period for AGMs held this calender year. These companies are expected to give shareholders at least 21 days' notice of the AGM, and they should seek advice on the operation of s 1322 and the possibility of civil actions by third parties for non-compliance with the Law.

Companies which believe they are in this position need not approach ASIC for a no action letter, and may rely on their own assessment of their circumstances.

(E) TRANSITIONAL ISSUES - 28 DAYS' NOTICE OF GENERAL MEETINGS: ASIC INFORMATION RELEASE

One of the amendments to the Corporations Law made by the Company Law Review Act 1998 ('CLRA') requires a listed company to give its members 28 days' notice of a meeting of those members. On 10 July 1998, ASIC issued an Information Release dealing with the interaction of that notice requirement with the requirement that a public company distribute its financial report to members prior to its AGM.

(a) Years Ended On or Before 30 June 1998

For years ended 30 June or earlier, public companies must distribute their financial report to members no later than 14 days before their AGM. Unless notice was given before 1 July 1998, notice of that AGM must be given 28 days before the meeting.

Where a listed company is not able to distribute its financial report earlier, the company will need to mail out notices of the AGM to its members in accordance with the 28 day requirement and make a second mail out of its financial report to meet the 14 day requirement.

(b) Years Ending On or After 1 July 1998

For years ending on or after 1 July 1998, public companies will be required to distribute their financial report to members by the earlier time of 21 days before the AGM and 4 months after the end of the financial year. However, if the company is listed, notice of the AGM must be given 28 days before the meeting.

Where a listed company is not able to distribute its financial report 28 days before the AGM, it will need to mail out notices of the AGM in accordance with the 28 day requirement and make a second mail out of the financial report.

(c) More Detail

Irrespective of the financial year end, there is no need for a public company to send its financial report to members at the same time as the notice of its AGM.

The requirement to give notice of meetings in relation to the distribution of financial reports to members are contained in separate provisions of the Law. The new requirements as to notice are generally operative from 1 July 1998, while the new requirements as to the distribution of financial reports are operative for financial years ending on or after 1 July 1998.

(d) Notice Requirements

Previously, the Law only required 14 days' notice to be given of most general meetings (refer former s 247(2)). Under new s 249H, 21 days' notice is required of a meeting of members of a public or proprietary company other than a listed company. Members can agree to a shorter notice.

The new requirement to give 28 days' notice of a meeting of members of a listed company is found in s 249HA and was introduced through a last minute amendment to the CLRA. It does not apply to meetings of holders of debentures or managed investment interests issued by a listed company.

The requirement applies from 1 July 1998, subject to a further amendment to the Law made by the Corporations Legislation Amendment Act 1998 introducing s 1424A under which the 28 day requirement does not apply where notice of a meeting was given before 1 July 1998.

Under new s 250N, a public company must generally hold its AGM within 5 months after the end of the financial year. This is consistent with the requirement under former s 245.

(e) Requirements to Distribute Financial Reports

CLRA also replaced the financial reporting requirements contained in Parts 3.6 and 3.7 of the Law. These are superseded by new Chapter 2M. However, under a new transitional provision, s 1431, Parts 3.6 and 3.7 continue to apply for years ending on or before 30 June 1998, while Chapter 2M applies for years ending on or after 1 July 1998.

Because the requirement for a public company to distribute financial reports to members is contained in Part 3.6 (see s 315(2)) and Chapter 2M (see s 315(1)), the revised requirements only apply in relation to financial reports in respect of years ending on or after 1 July 1998.

Under Part 3.6, the financial report of a public company was to be sent to members at least 14 days before the AGM. Under the new Chapter 2M, a public company must distribute its financial report to members by the earlier of:

(i) 21 days before the next AGM after the end of the financial year; or

(ii) 4 months after the end of the financial year.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Abe Herzberg, 'Why Are There So Few Insolvent Trading Cases?' (1998) 6 Insolvency Law Journal 77

The Federal Court decision in Metropolitan Fire Systems v Miller was handed down in May 1997. It is the first insolvent trading case under s 588G of the Corporations Law despite the fact that that section has been operative for about four years. This article argues that there are a number of reasons why it has taken so long for the first s 588G case to come before the courts. As the decision in Metropolitan Fire Systems v Miller indicates, these reasons have nothing to do with any inherent deficiencies in the insolvent trading provisions themselves. It is suggested that the main reason for the dearth of s 588G cases is a logical consequence of the increasing use of voluntary administrations.

(B) Simon Whelan, 'Administration of Insolvent Groups' (1998) 6 Insolvency Law Journal 107

The intractable problem of insolvent groups is receiving fresh attention in the UK and in Australia. Recent decisions in both jurisdictions have broadened the potential for 'pooled' solutions to problems posed by group structures when insolvency occurs. This article reviews those recent decisions and assesses the present state of 'pooling' in instances of group insolvencies.

(C) Murray Brown, 'The Priority of the Expenses and Remuneration of an Administrator or Provisional Liquidator in the Winding-up of a Company' (1998) 9 Journal of Banking and Finance Law and Practice 126

This article considers what priority the expenses and remuneration of an administrator or provisional liquidator of a company have in its winding up. In particular, it examines whether the debt arising in favour of an administrator or provisional liquidator should be regarded as secured.

(D) Ben Pettet, 'Towards a Competitive Company Law' (1998) 19 Company Lawyer 134

In March 1998, the UK Department of Trade and Industry announced a major review of UK company law to be undertaken over the next three years and leading to the publication of a report and a White Paper in 2001, with resulting legislation to follow. This article explores the structures and aims of the review and examines some of the issues likely to dominate the review.

The DTI consultation paper, 'Modern Company Law For A Competitive Economy', is available from the DTI website: "http://www.dti.gov.uk/CLD/comlaw/".

(E) Abdul Majid, Low Chee Keong & Krishnan Arjunan, 'Company Directors' Perceptions of Their Responsibilities and Duties: A Hong Kong Survey' (1998) 28 Hong Kong Law Journal 60

This article presents the findings of a survey conducted amongst managing directors of public listed companies in Hong Kong. The survey sought to evaluate Hong Kong directors' perceptions of their roles and responsibilities to find the extent to which directors are aware of their corporate responsibilities and accountability. The survey also sought to identify whether certain demographic and background variables were associated with the directors' perceptions of their responsibilities and duties.

(F) Shaun P Martin, 'Intracorporate Conspiracies' (1998) 50 Stanford Law Review 399

The author postulates the situation where two employees of XYZ corporation agree to illegally dump toxic waste from one of XYZ's plants. If after dumping the waste, the two are apprehended, each may be liable in civil and criminal actions. Further, XYZ corporation may also be liable for the illegal conduct of its employees. However, what happens if the employees are apprehended before, not after, the illegal act of dumping. Have the employees entered into a criminal conspiracy for which either may be punished, and may XYZ corporation itself be charged with conspiracy based upon the conduct of its employees?

The author examines the law of criminal intracorporate conspiracy and the convergence of criminal conspiracy with vicarious corporate liability. The article suggests a preferred approach to intracorporate criminality.

Note: Abstracts of articles published in the Journal of Banking and Finance Law and Practice and the Insolvency Law Journal are reproduced in this Bulletin with the permission of LBC Information Services.

6. CORPORATE LAW CONFERENCES AND SEMINARS

(A) Australian Law And Economics Association Annual Conference

The Evolution Of Social Norms And Its Relationship To Law

Australian Law And Economics Association Annual Conference   
Convenors: Megan Richardson (President), Jeannie Paterson (Secretary), Philip Williams (Treasurer)   
Sponsored by the Department of Treasury and Finance, Victorian Government

Friday 7 August 1998   
Staff Library, Faculty of Law, The University of Melbourne

1.15-2.15 pm: Robert Cooter, Professor of Law, Boalt Hall, Berkeley, 'Expressive Law and Economics'

Professor Cooter is a past President of the American Law and Economics Association and a co-author of one of the leading American law and economics textbooks. He has also published numerous articles and texts in the areas of contracts, torts and banking law. Currently he is writing on social norm development and constitutional and administrative law.

2.30-3.30 pm: Eric Jones, Professor, Melbourne Business School and Emeritus Professor, Economics Faculty, La Trobe University, 'Creative Disruptions of Social Norms'

3.45-4.45pm: David Lyons, Professor of Law and of Philosophy, Boston University, 'The Moral Opacity of Utilitarianism'

5.00-5.45 pm: Panel Discussion

The Panel will consist of the speakers and discussants for each paper. There will be ample opportunity for comments and questions from the floor.

5.45-6.00 pm: Annual General Meeting followed by drinks in the Staff Common Room   
Dinner at University House: 7.30 pm

Cost: $50 for Conference ($30 for members\*) plus $50 for Dinner   
\*paid up or attended 1997 AUSTLEA Conference

Please rsvp (with cheque) by Tuesday 4 August to Jeannie Paterson, Faculty of Law, Monash University, Clayton, Vic 3168, Phone 9905 3399; email "j.paterson@law.monash.edu.au".

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Registration Form: 1998 AUSTLEA Conference and Dinner

Name------------------------------------------------------------------------

Organisation--------------------------------------------------------------

Phone---------------------------------Fax---------------------------------

Attending: Conference   
Dinner

Cheque enclosed for: $-----------------------------(payable to the University of Melbourne Law School)

(B) Asia Pacific Economic Law Forum

The annual conference of the Asia Pacific Economic Law Forum will be hosted by the proposed Research Centre in Accounting and Corporate Law of the City University of Hong Kong, from 3 - 5 December 1998. The theme of the conference is 'The Current Crisis In The Asia Pacific Region: Legal And Economic Implications'. Interested participants are invited to submit an abstract of their paper of not less than 300 words. The abstract should be received not later than 15 September 1998 and the full paper not later than 15 October 1998. Four copies of the paper should be submitted.

For submission of the papers and further information about the conference, please contact:

Associate Professor Dr. D K Srivastava,   
Conference Convenor,   
Proposed Research Centre in Accountancy and Corporate Law,   
City University of Hong Kong,   
Tat Chee Avenue,   
Kowloon,   
Hong Kong.

Fax; + 852 2788 7847   
Email: lwdk@cityu.edu.hk

7. INTERNATIONAL VISITOR

Professor Deborah DeMott of Duke University Law School visited Australia in July to teach and present seminars. Professor DeMott co-taught a Master of Laws subject with Dr Elizabeth Boros at the University of Melbourne on Shareholders' Remedies. In addition, Professor DeMott presented a seminar in Melbourne to regulators, corporate lawyers and academics on issues that may arise under the proposed statutory business judgment rule contained in the Corporate Law Economic Reform Bill based on US experience. The seminar was hosted by the Centre for Corporate Law and Securities Regulation at The University of Melbourne and the Corporations Law Committee of the Law Council of Australia. Professor DeMott also presented a seminar on relational investing at Sydney University Law School.

8. ARCHIVES

The Corporate Law Electronic Network Bulletins are retained on an archive. You may review prior Bulletins by accessing the following website: "http://www.law.unimelb.edu.au/centres/cclsr/Activities/email\_archive.html".

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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