**CORPORATE LAW ELECTRONIC BULLETIN**   
**Bulletin No 16, December 1998**

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

with the support of

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MESSAGE FROM THE EDITORS

This is the final issue of the Bulletin for 1998. The next issue will be published in January 1999. We take this opportunity to thank the supporters of the Bulletin, in particular the Australian Securities and Investments Commission, the Australian Stock Exchange, the Federal Department of the Treasury and the major law firms listed above. The Editors have been very pleased with the success of the Bulletin. At the end of last year, the number of subscribers to the Bulletin was approximately 550. We now have approximately 1300 subscribers with a readership estimated at well in excess of this number as the Bulletin is distributed widely within law firms, government agencies, corporations and federal and state courts. A particularly pleasing feature is the increasing number of international subscribers from countries in Asia, Europe and North America. The Bulletin has been promoted by organisations such as the Corporate Lawyers Association, the Australian Institute of Company Directors, the Chartered Institute of Company Secretaries, and the Commercial Law Association. We are grateful to these organisations for their support.

If you have any suggestions for improvements to the Bulletin, please email them to: "cclsr@law.unimelb.edu.au". The Editors wish all of our readers an enjoyable Christmas and a Happy and Prosperous New Year.

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1. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) ASFA STATEMENT ON CHOICE OF FUND BILL

On 1 December 1998, The Council of the Association of Superannuation Funds of Australia (ASFA) released a position statement on the Government's Choice of Fund Bill, recently re-introduced into Parliament.

The statement from ASFA, the peak representative body and voice for the superannuation industry, stresses that the market and superannuation funds have changed significantly since the Bill was first introduced and that priorities should be re-assessed in light of that. ASFA considers that the Choice of Fund Bill is not now appropriate.

The Bill was first introduced on the 4th December 1997 but was withdrawn. The Council agreed that 'in the current environment first priority in extending member control over their superannuation benefits should be through encouraging informed member investment choice.'

ASFA represents all segments of the superannuation industry: corporate funds, public sector, industry funds, retail and service providers, and its membership and Council representation reflect this range of interests.

The full statement follows:

ASFA POSITION - CHOICE OF FUND

ASFA supports the objective that all Australians should be members in superannuation funds which are appropriate to their needs for retirement savings. The government's Choice of Fund Bill does not advance this position. It is likely to increase administrative costs for fund members and employers, and holds a number of dangers for both members and employers. ASFA also notes that the market and superannuation funds have changed significantly since the government's Choice of Fund Bill was first introduced on 4 December, 1997. The Choice of Fund Bill is not now appropriate, nor has the government responded to the necessary member safeguards previously highlighted by ASFA and others. In the current environment first priority in extending member control over their superannuation benefits should be given to encouraging informed member investment choice. ASFA believes that funds, employers, industry associations, and the government should now cooperate in ensuring a range of options and protection for members, namely:

(i) providing members with information and education to enable informed member investment choice;

(ii) ensuring that the superannuation arrangements provide for appropriate and effective disclosure of benefit characteristics, investment returns, fees and charges at entry, exit and on an ongoing basis;

(iii) ensuring that members have access to appropriate insurance coverage with adequate continuance arrangements in the event of switching;

(iv) ensuring strong prudential and other protections remain or are introduced, for example:

- an effective, independent and accessible complaints mechanism with enforcement powers;

- an effective avenue for resolving disputes between the employer and employee. The award system currently provides that mechanism; and

(v) amendment of the Superannuation Guarantee legislation to ensure monthly, or at least quarterly, payment of employer SG contributions into the member's (superannuation) account.

ASFA also noted that the Association will be examining a number of issues related to the portability of superannuation savings between funds. This needs careful attention and is not adequately addressed in the government's Choice of Fund Bill.

(B) FINANCIAL SYSTEM REFORM

On 30 November 1998, the Prime Minister, Mr John Howard, wrote to the Premiers and Chief Ministers seeking their support by year's end for a draft agreement to transfer regulatory responsibility for building societies, credit unions and friendly societies from the States and Territories to the Commonwealth.

The draft agreement was prepared by a joint Commonwealth, State and Territory working party. The regulatory transfer will complete the second stage of the Financial System Reforms - the Government's response to the Financial System (Wallis) Inquiry.

Subject to the support of the Premiers and Chief Ministers and passage of legislation, the transfer will take place on 1 July 1999. To meet this timetable, the Commonwealth intends to introduce legislation in the autumn sittings of Parliament to give effect to the transfer after consultation with industry groups. However, the legislation's timing and its effective operation depends on the agreement of the State and Territory governments.

(C) CLERP BILL 1998

As noted in Bulletin No 15 (November 1998) the Corporate Law Economic Reform Bill was first introduced into Federal Parliament on 2 July 1998. The Bill lapsed with the calling of the October Federal election.

The Bill was reintroduced into the House of Representatives on 3 December 1998. On 10 December 1998 the Bill was referred to the Parliamentary Joint Committee on Corporations and Securities for inquiry and report by 22 April 1999.

It is important to note that there are differences between the July version of the Bill and the December version of the Bill. These changes are mainly in the areas of takeovers and fundraising.

In relation to CLERP Paper No 6 (Financial Markets and Investment Products), consultation papers are expected shortly.

The December version of the CLERP Bill is available from the Treaury's website at:   
http://treasury.gov.au/publications/BusinessLaw/CLERP/Bill98/Index.htm

The following is an extract from the second reading speech of the Minister for Financial Services and Regulation, Mr J Hockey, delivered on 3 December 1998:

(a) Corporate Fundraising

The Bill will improve the fundraising provisions of the Corporations Law to facilitate more efficient capital raising by Australian business. A range of measures will be implemented to facilitate raising investment capital and reduce the high fundraising costs faced by Australian companies. Prospectuses are often too long and complicated and can obscure information of interest to investors. Issuers frequently complain that they are forced to burden prospectuses with unnecessary information and that prospectus costs are too high. The fundraising rules will be improved and costs reduced by:

(i) introducing short form prospectuses for retail investors with technical information contained in separate documents available on request;

(ii) permitting investors in certain industries to be provided with a short profile statement containing key information rather than the full prospectus; and

(iii) allowing companies to issue prospectuses in electronic form and distribute them through the Internet or other media.

It is also clear that uncertainty over liability for the content of prospectuses has added to the complexity and expense of fundraising and has detracted from the prime function of a prospectus to disclose relevant information to investors. The Government will clarify the potential liability of parties for prospectuses by providing that their liability is governed solely under the Corporations Law. Due diligence defences will be made available in all cases of fundraising where there is a positive duty to disclose information.

(b) Facilitating Fundraising by Small and Medium Sized Enterprises

The cost of a prospectus can be excessive in light of the amount of capital small and medium sized enterprises (SMEs) seek to raise. This acts as a significant impediment to SMEs seeking public funds.

A new fundraising mechanism will allow an SME to raise a total of up to $5 million through the use of offer information statements (OIS). The OIS introduces simpler disclosure obligations. Bodies wishing to use an OIS will be required to state the purpose for which the funds are required, the risks involved and include a copy of its audited accounts. Investors will be warned of the risks of investing without a prospectus and the desirability of obtaining professional advice.

In addition, a prospectus will not be required if a person makes personal offers that result in securities being issued to 20 or fewer persons in a one year period, with no more than $2 million being raised. This will cut the costs faced by SMEs when making small scale offerings without exposing investors to unnecessary risks. To facilitate SME fundraising, a company will be able to raise funds from sophisticated investors without preparing a prospectus in a wider range of circumstances.

(c) Clarifying Directors' Duties

Effective corporate decision-making is hampered by legal uncertainties arising from the liability of directors for their actions. A business judgment rule will be introduced to provide directors with a safe harbour from personal liability in relation to honest, informed and rational business judgments.

The rule will apply where an officer makes an informed decision in good faith, without a material personal interest in the subject matter of the decision and rationally believes that the decision is in the best interests of the company.

The objective of the rule is to protect the authority of directors in the exercise of their management duties. It is not designed to, and will not, insulate them from liability for negligent, ill informed or fraudulent decisions. The rule will not lead to any reduction in the level of director accountability, but will ensure that they are not liable for decisions made in good faith and with due care. Directors will benefit from the certainty that the rule provides in terms of their liability as they will be encouraged to take advantage of business opportunities and not behave in an unnecessarily risk averse way.

To reflect modern business practices, directors will, where appropriate, be able to delegate functions to, and rely on advice and information provided by, other persons. The availability of an indemnity for legal actions and directors' liabilities in corporate groups will also be clarified.

(d) Greater Accountability to Shareholders

A new 'representative' action will be introduced to enhance shareholders' rights to pursue an action on behalf of shareholders where the company is unable or unwilling to do so. This new right of action will provide an incentive for management to exercise powers appropriately and for the benefit of shareholders. Safeguards will be introduced to ensure that company management is not undermined by unjustified or vexatious litigation. The court will need to be satisfied that proceedings brought on behalf of a company are appropriate in that there must be a serious case to be tried, the applicant must be acting in good faith and the action must be in the best interests of the company.

(e) Making Accounting Standards More Useful for Business

Financial reporting requirements play an important role in Australian companies' ability to compete effectively and efficiently. Accounting standards that are responsive to the needs of the Australian business community and investors have to be developed, thus ensuring that Australia maintains an informed and efficient capital market.

To bring an investor and business focus to the standard setting process, an advisory body, the Financial Reporting Council (FRC), will be established with membership drawn from peak professional, business and government organisations. The FRC will have broad oversight of the Australian accounting standard setting process. It will report to the Minister and provide advice on the effectiveness of accounting standards. As a result, the accounting standard setting process will become more responsive to the needs of preparers and users of financial statements.

A key role of the FRC will be to ensure that the Australian Accounting Standards Board (AASB) is committed to, and works towards, adopting international standards having regard to what is taking place in major capital raising economies.

The FRC will report to the Government on the acceptance of international accounting standards in overseas capital markets, on the progress made by the International Accounting Standards Committee (IASC) on developing a core set of international standards and on the International Organisation of Securities Commission's acceptance of those standards.

(f) Streamlining Takeover Rules

The current takeover rules are complex and impose excessive costs on bidders and target firms. The Bill reforms the current takeover legislation to make requirements simpler and clearer.

To facilitate a more competitive market for corporate control, a bidder will be able to exceed the takeover threshold (more than 20 per cent of the total voting rights in a company) through a new mandatory bid procedure before being obliged to make a general takeover offer. The mandatory bid rule will provide two big advantages. First, by giving potential bidders the choice of which takeover method to employ, they are more likely to proceed with their bids, resulting in an increased likelihood of assets being used in their most productive way. Secondly, the mandatory bid rule will ensure that all target company shareholders will have the opportunity to sell their interest at a fair price and to benefit from the premium a bidder for control places on the securities.

The conditions generally applying to takeover bids will usually apply to mandatory bids. However, certain other conditions will also apply to mandatory bids to protect minority shareholders. For example, the conditions are designed to ensure that the mandatory bid complies with the equal opportunity principle - that target shareholders be given a fair opportunity to exit the company completely at a fair price.

(g) Takeovers Panel

To address concerns with the current dispute resolution mechanisms for takeovers, the existing Corporations and Securities Panel will be reconstituted to become the primary forum for resolving takeover matters. The Panel will retain its existing jurisdiction to enforce compliance with the spirit of the Law. It will also be given jurisdiction to review decisions of the Australian Securities and Investments Commission (ASIC) on exemptions from the takeover rules given to corporations. All interested parties will be able to bring matters before the Panel, not just ASIC. Court proceedings in relation to a takeover bid or proposed takeover bid will not be able to be started until after the end of the bid period except on the application of ASIC or another public authority of the Commonwealth or a State.

(h) Listed Managed Investments

Investors will also have the benefit of the takeover rules applying to listed managed investment schemes.

(D) TREASURY REORGANISATION

There has recently been a reorganisation of the Commonwealth Treasury with the result that the Business Law Division no longer exists. Instead, there are now two divisions that work primarily on the Corporations Law:

(a) Corporate Governance and Accounting Policy Division, headed by Veronique Ingram, General Manager; and

(b) Financial Markets Division, headed by Michael Willcock, General Manager.

There is also a Project Unit working primarily on CLERP Paper No 6 (Financial Markets and Investment Products).

(E) NEW ACCOUNTING STANDARD FOR CONCISE FINANCIAL REPORTS

The Australian Accounting Standards Board (AASB) has approved Accounting Standard AASB 1039 'Concise Financial Reports'. The need for this Standard arose from changes to the Corporations Law, permitting entities to send members either the traditional annual report (comprising the financial report, auditor's report and directors' report) or a concise report (including a concise financial report (CFR) instead of the financial report. The legislation requires a CFR to comply with the relevant accounting standard and be accompanied by a statement from the auditor. The due process for issuing a standard has now been completed and the Standard is effective for companies whose financial year ends on or after 31 December 1998.

The primary function of AASB 1039 is to identify the minimum contents of a concise financial report. The Standard requires the minimum to be based on consolidated information and comprise the three financial statements (as presented in the financial report) and specific disclosures (derived from the financial report). The disclosures specified relate to sales revenue, segment results, extraordinary items, dividends, earnings per share, events occurring after the reporting date and changes in accounting policies and estimates as well as notification of when the financial report has not been on a going concern basis. To assist the understanding of members who receive a CFR, it must be accompanied by interpretative discussion and analysis (D&A).

The AASB would have preferred to explicitly allow the D&A component to be presented in the directors' report but concluded this was beyond its powers. Many of those who responded to the Exposure Draft ED 94, issued in August 1998, opposed the inclusion of a D&A requirement because they considered it could create problems for auditors required to provide a statement on the CFR. Others, particularly user groups, supported D&A, in line with the AASB's opinion that the provision of D&A is relevant and necessary to help compensate for the brevity of the CFR compared with the financial report.

(F) SMALL BUSINESS TAXATION COMMITTEE ESTABLISHED

On 6 December 1998 the Federal Government established a Small Business Consultative Committee (SBCC) to advise it on the transition to 'A New Tax System'. The Committee will have an ongoing role to make recommendations to the Government on the most effective way to assist small business with the costs of transition to a GST.

It will also provide advice and where applicable options to address: the compliance cost for small businesses of the taxation reform proposals; the impact on small business of changes to the taxation system; and the most effective method to develop and disseminate information to small businesses on the new tax system and arrangements.

The committee will play a key role in creating a bridge between Australia's 900,000 small businesses and the Government over the vital issue of tax reform. It will also advise the Government on the allocation of the $500 million allocated for startup costs associated with the GST.

Mr Curt Rendall will chair the SBCC. Mr Rendall has wide experience in small business. He is Deputy Chairman of the NSW Small Business Development Corporation and Chairman of the Institute of Chartered Accounts of Australia National Small & Medium Enterprises Committee.

The SBCC will shortly embark on a period of extensive consultation and discussions with small business operators and representatives of the sector.

(G) CORPORATIONS AND SECURITIES PANEL ANNUAL REPORT

On 9 December 1998 the Annual Report of the Corporations and Securities Panel was tabled in Federal Parliament. The role of the Panel is to consider applications from the Australian Securities and Investments Commission for a declaration that an unacceptable acquisition of shares in a company has occurred or that there has been unacceptable conduct in relation to shares in, or the affairs of, a company. ASIC makes such applications if it considers that unacceptable circumstances as defined in s 732 of the Corporations Law have occurred. The Panel's purpose is to provide a mechanism for peer review of mergers and acquisitions activity.

The Annual Report indicates that the Panel received only one referral during the 1997-98 financial year (and only the third since the inception of the Panel in 1991). In the referral, ASIC sought a declaration that unacceptable conduct had occurred:

- in relation to an acquisition of shares in John Fairfax Holdings Limited by Brierley Investments Limited; or

- as a result of conduct in relation to shares in, or the affairs of, John Fairfax engaged in by Brierley Investments and subsidiary companies, and Merrill Lynch (Australia) Futures Limited.

The Panel held a public hearing and announced that it was not satisfied that unacceptable circumstances had occurred.

The Corporate Law Economic Reform Program Bill 1998 contains reforms designed to make the Panel more effective. See item 1(C) above.

(H) UNITED KINGDOM COMPANY LAW DEVELOPMENTS

As noted in the October issue of this Bulletin, on 10 September 1998, the UK Law Commission published its Consultation Paper titled 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties'. The full text of the Consultation Paper is available on the Internet at: http://www.open.gov.uk/lawcomm/library/lib-comp.htm#libcp153.

On 5 December 1998 the University of Cambridge hosted a conference titled 'Developing Directors' Duties' which discussed the Consultation Paper. The conference was organised by Professor Brian Cheffins of the University of Cambridge and was chaired by the Hon Ms Justice Arden DBE, Chairman of the Law Commission and Justice of the High Court (Chancery Division). The speakers at the conference were:

- Richard Nolan, University of Cambridge, 'Part X of the Companies Act'

- Dr Simon Deakin and Dr Alan Hughes, University of Cambridge, 'Economic Aspects of Directors' Duties'

- Professor Deborah DeMott, School of Law, Duke University, 'Directors' Duties in the United States'

- Professor Ian Ramsay, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 'Directors' Duties in Australia: Recent Developments and Enforcement Issues'

- Professor Janet Dine, Essex University, 'Directors' Duties: The EU Dimension'

- Professor Erich Schanze, Faculty of Law, University of Marburg, 'Directors' Duties: German and Continental Comparisons'.

The papers will be published in a future issue of the Company, Financial and Insolvency Law Review.

(I) CASAC CORPORATE GROUPS DISCUSSION PAPER

The Companies and Securities Advisory Committee has released its Corporate Groups Discussion Paper.

The Paper seeks to stimulate discussion on whether Australian corporate law needs to better recognise and respond to the way corporate groups operate in practice. It deals with a range of issues, for those who run corporate groups and those who deal with them, which hinge around the circumstances in which a corporate group should be viewed and treated as a collection of separate corporate entities, each with its own independent rights and obligations, or as together forming one economic enterprise with overall interests and responsibilities.

The Discussion Paper deals with:

- methods of regulating corporate groups   
- directors of group companies   
- minority shareholders of group companies   
- tort liability of group companies   
- reconstructions of corporate groups   
- liquidation of group companies.

Copies of this Discussion Paper will be available shortly on the ASIC website (http://www.asic.gov.au) under Contents on the What's New Page. Printed copies can also be obtained by phoning the ASIC Infoline on 1 300 300 630.

(J) OECD SURVEY OF THE AUSTRALIAN ECONOMY

The 1998 Survey of Australia was released by the Organisation for Economic Co-operation and Development (OECD) on 17 December 1998. The Survey provides a very favorable assessment of the performance of the economy throughout 1998 and highlights the impressive resilience of the Australian economy during the current downturn in the region. It emphasises that the Australian economy has coped well with the Asian crisis so far, despite its larger trade exposure to that region than most other OECD countries.

The Survey contains a strong endorsement of the Government's macroeconomic and structural policies and notes the importance of the Government's policy settings in placing Australia in such an excellent position to cope with the financial crisis in Asia. The OECD welcomes the comprehensive reforms contained in the Government's tax reform package and urges its full and rapid implementation. The OECD sees full and rapid implementation of the package as vital in achieving a substantial improvement in economic performance in Australia and the longer term security of the revenue base. With respect to the outlook for the Australian economy, the economic projections presented are identical to those released by the OECD in late November. That is, economic growth is expected to slow, with downside risks stemming from the external environment. While the OECD projects a widening in the current account deficit in 1998, the Survey notes that 'this deterioration should not be seen as a cause for concern in the current economic environment, so long as it is progressively reversed in the coming years'.

The OECD is supportive of the current monetary policy stance and considers that it is appropriate at the current juncture. The OECD also endorses the Government's approach to keeping fiscal policy geared towards continuing the gains in budget consolidation, while acknowledging that if any slowdown in economic growth were to occur it would be appropriate for the automatic stabilisers to work to reduce the budget surplus.

The OECD highlights the efficiency gains resulting from the financial system reforms and the Corporate Law Economic Reform Program being implemented by this Government. Once again, the OECD notes the benefits (in terms of ongoing strong economic growth in Australia) that could result from quicker progress in moving towards an industrial relations system focused on enterprise bargaining.

(K) PRODUCTIVITY COMMISSION REPORT

Australian governments made considerable progress with macroeconomic reform in 1997-98, according to a report released by the Productivity Commission on 18 December 1998.

The report, 'Macroeconomic Reform by Australian Governments 1997-98', found that, nationally, one of the main drivers of reform efforts continues to be the National Competition Policy.

State and Territory Governments have identified important reforms in the electricity, gas, transport and water industries, particularly the introduction of access arrangements for Australia's gas and rail industries, and the further development of the National Electricity Market.

The Commission's report documents macroeconomic reforms implemented by Australian Governments, based on information provided by all Commonwealth departments and State and Territory Governments. The report forms part of the Commission's Annual Report Series. Examining the reforms detailed in the report, it is apparent that macroeconomic reform is affecting all sectors and levels of Government, enabling governments to lower the costs of providing services, and gains are starting to flow to consumers and businesses.

The report details government business enterprise reforms undertaken in 1997-98 including: structural reforms; the establishment of independent oversight authorities; and the corporatisation, commercialisation, and privatisation of its businesses. These included one third of Telstra, 14 airport leases and Victoria's electricity businesses. The report also details regulatory and legislative reforms, the splitting of purchasing and service provider roles, pricing reforms, and tendering and contracting out. Additional measures reported by jurisdictions for 1997-98 involved further progress in labour market reform, with increased onus on employers and employees to negotiate employment\ arrangements. Other categories covered by the report include reforms to environmental management policies and trade policy reforms.

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

2. RECENT ASIC DEVELOPMENTS

(A) ELECTRONIC COMPANY REGISTRATIO9N PILOT PROGRAM

On 1 December 1998 ASIC launched its Electronic Company Registration (ECR) pilot project to assess the introduction of full electronic registration of new Australian companies over the Internet.

In a first for a government organisation the ECR system will allow ASIC clients to electronically prepare applications for registration, digitally sign them using private keys stored on cryptographic smart cards and transmit them to ASIC over the Internet.

When ASIC receives these documents it will authenticate the application, process it into the National Corporate Database and transmit the certificate of registration back to the client.

This system also allows associated payments to be made electronically. ASIC has chosen to use standard commercial X.509 certificates, stored on cryptographic smartcards or diskettes, to generate digital signatures.

This approach means ASIC clients are not locked into a proprietary system and will be able to use their certificates for other applications. ASIC's ECR is the first production application of this type in the commercial use of smart cards for digitally signing information using Public Key Technology in Australia.

The company KeyPOST is the initial registration and certification authority for this system, and it has worked with ASIC to introduce public key cryptography and the X.509 application process to ASIC's clients.

The system has been built to accept certificates issued by other registration and certification authorities to ensure that ASIC moves with this market as it matures. ECR will simplify the company registration process, be a more efficient system for both ASIC and its clients as well as increase the level of service which ASIC can provide.

Initial indications show the Australian business community will welcome this new technology and the flexibility it offers. The pilot will continue until the end of December, when the system will be released nationally.

(B) PROPOSAL RE: TRANSFER OF INFORMATION FROM THE DIRECTORS' REPORT

On 30 November 1998 ASIC announced a proposal to allow companies, registered schemes and disclosing entities greater flexibility in the presentation of their annual reports and half-year reports, while maintaining the integrity of the reporting process. ASIC is seeking public comment on a proposed class order which would allow entities reporting under Chapter 2M of the Corporations Law to transfer information presently required to be included in the directors' report to a document attached to the directors' report.

For example, the proposed order would allow the review of the operations of an entity to be included in a 'Chairman's Review' rather than in the directors' report. Information could also be transferred to the financial report and, if so, would be subject to audit. The relief proposed by ASIC would be aimed at providing greater opportunity for clearer and more effective communication to members, allowing entities to better meet the needs of members. The proposed relief would not result in the loss of information distributed to members or appearing in the reports lodged with ASIC.

ASIC has received submissions from time to time that relief of the nature proposed would allow information to be presented in annual reports in a more meaningful, comprehensive and logical manner.

It is proposed that the relief apply to any and all of the requirements as to the content of annual directors' reports contained in s 299 (general requirements), 300 (specific requirements) and 300A (directors' and officers' emoluments) of the Law. The directors would be able to determine which items, if any, are transferred from the directors' report. The proposed relief could also be applied to the requirements of s 306 concerning half-year directors' reports.

Proposed conditions for relief would include a requirement for a clear cross-reference from the directors' report to the page containing any information transferred out of the report. In addition, the information required by ss 299 and 300A would still be required to be included in any concise report.

The Law contains specific provisions which make false or misleading statements (including information which is misleading by omission) an offence.

Under s 1308(7) of the Law all information attached to a directors' report is treated as if it is part of the report for the purpose of these provisions. The proposed order would result in some consequential amendments to Practice Note 68 'New financial reporting and procedural requirements'. It is emphasised that this is a proposal only and does not represent settled ASIC policy.

Further details of the proposal are available from:

Jan McCahey   
ASIC Chief Accountant   
National Office, Melbourne   
Tel: (03) 9280 3265

(C) ASIC DEPUTY CHAIRMAN STEPS DOWN

Mr Peter Day, ASIC Deputy Chairman since October 1997, advised the Treasurer, Mr Peter Costello, on 4 December 1998 that he will be stepping down from his position early in 1999. Mr Day was previously a Melbourne company executive and chartered accountant. He intends to take up a senior management appointment with Bonlac Foods Ltd.

Mr Costello, said: 'Mr Day has contributed to a number of initiatives at ASIC including the establishment of an Office of Chief Accountant, the refocus of the Information Division and its readiness to deliver CLERP 7, and internally refocussing the Commission's own management and governance structures. He will be a loss to the Commission.'

The Government will be taking steps to appoint a replacement in the near future.

(D) NOMURA BREACHES CORPORATIONS LAW

On 10 December 1998, the Federal Court found that Nomura International PLC (Nomura) had breached both the Corporations Law and the Trade Practices Act following action taken by ASIC.

The Court found that on 29 March 1996 Nomura:

(a) sold and purchased shares in a manner that involved no change of beneficial ownership;

(b) engaged in conduct that was intended, and was likely, to create a false and misleading appearance of active trading in illiquid shares;

(c) engaged in conduct that created a false and misleading appearance with respect to the prices of contracts on the futures markets.

The Court found that Nomura's strategies constituted misleading and deceptive conduct in the securities and futures markets, thereby breaching the Corporations Law and the Trade Practices Act.

The Court also found that Nomura had placed orders to:

(a) buy an identical number of shares at a discount of 5-20% below the previous day's closing prices, for the purpose of trading with itself in the event that there was insufficient liquidity in the market for the shares that it had to sell;

(b) in relation to 2 stocks, Metal Manufacturers Ltd and National Mutual Property Trust units, Nomura traded with itself as a result of these buy orders;

(c) sell an identical number of shares at a similar premium to the previous day's closing prices for the purpose of confusing one of its brokers;

(d) sell parcels of stock unrelated to its arbitrage unwind in order to prevent the market from moving back up after Nomura finished selling.

His Honour Justice Sackville said the fact that a trader has an objective that can fairly be described as economically legitimate does not necessarily mean that all strategies consistent with that objective are lawful.

ASIC Chairman Alan Cameron said this was a landmark decision which required careful consideration to fully understand the ramifications.

'But it is already clear that it will help establish the boundaries of acceptable trading strategies not only in Australian markets, but also for players in the international securities and futures markets.'

'International traders in Australian markets will need to ensure they are fully conversant with Australia's legal and financial practices. It is anticipated that the benchmark set in this case for Australian markets will be closely considered in other markets around the world,' Mr Cameron said.

ASIC's investigation was assisted by both the SFE and the ASX. International cooperation was also provided by the UK Financial Services Authority and the Hong Kong Securities and Futures Commission.

Editor's Note: Sackville J's summary of the decision is available at item 4(C) below.

(E) QUEENSLAND REGIONAL OFFICE TARGETS PHOENIX ACTIVITY

From 10 December 1998, ASIC's Queensland Regional Office (QRO) has commenced a three month surveillance campaign targeting suspected insolvent trading and phoenix activity.

The surveillance inspections by the QRO's Small Business Program will be conducted on 85 companies throughout South East Queensland, with further inspections to be conducted in North Queensland in early 1999.

As a result of a surveillance inspection earlier this year, ASIC made an application in early December 1998 in the Federal Court for a provisional liquidator to be appointed to a company. Following allegations of phoenix activity by the company, ASIC examined the circumstances where a series of companies had previously gone into liquidation owing substantial group tax to the ATO.

After the filing of an application by ASIC, a related Brisbane company has paid $160,000 to the ATO. Following this payment ASIC and the company have agreed to settle the matter and no further details of the company or its activities can be given.

ASIC Queensland Regional Commissioner Barrie Adams said it is in the interests of consumers and the business community that ASIC take enforcement and other action wherever it appears there has been a serious and deliberate misuse of the corporate structure or where companies trade whilst insolvent.

(F) NEW ASIC NSW REGIONAL COMMISSIONER

On 7 December 1998, ASIC Chairman Alan Cameron announced that former Director-General of the NSW Department of Training and Education Co-ordination and Managing Director of TAFE NSW, Jane Diplock, had been appointed as ASIC NSW Regional Commissioner. Ms Diplock will take up her appointment from early January 1999. She comes to ASIC with a strong background in administration in both the public and private sectors. She has worked in ASIC in a management consulting role during 1998. Ms Diplock was a senior executive with the Westpac Banking Corporation between 1988 and 1993, working for two years as a Director of the subsidiary company Westpac Projects and Advisory Services Pty Ltd, then as Group Account Executive managing the financial institution's portfolios of the wholesale bank. She was later Chief Manager Employee Relations and Superannuation with the bank.

In July 1994 Ms Diplock was appointed Director-General of the Department of Industrial Relations, Employment, Training and Further Education. In 1995 she was appointed Director-General of the Department of Training and Education Co-ordination and Managing Director of TAFE NSW. She held these positions until December 1997.

Ms Diplock will manage the Sydney office of ASIC which is the largest operational office of the ASIC network and undertakes a diverse range of regulatory and law enforcement activities, being an integral part of ASIC's national operational programs.

(G) ASIC BROKERS COBAR SETTLEMENT

On 7 December 1998, ASIC announced the joint liquidators of Cobar Mines Pty Ltd and the mine's parent company, Ashanti, had reached a settlement under which Cobar employees would be paid almost all of their entitlements.

The settlement follows an ASIC investigation into the collapse of the Cobar Mines, and in particular a letter of financial support given by Ashanti to Cobar Mines and the withdrawal of that support in January 1998.

ASIC Chairman Alan Cameron said ASIC had rigorously investigated the circumstances in which the company had collapsed and on the information now available there was no cause for ASIC to take further action against directors of Cobar Mines or Ashanti. The main reason for the closure of the mine was the downturn in world copper prices at that time.

'The settlement will see Cobar mine employees receive about 85c in the dollar while the company's unsecured creditors will receive approximately 29c in the dollar,' Mr Cameron said.

'This is an excellent result for the Cobar community, especially mine employees who stood to lose much of their entitlements without ASIC intervention.'

Mr Cameron said the settlement brokered by ASIC, and the joint liquidators of the Cobar Mines Pty Ltd, Mr Ron Dean-Willcocks of Star Dean-Willcocks and Mr Greg Hall of Price Waterhouse Coopers is dependant upon court approval and approval at a meeting of all creditors to be held in this month.

A committee of employees and trade creditor representatives recently endorsed the settlement. Cobar mine, the mainstay of the rural NSW town of Cobar, closed in January 1998. Cobar Mines had insufficient assets to meet the majority of the wages and retrenchment entitlements of $10.8M due to its 250 employees and trading debts amounting to $6M.

ASIC launched an investigation into the collapse of the company and examined relevant executives of Cobar Mines under oath. Mr Cameron said ASIC's investigation gave the liquidators the necessary information to reach a favourable settlement with Ashanti under which employees would now receive the vast majority of their entitlements.

'It is especially pleasing to me that ASIC was able to help in the process of obtaining this settlement, through its investigation and discussions with the liquidators,' Mr Cameron said.

ASIC considered taking legal action against Ashanti on behalf of the employees and creditors if necessary, but this settlement made that unnecessary.

'Legal action would have resulted in long delays and uncertainties when the Cobar community needed an immediate outcome to sustain it. ASIC believes the settlement is a very good commercial outcome.'

Under the terms of settlement, Ashanti will pay $6.5M to Mr Dean-Willcocks, employees and creditors and $200,000 towards the liquidators' costs. Individual entitlements will vary, but the employees as a group can expect to receive a total of approximately 85 cents in each dollar due to them when the mine closed. Trade creditors are expected to receive approximately 29 cents in the dollar.

There is a prospect of additional payments by Ashanti to employees and creditors if certain tax losses can be claimed. Mr Dean-Willcocks will also be able to increase payments if he is successful in claims against other parties arising out of the collapse of Cobar Mines.

The settlement reflects Australian law which generally holds parent companies responsible for the insolvent trading of their subsidiaries, where the parent company ought reasonably have known that the subsidiary was incurring debts it was unable to pay. Mr Cameron said officers of Cobar Mines and Ashanti had co-operated fully with ASIC during the investigation.

(H) NEW VICTORIAN REGIONAL COMMISSIONER

On 15 December, ASIC Chairman Alan Cameron announced that Ms Sue Carter, the former Chief Financial Officer of ANZ Funds Management in Melbourne, had been appointed as the new Victorian Regional Commissioner.

As Chief Financial Officer of ANZ Funds Management, Ms Carter had responsibility for accounting, statutory reporting, risk and compliance, actuarial and company secretarial functions covering life insurance, general insurance, superannuation and trust products.

Ms Carter is a Chartered Accountant, holds a BA (Hons) in Economics and History from Leeds University and a Diploma of Applied Finance and Investment from the Securities Institute of Australia. She will join ASIC in February 1999.

(I) HALF-YEAR FINANCIAL REPORTS OF DISCLOSING ENTITIES

On 15 December 1998 ASIC provided clarification of the application of new accounting standards for half-years ending 31 December 1998.

The following new accounting standards apply for years ending on or after 30 June 1999:

(a) AASB 1004 'Revenue';

(b) AASB 1016 'Accounting for Investments in Associates' (as amended by AASB 1016A 'Amendments to Accounting Standard AASB 1016'); and

(c) AASB 1019 'Inventories'.

ASIC strongly encourages disclosing entities and borrowing and guarantor corporations to apply these accounting standards for half-year financial reports required under Chapter 2M of the Law in respect of half-years ending 31 December 1998.

This will ensure that half-year financial reports are prepared on a consistent basis with the ensuing full year financial reports (including a consistent treatment of any adjustments to opening retained profits/accumulated losses in both the half-year and full-year financial reports).

Paragraph 17 of the 'Development of the Standard' section at the end of accounting standard AASB 1029 'Half-Year Accounts and Consolidated Accounts' indicates that AASB 1029 does not require new accounting standards to be applied to a half-year which ends prior to the end of the first financial year to which those standards apply.

However, s 334(5) permits directors to elect in writing to apply accounting standards early. This election should be noted in the financial report but no separate notification to ASIC is required.

Under the current AASB 1029, a similar situation will arise in relation to half-years ending after 31 December 1998. For example, the new accounting standard AASB 1008 'Leases' will be operative for financial years ending on or after 31 December 1999 and an election would need to be made to apply that standard for half-years ending 30 June 1999.

(J) NON-LIFE PARENTS OF CONTROLLED LIFE COMPANIES

On 15 December 1998 ASIC confirmed its earlier statements concerning the application of its class order dealing with the treatment of controlled life insurance companies in the consolidated financial statements of their non-life parents.

The Australian Accounting Standards Board has recently issued accounting standard AASB 1038 'Life Insurance Business' which also deals with the consolidation of controlled life companies by their non-life parents.

This standard applies from financial years ending on or after 31 December 1999 but companies may elect to adopt the requirements of the standard for earlier periods.

ASIC Class Order 98/0112 allows non-life companies to consolidate controlled life insurance companies using financial reports prepared in accordance with the requirements set out by the Insurance and Superannuation Commission in Commissioner's Rules No.21 (now APRA Prudential Rules No.21). These Rules differ in some respects from the requirements of AASB 1038.

As stated in ASIC Information Release 98/012 dated 28 July 1998, Class Order 98/0112 will remain available for financial years and half-years ending on or before 30 December 1999. However, the class order is not available for a half-year where the full financial year is expected to end on or after 31 December 1999.

The continued availability of Class Order 98/0112 gives non-life parents of controlled life companies the option of applying either the class order or AASB 1038 until the mandatory operative date of the standard (except for half-years where the full financial year is expect to end on or after 31 December 1999). This ensures that companies are given sufficient time to prepare for the adoption of the new standard.

The Corporations Law (the Law) also permits application of either of the following requirements (instead of the class order and AASB 1038):

(a) the provisions of Schedule 5A to the Corporations Regulations which allow the non-consolidation of a controlled life company (provided that the separate financial report of the controlled life company is attached to the non-life parent's financial report); or

(b) the full financial reporting requirements of Chapter 2M of the Law (that is, including the requirements of all accounting standards other than AASB 1038).

(K) REVISED INTERIM POLICY STATEMENT ON SERVICED STRATA SCHEMES AND REVIEW OF REAL ESTATE AGENTS

On 16 December 1998 ASIC extended the period for public comment on a revised Interim Policy Statement 140 (IPS 140) regarding serviced strata schemes and announced the second stage of its review of the existing regulation of the financial advice activities of real estate agents. ASIC issued IPS 140 on 6 October 1998 for public comment with the purposes of:

(i) helping developers and promoters of serviced strata schemes understand their obligations under the Corporations Law;

(ii) highlighting for investors the relevant risks of investment in serviced strata schemes through better disclosure in marketing documentation; and

(iii) acting as the first stage in a review of the financial advice activities of real estate agents (as requested by the Government in accordance with recommendation 16 of the Financial System Inquiry Final Report 1997 (the Wallis Report)).

(a) The revised IPS 140 - Serviced strata schemes

ASIC has consulted widely and has considered over 40 written submissions on the content of IPS 140. Taking into account the comments received, ASIC has revised IPS 140 to:

(i) provide further clarification on when ASIC considers a serviced strata scheme to be regulated under the Law (including the use of examples);

(ii) provide relief for 'management rights schemes' (ie: common short stay letting arrangements) from the Law where a disclosure statement is provided to potential investors;

(iii) facilitate concise point of sale disclosure and reduce custodial capital requirements for hotel or resort-like serviced strata schemes. Otherwise, these schemes are expected to comply fully with the Law;

(iv) clarify policy on when relief will be given for 'well advanced' non-complying serviced strata schemes;

(v) clarify that ASIC will not require 'closed' or 'well advanced' non-complying serviced strata schemes to be registered under the managed investment provisions; and

(vi) clarify when ASIC requires compliance with modified secondary trading provisions.

ASIC Chairman Alan Cameron said ASIC considers that the revisions to IPS 140 mean the prospectus and managed investment provisions apply to serviced strata schemes in a more flexible way which recognises the needs of investors as well as the needs of the industry and the costs of compliance with the Law.

ASIC invites additional comment on the interpretative and policy positions contained in revised IPS 140. Comments are due by Tuesday 9 February 1999 and should be forwarded to Project Manager, Serviced Strata Schemes Project, Australian Securities & Investments Commission, GPO Box 4866, Sydney, NSW 1042 or emailed to "regpol.syd@asic.gov.au".

(b) Review of financial advice activities of real estate agents

Mr Cameron said the main focus of the second stage of the review of financial advice activities of real estate agents will be to compare and contrast the regulation of the relevant advice activities of real estate agents which are not covered under the Law with the way in which the Law regulates investment advisers.

He said ASIC will focus on advice about real estate that has a significant component of investment related advice, including advice on the possible financial gain to be made from buying or selling real estate, advice on the relative merits of real property as an investment against other possible investments, and advice about the financing of real estate investment packages, including the promotion of negatively geared investment packages.

ASIC invites comment on the issues involved in this review. Comments are due by Tuesday 9 February 1999 and should be sent to Greg Tanzer, Real Estate Agents Project, Australian Securities & Investments Commission, GPO Box 9827, Canberra City, ACT or emailed to "greg.tanzer@asic.gov.au".

To assist persons or organisations wishing to make comment ASIC has prepared an information kit outlining the current regulation of investment advisers under the Corporations Law and listing some issues which could be addressed in submissions.

Copies of the revised IPS 140 (including a copy of a marked-up revised IPS 140) and the information kit regarding the review are available from the ASIC Infoline on 1300 300 630 and from the media release section of the ASIC internet home page on "http://www.asic.gov.au".

(L) PROSPECTUS SURVEILLANCE IN VICTORIA

The results of a targeted review of 16 prospectuses by the ASIC Victorian Regional Office (VRO) were released on 17 December 1998. The review has resulted in ASIC making six interim stop orders on prospectus issued in Victoria.

During June to November 1998 a review was carried out on prospectuses covering a variety of companies including high risk-ventures, small and medium-sized companies, companies about to be listed and companies subject to investor complaints on their prospectuses.

The interim stop orders were made after ASIC found material defects in these prospectus and had the effect of preventing the further offer or issue of securities under the prospectuses until these defects were corrected. All 6 companies involved issued supplementary prospectuses to correct the defects.

Material defects uncovered included:

(a) misleading financial forecasts;

(b) failure to disclose the assumptions behind financial forecasts;

(c) failure to include other relevant financial information;

(d) inadequate disclosure on the risks associated with the investment; and

(e) misleading or inadequate information on directors.

Acting Victorian Regional Commissioner Phil Khoury said he wanted to ensure that directors and their advisers took full steps to ensure compliance with the fundraising provisions of the Corporations Law.

3. RECENT CORPORATE LAW DECISIONS

(A) Sengate Pty Ltd v Southern Equities Holdings Ltd [1998] SASC 6993, Full Court of the Supreme Court of South Australia, Prior, Lander and Wicks JJ, 27 November 1998

This was an appeal against orders made by Milhouse J on 18 November 1998 relating to a scheme of arrangement under s 411 of the Corporations Law between Southern Equity Holdings Ltd (SEQ) and it shareholders, in connection with a proposed merger with Balmoral Corporation Ltd (Balmoral).

Under the scheme, SEQ was to issue 5 non redeemable preference shares to Balmoral and cancel all ordinary shares on issue. Holders of the SEQ shares which were to be cancelled were to receive an issue of Balmoral shares in the ratio of four Balmoral shares for every three SEQ shares; thus SEQ was to become a wholly owned subsidiary of Balmoral. There was to be a reduction of capital in SEQ brought about by the cancellation of the ordinary shares.

The scheme meeting was held on 27 October 1998 where the scheme was approved by the requisite majority of shareholders, and the Court gave its approval on 18 November 1998.

The appellant, Sengate Pty Ltd (Sengate), held 42% of the issued ordinary shares in SEQ. Mr James Hayward and persons associated with him, held 53% of the shares in Sengate. On the basis of the explanatory statement in respect of the scheme of arrangement, Mr Hayward and the directors of Sengate voted in favour of the scheme.

Sengate now complained that SEQ had failed to make disclosure in the explanatory statement and accompanying documents of matters which were material to SEQ's shareholders in their consideration of the proposed merger. Specifically, Sengate complained that:

(a) there was no disclosure of an agreement between Mr Hayward and his associates and Balmoral which was entered into before the shareholders' meeting and which was consummated after that meeting. Under this agreement, Mr Hayward, the principal shareholder of Sengate which was the principal shareholder in SEQ, received $1.25m from Balmoral for his shareholding instead of Balmoral shares; and

(b) Balmoral had been committed to purchase assets of another company at a gross over valuation. Sengate submitted that both those facts were known to the directors of Balmoral at the time the meeting was held, but not known to SEQ's shareholders at the time, and as the scheme contemplated the issue of shares in Balmoral to SEQ, there should have been full disclosure of all that information to SEQ shareholders in the explanatory statement.

The Full Court unanimously agreed that Balmoral had failed in its obligation to bring to the attention of SEQ's shareholders, and the Court, information which was material. The Court said that SEQ's shareholders were entitled to full and adequate disclosure of all information which could be material for the purpose of making a decision in relation to the merger, and the Court was also entitled to all information which might be material for its determination whether to approve the scheme or not.

The Court held that, in considering whether or nor to approve the scheme, it would ensure the information in the explanatory statement, and all accompanying documents, was fair and adequate to assess whether the scheme was reasonable. It would also ensure, in so far as it could, that all reasonable information was before the meeting so that the shareholders could make a properly informed decision in relation to the proposed merger.

(B) Batoka Pty Ltd v Jackson [1998] VSC 137, Supreme Court of Victoria, Hansen J, 20 November 1998

In May 1998 pursuant to a takeover offer, Austrim Ltd (Austrim) became entitled to all the issued ordinary shares in its controlled entity, National Consolidated Ltd (NCL) for a consideration of $165.5m.

Austrim financed the takeover with funds provided by Westpac Bank, National Australia Bank and ANZ Bank. In June 1998, Austrim refinanced its total indebtedness, including its debts to the banks. As part of this refinancing, NCL became party to guarantee and negative pledge agreements in favour of the banks under which it guaranteed repayment of monies owed by Austrim under the refinancing, but excepting any part which related to the financing of the takeover bid as that would have contravened the prohibition in s 260A of the Corporations Law against a company providing financial assistance to acquire shares in itself except in specified circumstances, such as where the shareholders have approved the giving of the assistance under s 260B.

On 14 September 1998, the members of NCL, on the recommendation of its directors, voted in favour of a special resolution approving the company giving financial assistance in connection with Austrim's takeover of NCL. Notice of the meeting had been lodged with ASIC on 11 September 1998.

The applicant, Batoka Pty Ltd (Batoka), which held preference shares in NCL, sought an injunction to restrain the implementation of the special resolution. Batoka argued that the resolution was ineffective because it was passed as a special resolution under s 260B(1)(a) of the Corporations Law. Batoka submitted that provision prohibited Austrim or its associates voting on the resolution; that excluded all those present at the meeting of 14 September 1998.

Batoka also argued that the notice of the meeting was defective as it did not state that preference shareholders were precluded from voting and that Austrim and its associates were precluded from voting.

Batoka also submitted that the explanatory memorandum sent to members with the notice of the meeting did not satisfy the requirements of s 260B(4) in that it did not set out the relative advantages and disadvantages of the proposal, and the nature and quantum of the benefit or otherwise to NCL.

Hansen J held that Batoka was not entitled to injunctive relief. At the heart of Batoka's grievance was lack of notice of the meeting of 14 September 1998. Hansen J held that this did no more than deny Batoka the opportunity to consider the notice of the meeting and the explanatory memorandum and to attend the meeting. Batoka had no right to vote at the meeting as it was a preference shareholder. Whatever might have been said at or before the meeting, the resolution would have been passed, and none of those entitled to vote had suggested the explanatory memorandum was insufficient or misleading.

Batoka was not entitled to injunctive relief pursuant to s 1324 as it had not suffered prejudice or detriment as a result of the directors' actions or the passing of the resolution.

Further, s 260D provided that if a company provided financial assistance in contravention of s 260A, that contravention did not affect the validity of the financial assistance or any transaction associated with it. Granting the injunction would have produced a state of affairs which Parliament had said should not occur. The applicant then submitted that the mandatory injunction sought under s 1324 overrode s 260D. Hansen J held that s 1324 could be invoked at the time when a wrong is threatened, but once the relevant act of providing financial assistance is complete, s 1324 is not available.

(C) Australian Securities Commission v Nomura International PLC, No NG 3045 of 1997, FED No 1570/98, Federal Court of Australia, Sackville J, 10 December 1998

The following brief summary was prepared by Sackville J.

Summary of Judgment

"The applicant ('ASIC') seeks declarations and injunctions against the respondent ('Nomura'). Nomura is a company incorporated in the United Kingdom. At the relevant times, it did not have any permanent presence in Australia.

The ASIC says that Nomura, by transactions carried out on its behalf on 29 March 1996 on the Australian Stock Exchange ('ASX') and the Sydney Futures Exchange ('SFE'), contravened the Corporations Law and the Trade Practices Act 1974 (Cth). In effect, ASIC says that Nomura manipulated the market for securities on the ASX, taking advantage of the opportunities provided by lower liquidity and trading volumes on the ASX compared with some overseas exchanges.

Nomura was a stock index arbitrageur. Towards the end of March 1996, it had established an arbitrage position in index futures traded on the SFE, known as SPI Contracts, and in securities traded on the ASX. Its holdings were very large. Nomura held 10,912 sold March 1996 SPI Contracts due to expire on 29 March 1996. It held a 'matching' basket of securities, as part of its arbitrage position, worth about A$600,000,000.

Nomura allowed the SPI Contracts to go to expiry on 29 March 1996. The expiry price of the SPI Contracts was determined by the level of the All Ordinaries Index ('All Ords') on that day. The understanding of Nomura's traders (which was not entirely accurate) was that the closing level of the All Ords was determined by the weighted average of the closing price of the 353 securities comprised within the All Ords.

Nomura adopted strategies which, according to it, were designed to capture the profit from the arbitrage position it had built up by 29 March 1996. The strategies adopted by it were complex. The two key strategies, however, were the 'March Sale Orders' and the 'Bid Basket'.

The March Sale Orders comprised instructions given by Nomura to ten separate brokers. These required the brokers to sell Nomura's basket of securities very aggressively near to the close of trading on 29 March 1996. The brokers were instructed, in substance, to sell without being concerned about the extent of any drop in price that extremely aggressive selling would produce. An important feature of the case is that many of the securities covered by the March Sale Orders were 'illiquids' - that is, they were thinly traded on the ASX. Accordingly, there was a very limited opportunity for 'latent demand' for these illiquids to emerge during the brief period of aggressive selling contemplated by Nomura.

The second key aspect of Nomura's strategy on 29 March 1996 was the placement of the Bid Basket. This consisted of buy orders for the same securities and in the same quantities as the March Sale Orders. However, the broker responsible for placing the Bid Basket was instructed to record bids at prices substantially below the last traded price of each security. In the case of the most illiquid securities, the bid price was 20 per cent less than the last recorded sales.

For a variety of reasons, most of the brokers entrusted with the March Sale Orders did not fully comply with their instructions. Even so, in the case of two securities, Nomura's aggressive selling at the close of trading on the ASX produced the result that it 'hit' its own Bid Basket. That is, in two cases brokers implementing the March Sale Orders 'hit' bids placed on Nomura's behalf in the Bid Basket. Since the Bid Basket recorded bids well below the previous sales, the effect was that Nomura 'bought' its own securities at depressed prices. The judgment finds that, had the brokers responsible for the March Sale Orders carried out their instructions fully, the Bid Basket would have been hit on many more occasions and Nomura would have completed many more self-trades.

Nomura's position was that, in implementing these and other strategies, it was merely acting as an index arbitrageur, legitimately endeavouring to realise profits from the unwinding of the arbitrage position it had established. Nomura accepted that it was a price-insensitive seller of securities. However, it contended that the sale of these securities in this manner was an inevitable consequence of unwinding the arbitrage position it had established.

The judgment finds that Nomura was not in fact a price-insensitive seller of securities on the ASX. Nomura wished to realise a profit from its arbitrage position. But the strategies devised on its behalf were intended to lower the price of securities included in the All Ords at the close of trading on 29 March 1996. In particular, Nomura intended that the combined effect of the Bid Basket and the March Sale Orders would be to lower the price of illiquids at the close of trading. It intended to bring this about, in part, by self-trades at depressed prices. The judgment finds that Nomura's motivation was to obtain 'speculative' profits from the expected fall in the price of securities and the consequential fall in the closing level of the All Ords and the expiry price of SPI Contracts.

In short, the judgment finds Nomura endeavoured to 'move the close' in its trading on the ASX. That it enjoyed limited success in its endeavours was due to failures of communications, the inability or unwillingness of brokers to implement instructions and a degree of ineptitude on Nomura's part.

The judgment reaches the following conclusions on the principal legal questions in the case:

(i) In two instances, by the combined operation of the March Sale Orders and the Bid Basket, Nomura both sold and purchased securities in a manner that involved no change of beneficial ownership. It thereby contravened s 998(1) of the Corporations Law. It also contravened s 998(3) of the Corporations Law.

(ii) Nomura, in placing the Bid Basket and giving instructions for the March Sale Orders, engaged in conduct intended to create a false and misleading appearance of active trading on the ASX in illiquid securities held by it on 29 March 1996. It also engaged in conduct intended to create a false or misleading appearance with respect to the price of the illiquid securities held by it on the same day. Nomura's conduct in this respect contravened s 998(1) of the Corporations Law.

(iii) In the alternative to (ii), Nomura engaged in conduct likely to create a false and misleading appearance of active trading on the ASX in illiquid securities held by it on 29 March 1996. For this reason, as well, it contravened s 998(1) of the Corporations Law.

(iv) Nomura intended to determine unilaterally the closing price on 29 March 1996 for some illiquids within the All Ords. It knew and intended that this would have an impact on the closing level of the All Ords and, consequently, the cash settlement price of SPI Contracts going to expiry on 29 March 1996. Nomura intended to create a false and misleading appearance with respect to the price for dealings in contracts in the futures market. It thereby contravened s 1260(1)(b) of the Corporations Law.

(v) Nomura's conduct in placing in the Bid Basket the March Sale Orders also contravened s 995(2) of the Corporations Law and s 52(1) of the Trade Practices Act.

(vi) Other strategies adopted by Nomura on 29 March 1996 also involved contraventions of s 995(2) and s 998(1) of the Corporations Law and s 52(1) of the Trade Practices Act.

The ASIC has been directed to draft declarations to give effect to the reasons for judgment. The parties will have an opportunity to make further submissions on what other orders, if any, should be made."

4. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Tania Cini, 'Litigation Funding Arrangements in Corporate Insolvencies' (1998) 6 Insolvency Law Journal 171

In the wake of Drummond J's decision in Re Movitor Pty Ltd, an alternative source of litigation funding has opened up for liquidators with a good cause of action but insufficient funds available to pursue it. In Movitor, the court sanctioned litigation funding arrangements between liquidators and insurers whereby an insurer agrees to pay the costs of an action brought by a liquidator in return for payment of a premium out of the proceeds of the litigation. If the action is unsuccessful, the insurer agrees to indemnify the liquidator for any liability arising from adverse costs orders. This article explores how the court overcame the rule against maintenance and champerty and gave judicial approval to such schemes. It examines the application of the reasoning in the Movitor decision to other forms of external administration. It also explores some of the legal issues which have arisen as a result of the introduction and implementation of these schemes, including the extent of a liquidator's duty to consider entry into such an arrangement, to seek approval of creditors and the court, to negotiate an appropriate premium and to be cognisant of restrictions regarding settlement of the insured action. Further, it considers the potential for conflict between the insured's duty of disclosure and the maintenance of legal professional privilege. Finally, issues relevant to other forms of litigation funding, namely creditor funding and solicitors' contingency fees, are explored.

(B) Barbara Mescher, 'Company Directors' Knowledge of the Insolvent Trading Provisions' (1998) 6 Insolvency Law Journal 186

Section 588G of the Corporations Law states that it is a duty of directors to prevent their company from trading when it is insolvent. Company directors now face heavy penalties if their company engages in insolvent trading. This article examines the law and evaluates responses to a survey sent to randomly selected directors of both proprietary and public listed companies. The results of the survey have implications for both company directors and insolvency law practitioners because very little empirical data is available in this area of the law.

(C) Andrew Hanak, 'The Wife's Special Equity Survives the High Court' (1998) 6 Insolvency Law Journal 202

The High Court's recent decision in Garcia v National Australia Bank confirmed the wife's special equity to set aside a transaction by approving the judgment of Dixon J in Yerkey v Jones. This article looks at the reasoning of the court in Garcia v National Australia Bank as well as the judgment of Dixon J in Yerkey v Jones to determine the full extent of the wife's special equity. It argues that the High Court's reasoning in Garcia came as a surprise to most commentators. Although the court had the opportunity to develop a doctrine of broad application with little adverse consequence, it failed to do so. Instead, the court's reasoning in Garcia has led to much uncertainty for all concerned and will, no doubt, give rise to further litigation.

(D) C S Symes, 'Do Not Dismiss the Employee as a Statutory Priority Creditor in Corporate Insolvency' (1998) 26 Australian Business Law Review 450

The Corporations Law provides for employees' wages and entitlements to be paid as a priority before the unsecured creditors. This article reviews the relevant past and present legislation and demonstrates numerous reasons why this priority should not be removed. While supporting the retention of s 556, there are minor reform issues to be debated and the article argues that the ceiling on excluded employees should rise, the definition of spouse should change to include de facto, and the Long Service Leave Funds should be included in the leave priority. No support is given to arguments that employee-like persons should be included in s 556 or that there be changes to the present inclusive, non-discriminatory approach to employees who gain from the priority.

(E) S M Wallman, 'Competition, Innovation, and Regulation in Securities Markets' (1998) 53 Business Lawyer 341

This article describes a variety of facts that encourage both command and control regulation and regulatory incrementalism. The author warns that 'incremental regulation fails when the underlying economics for competitive context, or the technology itself, move other than in slow incremental steps'. With the accelerating changes in technology, markets, and competition as well as significantly greater globalisation of the financial industry, the author asserts that a 'broader, bolder approach is not only desirable, but absolutely necessary'. He argues for 'gold-oriented regulation' in which regulators articulate broad standards and allow market participants - driven by competition - to determine how best to satisfy them.

(F) G Varallo, W M McErlean and R C Silverglied, 'From Kahn to Carlton: Recent Developments in Special Committee Practice' (1998) 53 Business Lawyer 397

Recent case law has contributed to a better understanding of practice with special committees assigned to negotiate corporate transactions and so-called special litigation committees as well. This developing case law has made clear that committees formed to negotiate corporate transactions should be rigorously independent and qualified in negotiation strategy so as to attempt to simulate arms-length bargaining. Likewise, a recent series of decisions in the special litigation committee area have elucidated the 'second step' of Delaware's Zapata test and answered a number of previously unanswered questions that arise in connection with such committees.

(G) R A Booth, 'Stockholders, Stakeholders, and Bagholders (Or How Investor Diversification Affects Fiduciary Duty)' (1998) 53 Business Lawyer 429

The most basic question in corporation law is: To whom does management owe its fiduciary duty, and what does that duty entail? The traditional wisdom is that management should serve the interests of the corporation and the stockholders who own it by maximising stockholder wealth. But a significant number of legal scholars argue that management duty should be more broadly construed to include other constituencies ('stakeholders'), such as employees, creditors, customers, suppliers, and the community at large. The distinction makes a difference. The broader view of management duty means that management has more discretion and that stockholders will seldom have recourse if management fails to maximise profits. Nevertheless, many states in the US have adopted so-called other constituency statutes permitting - and in some cases arguably requiring - management to consider such other interests. Ironically, management is the only constituency that identifies most with the fortunes of the corporation as an entity. A diversified shareholder can afford to win some and lose some. Management cannot. Management stands to lose the most if the corporation fails. Thus, management is not likely to pursue high risk-high return strategies, even in the absence of another constituency statute. After all, if such strategies lead to the ruin of the company, it is management that is left holding the bag.

(H) M S Harris and K L Valihura, 'Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service' (1998) 53 Business Lawyer 479

When outside counsel serves as a director of a corporation or other entity for which the lawyer also acts as legal counsel, many thorny issues may arise. Dual service may be difficult to refuse and difficult to perform. This article seeks to present a balanced view of the advantages and disadvantages of dual service by providing: (1) an overview of existing law and commentary both supporting and criticising dual service; (2) an analysis of the risks and benefits of such dual service; and (3) some practical suggestions for minimising risks and maximising benefits when dual service is undertaken.

(I) B Taylor, 'The Enforceability of Debt Securities Issued by Trustees in Securitisation Programs' (1998) 9 Journal of Banking and Finance Law and Practice 261

Securitisation is a form of financing involving the issue of debt securities intended to confer an interest in financial assets. Many Australian securitisation programs are structured so that investors hold debt securities issued by a public trustee company which acts as trustee for a large number of unrelated trusts. In this article, the author analyses the rights of investors under these arrangements and discusses whether they provide an adequate means of segregating assets for the benefit of investors. Issues reviewed include the efficacy of trustee limitation of liability clauses, the effect of the trustee's insolvency, the rights of subrogation of unsecured trust creditors and the priority to be accorded investors as beneficiaries of security over trust assets. The article concludes that there is a degree of uncertainty as to the protection afforded to investors under these arrangements, and that more effective segregation of scheme assets could be achieved if special purpose companies held scheme assets and issued securities.

(J) M Markovic, 'Banks and Shadow Directorships: Not an 'Almost Entirely Imaginary' Risk in Australia' (1998) 9 Journal of Banking and Finance Law and Practice 284

The threat to banks in the United Kingdom of being held to be a shadow director of a corporate client is considered 'almost entirely imaginary'. This article examines the risk of shadow directorships for Australian banks involved in a business workout or intensive care situation. The consequences of a bank falling within the definition of shadow director are far-reaching, as shadow directors are subject to the duty to prevent insolvent trading. Banks at risk of being held to be shadow directors may therefore present an extremely attractive target for liquidators.

(L) Peter Fitzsimons, 'New Zealand's Securities Regime: An Overview and Analysis of the New Package' (1998) 6 Asian Commercial Law Review 29

(M) J Black, 'Audacious But Not Successful? A Comparative Analysis of the Implementation of Insider Dealing Regulation in EU Member States' (1998) 2 Company, Financial and Insolvency Law Review 1.

(N) Special Issue on Securitisation in Asia, 1998 (October), Asia Law and Practice. Articles include:

- A Legal Overview of Securitisation in Asia   
- Securitisation in Hong Kong and The PRC   
- Securitisation in Japan   
- Securitisation in Korea   
- Securitisation in Thailand

(O) Special Issue on Harmonisation of Accounting Standards (1998) (November) 16 No 2 Australian Accounting Review. Articles include:

- An American View on the Accounting Aspects of the Corporate Law Economic Reform Program   
- Standard-Setting in Australia: Implications of Recent Reform Proposals   
- Harmonising with Overseas Accounting Standards: A New Zealand Perspective   
- Measuring the Degree of International Harmony in Selected Accounting Measurement Practices.

(P) D J Dorward, 'The Forum Non-Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs' (1998) 19 University of Pennsylvania Journal of International Economic Law 141

(Q) F A Gevurtz, 'An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil' (1997) 76 Oregon Law Review 853

(R) E Warren, 'The Bankruptcy Crisis' (1998) 73 Indiana Law Journal 1079

(S) N C Howson, 'China's Company Law: One Step Forward, Two Steps Back? A Modest Complaint' (1997) 11 Columbia Journal of Asian Law 127

(T) N McAlister, 'Management Buyouts: Issues Affecting Management and the Seller' (1998) 9 International Company & Commercial Law Review 248

(U) Victoria Younghusband, 'Corporate Governance in the United Kingdom' (1998) 9 International Company & Commercial Law Quarterly 275

(V) Julianne Doe, Alex H Hui and Carmen Leung, 'Corporate Governance in Hong Kong' (1998) 9 International Company & Commercial Law Quarterly 281

(W) Philip T N Koh, 'Principles, Practice and Prospects of Corporate Governance: The Malaysian Legal Framework' (1998) 9 International Company & Commercial Law Quarterly 291

(X) Laurence Gavin, 'Striking a Balance: Corporate Governance in Smaller Companies' (1998) 9 International Company & Commercial Law Quarterly 300

(Y) Sean B Hughes, 'Corporate Governance in the Sun: Reform to Corporate Governance in Australia' (1998) 9 International Company & Commercial Law Quarterly 307

(Z) Professor Erik Werlauff, 'Common European Company Law: Status 1998 (3) - Group, Company Structure, New Company Forms etc' (1998) 9 European Business Law Review 274

(AA) Stephen Tromans, 'Multinational Companies and Environmental Liability' (1998) 26 International Business Lawyer 441

(AB) B Singhof and O Seiler, 'Shareholder Participation in Corporate Decision-Making Under German Law: A Comparative Analysis' (1998) 24 Brooklyn Journal of International Law 493

(AC) J Lowry, 'Directorial Self-Dealing: Constructing a Regime of Accountability' (1997) 48 Northern Ireland Legal Quarterly 211

(AD) G Crandall, S J Starrett and D L Parker, 'Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights' (1998) 100 West Virginia Law Review 537

(AE) A Keay, 'The Avoidance of Pre-Liquidation Transactions: An Anglo-Australian Comparison' (1998) Journal of Business Law 515

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The University of Melbourne Faculty of Law offers a leading graduate program in corporate and commercial law.

In 1999 The University of Melbourne Faculty of Law will offer almost 50 subjects in areas such as Corporate and Securities Law; Banking and Finance Law; Insurance Law; Energy and Resources Law; Intellectual Property Law; Information Technology Law; Media Law and Taxation.

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- Members' Remedies

- Reconstructing Government Business Enterprises

- Securities for Corporate Lending

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6. NEW CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION PUBLICATIONS

(A) PAMELA F HANRAHAN, 'MANAGED INVESTMENTS LAW' (1998)

Managed investment schemes such as public unit trusts, agricultural schemes, serviced strata developments and other investment schemes represent a very substantial part of the Australian economy, with assets under management now totalling over $100 billion.

The law governing managed investment schemes was totally rewritten on 1 July 1998, with the commencement of the Managed Investments Act 1998. CCH and the Centre for Corporate Law and Securities Regulation at The University of Melbourne have now released the definitive Managed Investments Law, a comprehensive analysis of the new provisions by leading academic and practitioner Pamela Hanrahan.

Managed Investments Law provides expert commentary on the key legislative provisions and ASIC policy statements, covering:

- Scope of regulation   
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- Duties and liability of officers and compliance committee members   
- Members' rights   
- Role and powers of ASIC   
- Deregistration and termination

Pamela Hanrahan is Senior Lecturer in Law at The University of Melbourne, where she teaches Managed Investments Law as part of the Law School's graduate program. She was an active participant in the law reform process leading to the enactment of the Managed Investments Act and is a frequent keynote speaker on the legislation. She is also Special Counsel with Arthur Robinson & Hedderwicks, where she maintains an advisory practice in managed investments law.

Cost: $65 - For a book order form please contact Ms Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Law School, Baldwin Spencer Building, The University of Melbourne, Parkville, Vic 3052, telephone 61 3 9344 5281, fax 61 3 9344 5285, email "cclsr@law.unimelb.edu.au".

(B) PROFESSOR IAN RAMSAY AND DR GEOF STAPLEDON, 'CORPORATE GROUPS IN AUSTRALIA' (1998)

The recent Australian waterfront dispute highlighted the significance of the corporate group. A key aspect of the dispute was the restructuring of the Patrick group of companies. In one of the judgments resulting from the waterfront dispute, Justice North of the Federal Court stated that the change in the Patrick group structure made it easier to dismiss its workforce. The general issue of use of corporate structures to avoid employee and creditor rights has recently been referred to the Parliamentary Joint Committee on Corporations and Securities.

This Research Report presents the results of an empirical study of the group structures in Australia's Top 500 listed companies in 1997. It includes findings on the incidence of subsidiaries across the Top 500 companies, and the size and industry groups of those listed companies with subsidiaries. It also provides a breakdown according to whether the subsidiaries were wholly or partly owned, and the country of origin of the subsidiaries.

The Report also gives an overview of the regulatory approaches that have been adopted in Australia in relation to corporate groups. These approaches include:

- statutory prohibition of certain cross shareholdings in corporate groups;

- lifting of the corporate veil by courts;

- imposition of statutory directors' duties on 'shadow directors';

- recognition by the courts of the possibility of a parent company being vicariously liable for wrongs committed by its nominee directors on a subsidiary company's board;

- acknowledgment by the courts and Parliament of the need for a degree of flexibility in the content of directors' duties in a group context;

- use of the oppression provision to remedy abuses in corporate groups;

- increased statutory regulation of financial benefits flowing from public companies to their related parties (including other companies in the corporate group);

- encouragement by the regulator of the use of cross-guarantees; and

- introduction of specific laws dealing with insolvent trading in corporate groups.

The Research Report is of relevance to those in the business sector and their advisers (legal, financial, management and accounting) as well as to regulators and academics.

Cost: $44 - For a book order form please contact Ms Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Law School, Baldwin Spencer Building, The University of Melbourne, Parkville, Vic 3052, telephone 61 3 9344 5281, fax 61 3 9344 5285, email "cclsr@law.unimelb.edu.au".

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