**CORPORATE LAW ELECTRONIC BULLETIN  
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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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 1. CENTRE FOR CORPORATE LAW CLERP SEMINARS

(A) CLERP and Takeovers

Date: Thursday 9 March 2000

Time: 5.30-7.00 pm

Venue: Mallesons Stephen Jaques, Level 28 Conference Room, 525 Collins Street, Melbourne, Vic 3000

Speakers:

Rodd Levy, Partner, Freehill Hollingdale & Page; Alison Lansley, Partner, Mallesons Stephen Jaques; Richard Cockburn, National Coordinator, Fundraising and Mergers and Acquisitions, Australian Securities and Investments Commission; Simon McKeon, Executive Director, Macquarie Bank, President, Corporations and Securities Panel.

Please see Item 7 of this Bulletin for further details.  
  
  
(B) CLERP and Fundraising

Date: Thursday 30 March 2000

Time: 5.30-7.00 pm

Venue: Arthur Robinson & Hedderwicks, Level 34 Conference Room, 530 Collins Street, Melbourne Vic 3000

Speakers:

Jon Webster, Partner, Arthur Robinson & Hedderwicks; Michael Ziegelaar, Partner, Freehill Hollingdale & Page; Deborah Hambleton, National Listings Counsel, Australian Stock Exchange; John Price, Principal Lawyer, Regulatory Policy Branch, Australian Securities and Investments Commission.

Please see Item 7 of this Bulletin for further details.

2. RECENT CORPORATE LAW DEVELOPMENTS

(A) CLERP 6 DRAFT LEGISLATION RELEASED

On 11 February 2000 the Minister for Financial Services & Regulation, the Hon Joe Hockey, released the draft Financial Services Reform Bill.

The draft legislation puts into effect proposals contained in the Government’s Corporate Law Economic Reform Program 6 (CLERP 6) consultation paper ‘Financial Products, Service Providers and Markets - An Integrated Framework’, released in March 1999, and will implement a number of recommendations of the Financial System Inquiry.

Key aspects of the draft legislation are:

- uniform regulation of all financial products (which are defined to include securities, interests in registered managed investment schemes, derivatives, life and general insurance products, superannuation products, retirement savings accounts and deposit accounts. Excluded are health insurance, interests in unregistered managed investment schemes and all credit products);

- a single licensing framework for financial service providers to replace the differing requirements currently imposed on securities dealers, investment advisers, operators of managed investment schemes, futures advisers and brokers, general and life insurance brokers and foreign exchange dealers;

- minimum standards of conduct for financial service providers dealing with retail clients;

- uniform disclosure obligations for all financial products provided to retail clients including the provision of a Financial Services Guide to retail clients on first contact, a Statement of Advice detailing any potential benefit which might influence an adviser’s advice and a Product Disclosure Statement (ie point of sale document);

- flexibility for authorisation of market operators and clearing and settlement facilities.

Comments on the draft provisions should be sent to the Treasury by 12 May 2000.

The draft legislation is available on: "<http://www.joehockey.com>" and the AusInfo Bookshops.

(B) SHARE OWNERSHIP SURVEY

On 8 February 2000 the Australian Stock Exchange announced that the Share Ownership 2000 survey revealed total share ownership in Australia has increased from 40.3 per cent of the adult population to 53.7 per cent.

The survey shows that an estimated 2.1 million Australians have entered the sharemarket directly or indirectly since the October 1998 survey. Approximately 7.6 million Australians now own shares themselves, or through a managed fund or personal superannuation.

Australia now ranks first among similar economies worldwide in terms of the proportion of the population who own shares.

Since the last survey, the biggest increase has been in the number of Australians with a direct ownership of shares. An estimated 40.6 per cent of the adult population - representing 5.7 million Australians - now own equities themselves.

Since October 1998, an estimated 1.3 million Australians have become shareholders for the first time. This increase continued the trend that has seen 2.9 million Australians - a fifth of the adult population - directly enter the sharemarket since 1997.

Several factors have contributed to the large number of new entrants to the sharemarket since the last survey, increased access to information about the market being a major contributor. Another was the high number of floats on the market (142 new listings in 1999), and the Telstra 2 IPO. An estimated 1.8 million Australians participated in the T2 float, including 321,000 who bought shares for the first time.

The increase in shareholders can be seen across the board. While more men than women continue to own shares directly (45 per cent to 36 per cent), the increase since the last survey has been similar in both groups. Direct share ownership among both men and women has doubled since 1997.

This breadth is also reflected across age groups. Less than three years ago those aged 55-or-over were the predominant category of direct share ownership. They have been replaced by those aged 35-54. There are now 1.5 million Australians aged 18-34 who directly own shares, approximately the same number as those aged 55-or-over.

The increase in share ownership is also reflected across geographic boundaries. There is a very similar proportion of direct shareholders across all states, all of them reflecting the upward trend since the 1998 survey.

More significantly, there has been a similar increase in direct share ownership in both the metropolitan and regional areas, at 42 per cent and 39 per cent respectively. This reflects not only the nationwide breadth of interest in the market, but also the greater ease of access to information about shares, and to the sharemarket itself, through the Internet and other avenues.

Shares are now seen as an important component of a balanced investment portfolio, representing the third most popular form of investment (after superannuation and cash). They account on average for 13 per cent of all funds invested by Australians.

Not only has the profile of share owners changed significantly in the past year, but so has the level of their investment. Since 1998 there has been greater diversification, with the average number of companies held in a portfolio increasing from three to six. However, many investors still hold a small range of shares. An estimated 62 per cent of direct share owners hold three stocks or less in their portfolio.

A large proportion have also entered the sharemarket with relatively small amounts. An estimated 42 per cent have a portfolio valued at $10,000 or less.

While increasingly likely to own shares, Australians are still relatively passive investors. More than one third (36 per cent) of shareholders have not bought or sold shares in the past 12 months, and 29 per cent traded on the sharemarket only once. However, since the last survey the average number of trades has doubled - from less than one a year to 1.8 trades a year.

(C) NATIONAL SCHEME TO PROTECT EMPLOYEE ENTITLEMENTS

On 8 February 2000 the Minister for Employment, Workplace Relations and Small Business announced the establishment of the national Employee Entitlement Support Scheme.

The scheme will be established on an interim administrative basis in the first instance and backdated to cover employees dismissed through their employer’s insolvency since January 1, 2000.

Outstanding employee entitlements will be paid out of a fund established for the purpose.

Under the safety net, employees will be entitled to a maximum of 29 weeks pay at ordinary time rates for unpaid entitlements made up as follows:

- up to 4 weeks unpaid wages;

- up to 4 weeks annual leave accrued in the last year;

- up to 5 weeks pay in lieu of notice;

- up to 4 weeks redundancy pay;

- up to 12 weeks long service leave.

The maximum rate of payment for each week’s entitlements will be the rate corresponding to an annual wage of $40,000. There will be a $20,000 cap on the amount any individual may receive from the fund.

The Employee Entitlements Support Scheme generally reflects community standards set by a combination of federal and state legislation and awards.

The former employees of National Textiles will be the first recipients of the Employee Entitlements Support Scheme.

The National Textiles employees will get their full entitlements for wages, annual leave, long service leave, pay in lieu of notice and redundancy as part of a special package recognising, according to the Government, the current conditions of the textile industry and National Textiles’ location in a disadvantaged regional area.

This is subject to the adoption of the Deed of Company arrangement and the cooperation of the administrator of National Textiles and Bruck Textiles and the continued cooperation of the NSW Government.

The Commonwealth intends that the Employee Entitlements Support Scheme will be funded jointly by the Commonwealth and participating States and Territories on a fifty-fifty basis. In the event that a State or Territory does not wish to participate, the Commonwealth will nevertheless contribute 50% of the benefits of the Scheme for employees working in that State or Territory.

It is estimated that the EESS fund will cost $100 million.

In recognition of the primary responsibility that employers have to meet their employees’ entitlements the Government will also change the Corporations Law to:

- Introduce a new offence which would penalise any person who enters an arrangement or transaction for the purpose of, or for purposes including, avoiding payment of employee entitlements;

- Strengthen the existing insolvent trading and related party provisions of the Corporations Law, so that directors would be in breach of these provisions if they give a financial benefit to a related party, or enter into an uncommercial transaction, causing the company to become insolvent; and,

- Allow a court to order payment of some or all of an insolvent company's outstanding employee entitlements by any person that the court is satisfied has been involved in transactions or arrangements for the purpose of avoiding payment of the employee entitlements concerned.

These amendments to the Corporations Law were introduced into Parliament on 17 February.

The Scheme is being established on an interim administrative basis so that the Government can continue to actively consider a compulsory insurance scheme, noting however the precondition that small business are exempt from any additional cost. The Government is consulting with State Governments, the insurance industry and others on the prospects of an insurance scheme. A final decision on this matter will be made in due course.

(D) RELEASE OF CLERP 7 PAPER – STREAMLINING PAPERWORK UNDER THE CORPORATIONS LAW

On 3 February 2000, the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, released Corporate Law Economic Reform Paper No 7 titled "Simplified Lodgments and Compliance: Streamlining Paperwork Under the Corporations Law".

PART 1: REFORM PROPOSALS

PROPOSAL NO. 1: ABOLITION OF COMPANY ANNUAL RETURNS

(1) Companies would no longer be required to lodge an annual return with ASIC.

(2) However, companies would still be required to notify ASIC of any changes in company particulars as they occur.

(3) All companies would be subject to an Annual Fee, payable on the anniversary of the company’s registration (or an alternative date nominated by the company and agreed by ASIC).

(4) An Extract of Particulars would be sent to the company by ASIC with an Annual Fee invoice. Unless ASIC is advised otherwise, payment of the Annual Fee would be taken as confirmation of details about the company shown in the Extract of Particulars.

(5) ASIC would have discretion to require a company to lodge a Return of Particulars to confirm information kept on the Register of Companies.

(6) If a company fails to pay its Annual Fee by the due date, it would incur a late payment fee and may be required to lodge a Return of Particulars.

PROPOSAL NO. 2: STREAMLINING DOCUMENT LODGMENT REQUIREMENTS

(1) Several existing forms used for notifying changes in particulars would be replaced by a single Multi Purpose Form.

(2) The existing facilities for electronic notification of corrections and changes to company particulars will be enhanced.

(3) The Corporations Law would be amended to facilitate, and encourage, the electronic lodgment of documents.

PROPOSAL NO. 3: CREATION OF BUSINESS ADVISORY BOARD

(1) To ensure direct input from business on changes affecting them, a Business Advisory Board would be established to advise ASIC.

(2) The Advisory Board would be appointed and chaired by ASIC, with members drawn mainly from the business community and professional organisations.

PROPOSAL NO. 4: OVERHAUL OF CORPORATIONS LAW FEES

(1) An Annual Fee for companies would be introduced in conjunction with the abolition of the requirement to lodge annual returns, replacing the existing annual return fee.

- The Annual Fee for proprietary companies would be set at $200 (the amount of the present annual return fee) and be capped at that level for three years.

- Public companies that operate solely as strata title companies would be brought within the definition of ‘special purpose companies’.

(2) Occupational licence holders would pay an Annual Fee rather than a fee for each document lodged with ASIC.

- Fees for licence holders would be calculated on a sliding scale according to the number of representatives the licence holder has.

(3) Fees for prospectuses would be changed to a differential scale according to the type of disclosure document - $1,800 for an offer information statement and profile statement and $4,000 for a short-form or full-disclosure prospectus.

(4) The existing flat-rate fee structure for lodging takeover documents would be retained, but the amount of the fee would be set at $4,000.

(5) Fees for occupational licence holders, fundraising and takeover activities would continue to be monitored with a view to ensuring that they are progressively increased to a level that fully covers regulatory costs.

(6) The existing late fee regime, which depends on whether documents are lodged more or less than one month late, would be retained. The late fee regime would also apply to late payment of annual fees.

(7) The schedule of fees payable by companies would be simplified, with the number of items reduced from 51 to about 30.

(8) The fees to apply in 2001-02 and later years would be based on the fees proposed to apply from 1 July 2000 with an appropriate adjustment to reflect movements in the Consumer Price Index (except that the Annual Fee for proprietary companies would be capped at $200 until 30 June 2003).

3. RECENT ASIC DEVELOPMENTS

(A) ASIC INDICATES REASONS WHY PROSPECTUSES DEFECTIVE

On 27 February 2000, the Australian Securities and Investments Commission (ASIC) revealed the issues that caused it to refuse registration of prospectuses or take enforcement action on prospectuses during the past 12 months.

ASIC registered 828 prospectuses in the 1999 calendar year and declined to register 93 others because of defects. The number of defective prospectuses are even higher because that figure does not take account of prospectuses that were withdrawn before being refused registration or are the subject of enforcement action after registration.

The Commission has not only outlined issues it found in previous prospectuses, it has also recommended the disclosure details it believes will address the new legislative requirements in the CLERP Act that will commence on 13 March 2000. These may also help people involved in advertising the prospectus or securities.

(1) Benchmarking

Where the stated investment strategy of a fund is to give investors a return which tracks, or betters, a relevant industry benchmark the prospectus should contain a comparison of the fund returns against that benchmark. This helps investors determine how well the fund achieves its stated objectives.

The gross performance of the fund (returns before deduction of management fees and expenses) is not an appropriate measure if the fund is promoted on the basis that its net returns will exceed the benchmark In these cases the net returns on the fund should be the figures compared with the industry benchmark.

As a guide, when the history of fund returns are quoted, the movements in the benchmark should also be quoted. Selective quotation may be misleading if it does not give a fair representation of the comparative performance.

(2) Quoted Rates of Return

Many prospectuses or prospectus advertisements quote rates of return. The use of these rates can mislead investors because they don’t use consistent terminology or the description of the assumptions or calculation method for the return rate are not clear.

Differing terminology or assumptions, particularly in projected returns, can make comparisons of competing investments very difficult. The situation is more pronounced in investments which have long lead times or where the profits are not expected for some years, such as in agricultural schemes.

There are two common rates used at present. Average Return on Investment (ARI) and Internal Rate of Return (IRR). ARI is calculated by dividing net cash flows over the investment period by the initial cash outlay and averaging the result by the period of the scheme in years. IRR is calculated by discounting cash flows to their present value based on the timing of their receipt.

The two methods produce different results. In the case of a scheme with an initial capital outlay of $20,000 and total net income of $100,000 over 20 years, the AR1 is likely to be 25% and dependant upon the timing of the cash flows in that 20 year period the IRR could be as low as 12%.

The Commission recommends issuers use the IRR method as an IRR, unlike an ARI, does not take into account the time value of money. Future returns are usually worth less in today’s money. In circumstances where an ARI is used and it differs materially from what the IRR is, the ARI is likely to be misleading.

(3) Experts Reports

Experts reports provide a useful commentary on aspects of the investment decision particularly the valuation of important assets in the float or scheme. However these are subjective assessments by a qualified person and critically depend upon the assumptions and the quality of the information they are built on.

The Commission believes an expert’s report should contain additional detail which will enable an investor to make a decision about whether they should accept or modify the underlying assumptions and the conclusion of the expert.

Where alternative valuation methods are available the expert should give some indication of why a particular method was chosen and, where an alternative method would produce a materially different result, what that difference would have been.

Where an expert relies on information provided by third parties they should indicate if they have any reservations about accepting that information as accurate because they will often be in the best position to decide if the information warrants further inquiry.

The Commission expects to see at least a negative assurance ( that they have no reason to doubt the accuracy of the information) from experts in such situations.

(4) Projected Returns

The assumptions underlying profit forecasts or projections should be detailed and specific enough to enable a reader to work through the forecasts or projections on a year by year basis. Many prospectuses don’t provide enough detail for this. Matters such as the inflation rate or other variable assumptions should be clearly disclosed, and highlighted where they are changed during the projection example.

(5) Risk

Where the prospectus relates to a venture which has investments in particular asset classes the risks associated with that asset class are usually fairly well described.

However the documents tend not to address the specific risks associated with the investment strategies that the company proposes to adopt within that investment class.

Greater disclosure of the risks specific to the proposed investment strategy should be provided. For example, a managed investment scheme investing in shares would disclose both the asset class risk (volatility of share prices), as well as the risks associated with their particular investment plans of taking positions in "emerging Industries", as these will have some characteristics different from the general asset class.

(6) Other Issues

Other frequent defects uncovered by ASIC in the registration process have included:

- incomplete disclosure of the taxation implications of the investments, particularly in tax driven schemes; and

- failure to address specific content requirements under the Corporations Law such as experts consents, disclosure of amounts paid to experts and directors or matters relating to proposed listing on the Australian Stock Exchange.

(B) CLERP FUNDRAISING POLICIES

On 17 February 2000 ASIC issued eight new policy statements to assist industry and consumers deal with the fundraising aspects of the Corporate Law Economic Reform Program (CLERP) Act 1999.

The policy statements set out how ASIC will approach the administration of the new fundraising provisions which are expected to commence on 13 March 2000.

The new policy statements are:

PS 151 Fundraising: Discretionary powers

PS 152 Lodgment of disclosure documents

PS 153 Profile statements

PS 154 Certificate by a qualified accountant

PS 155 Debenture prospectuses

PS 156 Transitional relief for excluded corporations issuing debentures

PS 157 Financial reports for offer information statements

PS 158 Advertising and publicity for offers of securities

Copies of the policy statements and the class orders giving effect to new policies arising out of the CLERP Act changes are available on the Policy and Practice page of the ASIC homepage at "<http://www.asic.gov.au>".

CLERP fundraising policy statements

Set out below is a summary of the main elements of ASIC’s policy statements on administering the fundraising provisions of the Corporations Law (Law) following the commencement of Schedule 1 of the Corporate Law Economic Reform Program Act 1999 (CLERP Act) which is expect to take place on 13 March 2000.

(1) PS 151 Fundraising: Discretionary powers

This policy sets out which of ASIC’s policy statements, practice notes, class orders and pro formas on fundraising matters that applied prior to 13 March 2000 will continue to apply after that date. The approach that has been taken is to continue to apply existing policy unless legislative changes brought about by the CLERP Act necessitate a different approach. Given that the CLERP Act preserves much of the policy of the present fundraising provisions, a significant amount of existing policy is to continue.

ASIC’s existing approach to giving exemptions from and modifications to the fundraising provisions prior to 13 March will continue under the new provisions (see Policy Statement 51 Applications for relief).

All the policies that applied before 13 March will continue to apply to prospectuses lodged before that date and to the consequent offers, issues and transfers of securities. The class orders and individual instruments that were in force before 13 March continue to have effect in relation to those prospectuses, offers, issues and transfers.

(2) PS 152 Lodgment of disclosure documents

The purpose of the 7 to 14 day period after the lodgment of a disclosure document for non quoted securities during which the offeror is not able to accept applications (the exposure period) is to enable market participants and ASIC to examine the document and take any necessary action if it is deficient. An offeror is expected to make its disclosure document generally available during the exposure period. This would usually involve putting the document on a web site and offering to make it available on request in paper form.

ASIC will exempt a profile statement from the exposure period where its material content has already been subject to an exposure period in the associated prospectus or another profile statement.

ASIC will extend the exposure period from 7 to 14 days when the document has not been made generally available. The period will also be extended when apparent deficiencies in the document are detected in the first 7 days or when the offeror requests an extension.

ASIC is unable to allocate resources to pre-vet disclosure documents prior to lodgment, other than in the most exceptional circumstances. Disclosure documents will be reviewed on a selective basis after lodgment both during and after any exposure period. Where apparent deficiencies are detected, ASIC will work with the offeror to resolve them.

The prohibition against accepting applications during the exposure period has the effect that an offeror must not do anything to confer a preference on any applications that are received during that period.

Such applications must not be treated any more favourably than applications received on the first day after the exposure period.

(3) PS 153 Profile statements

ASIC has approved the use of profile statements for offers of interests in unlisted registered managed investment schemes formed to carry on portfolio investment activities.

In addition to including the information required by the Law, ASIC will require profile statements to include some additional details about how the scheme will generate returns; how to invest and withdraw; and information in a standardised form about risks, returns and fees and charges. These content requirements are aimed at ensuring that profile statements contain all the key information about the investment and enabling investors to make comparisons between products. Beyond those minimum requirements issuers are free to decide what information should be included and how it should be set out.

(4) PS 154 Certificate by a qualified accountant

After 13 March, investors certified by a "qualified accountant" as having a certain level of income and assets may receive offers of securities without a disclosure document. ASIC has approved accountants who are entitled to use the post nominals "CPA", "FCPA", "CA", "ACA", "FCA", "MNIA" or "FNIA" as "qualified accountants" provide they comply with the professional education requirements of the relevant professional body.

(5) PS 155 Debenture prospectuses

ASIC has provided relief to enable continuous issuers of debentures (eg finance companies) to update interest rate and term information for the securities being offered by the use of loose leaf application forms that are substituted from time to time and by other means.

(6) PS 156 Transitional relief for excluded corporations issuing debentures

The CLERP Act will remove exclusions from the fundraising and debenture provisions of the Law enjoyed by certain pastoral companies and subsidiaries of pastoral companies, life insurance companies and Australian authorised deposit taking institutions (ADI’s). ASIC has provided transitional relief for two years during which those companies have the opportunity to seek authorisation as an ADI or make preparations to comply with fundraising and debenture provisions.

(7) PS 157 Financial reports for offer information statements

The CLERP Act introduces the offer information statement (OIS) as a means of facilitating fundraising by small and medium size enterprises. An OIS must include a financial report covering 12 months that is prepared in accordance with Chapter 2M of the Law and the accounting standards. ASIC has provided relief to take account of the fact that financial reports may be for periods slightly longer or shorter than 12 months; and the possible difficulties in complying with the requirement in the accounting standards to provide comparative information where a report is for a period that is not a financial year.

(8) PS 158 Advertising and publicity for offers of securities

ASIC will continue to provide relief to allow "road show" presentations and market research to be carried out before a disclosure document is lodged for the offer of securities.

Revised versions of existing class orders giving effect to continuing policies as outlined in PS 151 will be issued progressively, prior to the commencement of the CLERP Act. They will also be available on the ASIC homepage.

(C) CLERP ACT TRANSITION

On 17 February 2000 ASIC advised it will help market participants in dealing with transitional issues arising from the fundraising and takeover provisions of the Corporate Law Economic Program (CLERP) Act 1999.

Those provisions are expected to come into force on 13 March 2000.

(1) Status of current ASIC policies

In a separate announcement, ASIC released its new policy statements on how it will administer the fundraising provisions to be introduced by the CLERP Act: (see PS 151 Fundraising: Discretionary powers, indicates among other things which of ASIC’s pre-13 March policies on fundraising will continue).

The bulk of ASIC’s existing policies fall into this category as the changes to be introduced by the CLERP Act have generally not altered the rationale for the policy. In some other cases, existing policies are treated as superseded because the substance of the policy has been incorporated into the legislation.

An announcement regarding the status of ASIC’s existing policies on takeovers is expected to be made shortly. As with fundraising, the approach that will be taken will be, as far as possible, to continue to apply existing policy.

(2) Status of current ASIC relief

Many of ASIC’s existing takeover and fundraising policies are presently implemented through the granting of exemptions from, or modifications to, the Corporations Law (Law) under various discretionary powers. This is done both through class orders and through individual instruments of relief.

ASIC will have similar powers to exempt from or make modifications to the fundraising and takeovers provisions after the commencement of the CLERP Act.

The transitional provisions in that Act have the effect that the Law prior to 13 March (old Law) continues to apply to takeover and fundraising transactions that commenced before 13 March (where a Part A Statement, prospectus or secondary sale notice has been lodged or a takeover announcement made before that date). Accordingly, any relief that applied before that date, whether it is under a class order on under an individual instrument, will continue to apply to that transaction in accordance with its tenor.

The CLERP Act does not otherwise preserve the effect of class orders and individual instruments issued before 13 March under the existing general exemption and modification powers. ASIC is proceeding to address this as follows.

(3) Class orders

ASIC is currently redrafting its existing fundraising and takeover class orders where this relief is necessary to give effect to continuing policy as discussed above. These Class Orders will be reissued progressively before commencement.

(4) Individual instruments

Some individual relief which is intended to be of an ongoing nature will cease to have effect from 13 March. This is relief that does not apply to a Part A Statement, a prospectus or a secondary sale notice that has been lodged or a takeover announcement that has been made before 13 March. Examples of relief of this kind include:

- in relation to takeovers - ongoing relief which disregards relevant interests and entitlements in certain circumstances or for a certain company;

- in relation to fundraising - relief from the requirement to lodge a prospectus or secondary sale notice.

In some cases, there will be no consequences from the instrument ceasing to have effect as the Law will be amended by the CLERP Act in a way that incorporates the effect of the instruments or otherwise makes the instrument unnecessary. Examples of this kind include:

- in the area of takeovers - relief disregarding relevant interests and entitlements which arise as a result of pre-emptive rights; and

- in the area of fundraising - relief from the requirement to issue a secondary sales notice by a person who is not a controller of the body that issued the securities.

ASIC invites market participants to contact ASIC to discuss whether any particular individual instrument granting current relief in fundraising or takeovers needs to be reissued under the new provisions.

ASIC has the power to give relief under the new CLERP provisions prior to their commencement.

(D) ASIC PROMOTES FULLY ONLINE SECURITIES OFFERS

On 15 February 2000 ASIC issued Policy Statement 150 "electronic applications and dealer personalised applications" which follows a Policy Proposal Paper issued for public discussion in September last year.

The Policy Proposal Paper canvassed the regulatory issues of allowing issuers of securities to do business fully electronically, including receiving electronic applications for securities.

ASIC has granted relief from the Corporations Law so issuers can receive electronic applications for securities, without using electronic copies of the paper application forms that are lodged with the paper prospectus.

A key condition of the relief is that an investor must be given access to the relevant prospectus when they apply for the securities and the same information as an investor using a paper application form.

Issuers will be able to make effective use of electronic technology when designing their electronic application processes, as long as they comply with the conditions of the relief and do not engage in misleading or deceptive conduct.

ASIC has also given relief to allow licensed dealers to personalise and issue application forms for securities, created by themselves or by issuers. A dealer created form can be different from the application forms provided by issuers with their prospectuses.

The dealer must give clients a copy of the relevant prospectus and a dealer’s personalised form must contain all the information in the issuer’s application form that is material to a decision to invest in the securities.

The ASIC relief relates to applications for securities regulated by the Corporations Law before and after the commencement of the Corporate Law Economic Reform Program Act 1999 (CLERP Act) which commences on 13 March 2000.

Copies of Policy Statement 150 can be obtained from the Policy and Practice page of the ASIC homepage at "<http://www.asic.gov.au>".

(E) CLERP UPDATE – NEW RULES FOR LISTED MANAGED INVESTMENTS

On 7 February 2000 ASIC announced that listed managed investment schemes will be subject to the takeover provisions of the Corporations Law when amendments made by the Corporations Law Economic Reform Act commence operation on 13 March 2000.

Acquisitions of voting power attached to units in listed trusts which constitute between 20 and 90 per cent of the voting in the trust will be regulated by the Corporations Law. The regulation aims to ensure that unit holders are treated equally and that any change in control of the listed scheme takes place in an informed and efficient market.

Disputes concerning bids for managed investment schemes will fall under the jurisdiction of the Corporations and Securities Panel. The Panel will also resolve disputes concerning takeovers of companies and is expected to provide a quick and commercial forum for resolving disputes.

(1) Substantial security holder notification

Persons holding five per cent or more of the units in a listed managed investment scheme must lodge a notice with the responsible entity and the Australian Stock Exchange within two business days of commencement of the amendments. Any change either up or down in their holdings of one per cent or more must also be advised.

Where the responsible entity itself is involved in purchasing units in the scheme, it must monitor its own holdings and comply with the notification procedures. This may require revision of the compliance plan to ensure there are procedures for compliance with the new obligations.

(2) Beneficial Ownership Tracing

ASIC and responsible entities will also have the power to issue notices to unit holders to trace beneficial ownership of units in listed schemes. Unit holders who receive such notices are required to respond within two business days. The response must include the details of each person who has a beneficial interest in the units which are registered in their name or gives instructions on voting the units.

(3) Takeover Provisions

Managed investment schemes which have provisions in their constitution governing the terms and conditions under which takeovers can be made for units in the scheme should review those in light of the amendments to ensure that they do not conflict with the Corporations Law.

As mangers of potential takeover targets, responsible entities need to be aware of their duty to prepare target statements to inform their unit holders in the event of a takeover being launched for the scheme.

People who hold more than 20 per cent of the units in listed managed investment schemes need to be aware that they have a deemed relevant interest in the securities held in the scheme. These interests must be counted together with their own securities to determine compliance with section 606 of the amended Law.

(4) Compulsory acquisition

Where a unit holder achieves ownership of more than 90 per cent of a class of units they will be entitled to compulsory acquire the remaining units in that class. The legislation provides safeguards to ensure that the price offered is fair and there are also appeal mechanisms to state Supreme Courts.

(F) ASIC LAUNCHES NATIONAL CONTINUOUS DISCLOSURE SURVEILLANCE PROGRAM

On 1 February 2000 ASIC and the Australian Stock Exchange launched a new continuous disclosure surveillance program through which directors of listed companies in market sectors with high trading volatility will come under close scrutiny. The program will involve ASIC selectively reviewing responses by directors of these companies to ASX price query letters.

ASX’s continuous disclosure rule requires listed companies to disclose immediately any information that could reasonably be expected to affect the company’s share price. A breach of ASX’s continuous disclosure requirement may amount to a breach of the Corporations Law. There are limited exceptions to this continuous disclosure rule, each of which requires that a reasonable person would not expect the information to be disclosed and for the information to be kept confidential.

ASX issues a price query to companies when it detects unexplained movements in the price or volume of shares traded, seeking an assurance that the market is fully informed of all relevant and necessary information. In many cases, the company’s response is a short reply to the effect that the company is not aware of any reason for the price and volume movement. ASX and ASIC believe a pattern is emerging where the unexplained price and volume movements continue for a fortnight or so, only to be brought to an end by the release of information to the market by the company.

The national surveillance program is a collaborative project between ASX and ASIC as a result of both organisations looking for more effective ways to minimise unexplained price and volume movements and ensure compliance with continuous disclosure requirements. Initially, the program will involve ASIC sending out an audit letter asking the directors of the company to explain in detail the basis for the company’s response to ASX. The audit letter will also request information from company directors about the extent of trading by people connected with the company during the period of the unexplained price and volume movement.

If ASIC still has concerns after receiving the response to the audit letter, then it will carry out a surveillance of the company. The results of ASIC’s audit letters and surveillance action will be released to ASX to assist it to determine whether the company should be suspended from trading pending release of further information. If ASIC’s surveillance reveals that the company has breached its continuous disclosure obligations or misled the market, ASX or ASIC, then enforcement action is likely.

There may be cases in which a legitimate difference of opinion between ASIC and a company on the application of the exceptions to the continuous disclosure rule would be referred to the courts.

Because the surveillance program will target companies in market sectors with high trading volatility, it will inevitably focus on small mining and high technology companies. With many of the companies which currently fit this profile having their home exchanges in Perth and Brisbane, the surveillance program will be centred in those two regions, with smaller scale programs in other regions.

The surveillance program will last six months at the end of which ASIC and ASX will review its effectiveness and report on its outcomes.

4. RECENT ASX DEVELOPMENTS

(A) ASX BUSINESS RULES AMENDMENTS

Amendments to the ASX Business Rules first proposed in the ASX Discussion Paper in April 1999 came into effect in early February. The amendments include a number of technical amendments which follow from changes to the Corporations Law together with the following substantive amendments:

(1) amendments to rule 13.5.1 which increases the maximum monetary fine that may be imposed for a breach of the Rules or Prohibited Conduct by an Affiliate or a Participating Organisation. This amendment is effective from 7 February 2000.

(2) amendments to the Crossing rules during normal trading to facilitate Automated Order Processing and in particular Automated Client Order Processing (Rules 2.7, 3.1 and 3.3). These amendment are effective from 14 February 2000; and

(3) amendments to the client order precedent rules to allow greater flexibility to the management of conflicts of interest between a Broker and its clients, and as between clients of the Broker (Rules 5.8(4)&(7)). These amendments are effective from 14 February 2000.

ASX also issued a number of ASX Business Rule guidance notes on 1 February 2000. The guidance notes provide:

(1) assistance to Participating Organisations on the interpretation of amendments to the ASX Business Rules about:

- crossings during normal trading which accommodate Automated Order Processing; and

- Client Order Precedence and Allocation rules; and

(2) an explanation of ASX’s policy about:

- the electronic distribution of Warrant Offering Circulars. This guidance note replaces the existing Guidance Note 2/99 - 23 April 1999; and

- when Participating Organisations can give clients Warrant explanatory booklets in electronic form for the purposes of complying with the ASX Business Rules.

5. RECENT CORPORATE LAW DECISIONS

The full text of the following decisions can be accessed from the corporate law judgments website at: "<http://cclsr.law.unimelb.edu.au/judgments/>".

(A) POWER OF AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION TO MODIFY CHAPTER 6 OF THE CORPORATIONS LAW

(By Kate Westmore, [Phillips Fox](http://www.phillipsfox.com.au))

Australian Securities and Investments Commission v DB Management Pty Ltd; Southcorp Wines Pty Ltd v DB Management Pty Ltd [2000] HCA 7, S105/1999, High Court of Australia, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, 10 February 2000

The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/february/2000hca7.html>.

Here, two appeals were heard together concerning the extent of the modification power given to the Australian Securities and Investments Commission ("ASIC") by section 730 of the Corporations Law (the "Law"). The question for consideration was whether, even though section 701 of the Law does not provide a power of compulsory acquisition of shares allotted, after an offer period, pursuant to the exercise of an option, section 730 can be used to modify section 701 in such a manner as to confer such a power.

(1) The Facts

In May 1996, the appellant, Southcorp Wines Pty Ltd ("Southcorp") acquired 97% of the issued shares in the capital of Coldstream Australasia Limited ("Coldstream") after a successful takeover bid. The remaining shares were compulsorily acquired pursuant to section 701 of the Law.

There were also in existence a number of options to acquire Coldstream shares. Most of these were acquired by Southcorp by agreement. However 3,100 options remained outstanding. These were held by DB Management Pty Ltd, Batoka Pty Ltd and Winpar Holdings Limited (the "option holders") who refused to sell.

In August 1996 Southcorp applied to ASIC for a declaration under section 730, modifying section 701, so that Southcorp would be entitled compulsorily to acquire the shares issued on exercise of the outstanding options. The respondent option holders made submissions to ASIC opposing the modification.

On 1 October 1996, ASIC made a declaration that Chapter 6 of the Law should apply to Southcorp in the case of the compulsory acquisition of shares on Coldstream upon the exercise of the options as if section 701 were modified or varied. To section 701(1) was added a paragraph which extended the concept of relevant shareholder to include a person who has become the holder of shares in the target company after the end of the offer period.

(2) Administrative Appeals Tribunal

The option holders applied to the Administrative Appeals Tribunal (the "Tribunal") to review ASIC’s decision to make the declaration. The Tribunal affirmed the decision. Deputy President McMahon considered and rejected the argument that the power given by section 730 did not extend to the modifications and variations of section 701 made by ASIC.

(3) The Federal Court

The option holders appealed to the Federal Court "on a question of law" pursuant to section 44 of the Administrative Appeals Tribunal Act 1975 (Cth). Their contention was that the Tribunal had erred in law in its review of ASIC’s decision. At first instance in the Federal Court, Whitlam J dismissed the appeal, holding that there was no error of law.

(4) The Full Court of the Federal Court

The option holders then appealed to the Full Court of the Federal Court. By majority, (O’Connor and Dowsett JJ, Beaumont J dissenting), the Full Court allowed the appeal, concluding that the provisions of section 730 do not authorise the abrogation of the property rights of third parties. Thus the declaration was found to be beyond what was contemplated by section 730.

(5) Submissions in the High Court

The decision of the Full Federal Court was then appealed to the High Court.

The option holders’ submission was that although section 703 recognises and addresses the position of holders of options and notes, there is nothing in section 701 which empowers compulsory acquisition of such interests, or of shares resulting from an exercise after the expiration of the offer period.

In response, the appellants acknowledged this as being so, and contended that this is why, in an appropriate case, and on appropriate terms, section 701 may need to be modified or varied.

(6) Decision in the High Court

In a joint judgment, the 5 justices of the High Court found that the discretionary power conferred on ASIC by section 730 of the Law could not be limited in the manner determined by the majority in the Full Court. The High Court held that read literally, the words of section 730 were wide enough to empower the modifications and variations to section 701 which ASIC had made. In the context of the legislation, there was no warrant for giving the words of section 730 other than their literal meaning. Section 730 provided ASIC with a wide discretionary powers in the context of legislation regulating acquisition of property and, subject to certain safeguards, rights of compulsory acquisition.

(B) APPLICATION BY LARGE PROPRIETARY COMPANY FOR RELIEF FROM OBLIGATION TO LODGE ANNUAL ACCOUNTS

(Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

Incat Australia Pty Ltd v Australian Securities and Investment Commission [2000] FCA 58, Federal Court of Australia (Tasmanian District Registry), Heerey J, 4 February 2000.

The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/february/2000fca58.htm>.

This was an appeal to the Federal Court by Incat Tasmania Pty Ltd ("Incat Tasmania") and Incat Australia Pty Ltd ("Incat Australia")(together "Incat"), from a decision of the Administrative Appeals Tribunal ("AAT"). The AAT affirmed the decision of the Australian Securities and Investment Commission ("ASIC") which refused to relieve the directors and auditors of the two Incat companies from the obligation to lodge annual accounts for the financial years ending 30 June 1996, 1997, and 1998.

(1) Background

There are a number of features of Incat’s production that are unique to the companies, and that were argued in support of Incat’s contention that it should be relieved from the requirement to lodge annual returns.

Incat Tasmania and Incat Australia are, respectively, engaged in the business of building fast ocean-going aluminium wave piercing catamarans for the purposes of vehicle and passenger carriage. The success of the business is reflected in Incat’s market share. Of the 55 fast catamarans in operation throughout the world, Incat have built 26.

Incat operates on a continuous production line rather than building to customers’ orders, enabling the company to achieve an economy of scale. Between three and four homogenous vessels are produced per year. Incat Tasmania builds the vessels and on-sells them to Incat Australia at cost. Incat Australia is responsible for marketing and sales of the catamarans.

Incat’s submission to ASIC was that because a limited number of a single product were produced in any year, compliance with Division 6 of the Corporations Law would enable customers and competitors to calculate the profit margin on a single vessel, thereby putting Incat at a severe negotiating and competitive disadvantage. This would lead to a reduced profit margin for Incat. It was submitted that the lodging of accounts was an "unreasonable burden", and "inappropriate" to Incat’s special circumstances.

(2) Obligation to report

The Incat companies are "large proprietary companies" within the meaning of section 45A(3) of the Corporations Law and are therefore subject to the same reporting requirements as public companies. Under what was section 313 of the Corporations Law (see now Part 2M.6), an application could be made to ASIC by the directors of a company for relief from compliance with the requirement to lodge accounts. ASIC had the power under that section to relieve the directors or auditors of the company from all or any of the requirements relating to the audit and reporting of accounts if it was satisfied that compliance with the requirements:

(i) would be inappropriate to the circumstances of the company, or companies included in that class; or

(ii) would impose unreasonable burdens on the company, an officer of the company, or auditor of the company.

See now section 342.

(3) Decision of the AAT

The AAT declined to relieve the directors and auditors of the two Incat companies from the obligation to lodge annual accounts and reports with ASIC, as it was not satisfied that compliance with the reporting requirements of the Corporations Law would place an "unreasonable burden" on the companies.

The AAT considered that an "unreasonable burden" for the purposes of section 331 of the Corporations Law was to be evaluated by reference to the evidence, and nature of requirements to be performed, while having regard to the policy objective of the legislation that companies of economic significance should lodge accounts. Any economic detriment likely to flow to the Incat companies as a result of compliance was also a relevant consideration. Heerey J of the Federal Court accepted this view of the law.

Evidence was presented that the Incat companies had two competitors - Austal Ships, a Western Australian publicly listed company, and Kvaerner Fjellstrand of Norway. The European representative of Incat gave evidence that it was not possible to determine the companies’ profit margins from information that was available in the public domain and that the sale of vessels was subject to factors that were not publicly known, including the cost of financing, discounting, price paid for bought in tonnage, and any equity retained by the builder, Incat Tasmania.

Evidence was also adduced from Incat’s group accountant, an auditor and the company’s Chief Financial Officer. The companies’ group accountant contended that evidence adduced by ASIC to calculate profit margins on the basis of publicly available information, resulted in inaccurate estimates. He was of the opinion that reasonably accurate profit margins per vessel would be able to be calculated from information in financial statements if they were placed on the public record. The Chief Financial Officer believed that an "educated user" would be able to calculate profit margins from examination of accounts because of the small number of vessels produced in a given year. The timing of sale or charter of vessels would be well known in the industry.

The auditor was of the opinion that Incat was covered by the competitive disadvantage guidelines in Part 27 of ASIC Policy Statement 43. Evidence of estimates of profit margins made by ASIC based on information available in magazines and newspapers were, according to the auditor, inaccurate when compared to the estimates that could be made if accounts were lodged. Furthermore, Incat argued that information provided to the industry and public through its own marketing activities, and customer on-site presence, provided sales revenue and sales volume information that would make it possible to more accurately estimate profit margins per vessel.

The AAT accepted the evidence of ASIC that the companies’ financial statements did not contain enough information to enable accurate estimates of profit margins per vessel to be made. Therefore, there could be no detriment incurred by Incat as a result of lodging accounts.

The AAT rejected Incat’s submission that knowledge of profit margins gained from lodged accounts would result in lower returns for the company, as customers would be in a position to essentially bargain for a better price. The AAT decided that this did not amount to an "unreasonable burden" for Incat, particularly as there were many other factors such as supply and demand considerations, exchange rates, preservation of residual values and economic and political policy considerations that could influence the price at which an Incat customer negotiated the price of a vessel. The AAT considered that price is only one factor in the procurement of vessels from Incat. Doing business with a reliable, successful company, and the capacity of vessels, were also important factors.

The AAT decided that granting a company relief from lodging accounts was not "in harmony with the object and purpose of the legislation".

(4) Incat’s argument on appeal

Incat’s Notice of Appeal raised grounds that the AAT ought to have found that the lodging of accounts would enable customers to determine, "with a substantial degree of accuracy", the profit per vessel so as to enable the price of vessels to be discounted in negotiations, and that the failure of the AAT to make such a finding was so unreasonable that no reasonable tribunal could have failed to so find. However, before Heerey J, Incat relied instead on the AAT’s alleged failure to make any or sufficient findings of fact from which its conclusions could reasonably be drawn.

Incat also appealed on the ground that the AAT did not comply with section 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth), by publishing in its reasons, findings on material questions of fact and references to the evidence or other material on which its findings were based. Incat submitted that the AAT wrongly considered whether lodging accounts would disclose a high rate of return on the investment of Incat, because Incat had only argued that it would suffer detriment from the disclosure of profit per vessel.

Incat’s final ground of appeal was that the AAT should have found that the Incat group were "non reporting entities", and that lodgement of group accounts was "inappropriate in the circumstances".

(5) The Federal Court’s decision:

(i) Findings of fact

Heerey J rejected Incat’s submissions as to the AAT’s findings of fact, and referred to the decision in Minister for Immigration and Ethnic Affairs v Wu Shang Liang (1996) 185 CLR 259, where the High Court stated that an "overzealous or pedantic approach in judicial review of administrative decisions" is to be avoided where it is alleged that inadequacy derives from the manner in which a Tribunal’s reasons are expressed.

Heerey J observed that the AAT had been called upon to make an "essentially speculative" decision as to the effect of disclosure of certain information on the profit made by Incat per vessel. Given the difficulty of estimating the profit of a business, His Honour found no grounds for criticism of the AAT’s failure to express its findings any more precisely than it did. It was not necessary for the Tribunal to set out in its decisions all the evidence that it relied upon to make its findings. Furthermore, Heerey J referred to the decision of the Federal Court in Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940, and observed that the AAT did not have to give " a line by line refutation of the evidence of the claimant where there is evidence that is contrary to the findings of fact made by the Tribunal". According to Heerey J, the AAT, by including a detailed written statement of the Chief Accountant of ASIC in its decisions, sufficiently discharged its obligations under section 43(2B).

(ii) Consideration of return on investment

In relation to this ground of appeal, Heerey J noted that the AAT was engaged in an administrative inquiry, and was not restricted by the pleadings. His Honour considered that the question of return on investment was not inherently irrelevant to the AAT’s ultimate discretion. The Tribunal was not legally disentitled from considering it, and in Heerey J’s opinion, consideration of it did not adversely affect Incat.

(iii) "Inappropriateness" and "Non reporting entity"

As Incat fell within the definition of "large proprietary company" in the Corporations Law, it was subject to the requirement to lodge annual accounts. The content of Incat’s obligation to report depended on whether it was a "reporting entity" which is defined in the Corporations Law Regulations as "all entities…in respect of which it is reasonable to expect the existence of users dependent on general purpose financial reports for information which will be useful to them for making and evaluating decisions about the allocation of scarce resources". Incat argued that the companies fell within this definition, and that their accounts were required to be general purpose accounts. Incat only supplied limited, special purposes financial statements to banks, major financiers, major creditors, export credit insurers, underwriters, and credit rating agencies. It contended that it was not necessary for financial information to be made available to the public, and that it was not reasonable to expect that there would be users dependent upon general purpose accounts required to be lodged. Therefore, Incat submitted that it was "inappropriate" for the companies to lodge accounts.

Heerey J upheld the AAT’s decision that it was not "inappropriate" for Incat to lodge accounts. Incat’s appeal was dismissed with costs.

(C) APPLICATION BY UNSECURED CREDITOR TO REMOVE ADMINISTRATOR

(By Kate Westmore, [Phillips Fox](http://www.phillipsfox.com.au))

Peter Stannard Homes Pty Ltd v Lyford [2000] WASC 18, Bredmeyer M, Supreme Court of Western Australia, 28 January 2000.

The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/january/2000wasc18.html>.

This was an application by Peter Stannard Homes Pty Ltd (the "applicant") which was a major creditor of Turner Corp Pty Ltd (the "company"). The application sought to have the administrator of the company, Mr Lyford (the "administrator") removed and replaced by a Mr Francis. It was noted that both the administrator and Mr Francis are qualified liquidators, receivers and administrators.

The application was made under sections 449B, 447A, 447B and 447E of the Corporations Law. The most relevant of these sections for the purposes of the application was section 449B, which deals with the removal of an administrator by the Court. Bredmeyer M referred to and agreed with Hayne J’s statement in Network Exchange Pty Ltd v MIG International (1994) 12 ACLC 594, that an administrator should only be replaced if it would be "for the better conduct of the administration."

(1) Arguments for the removal of the administrator

Several arguments were raised by the applicant as justification for the removal of Mr Lyford as administrator of the company.

The first was that he was said to have a conflict of interest. Bredmeyer M rejected this, finding instead that the administrator had revealed his previous appointment as an investigating accountant to the company at the first meeting of creditors. The applicant had been present at that meeting through its director and solicitor. A vote was subsequently taken at the meeting to retain the administrator as administrator. His further involvement with the company, although not disclosed, was slight and neither that involvement, nor his failure to mention it, justified his removal.

The second argument was that the administrator did not adequately investigate the claim of Mr Turner (director of the company) as to the enforceability of a charge held by a creditor of the company named Vision. It appeared that the administrator, during his time as investigating accountant, noted that the Vision charge was for $2 million and that Mr Turner had claimed it was invalid or of no value because he had a counter-claim for $2.2 million. Vision ultimately agreed in the deed of company arrangement to allow unsecured creditors to have the first $200,000 and to reduce the secured part of the debt from $2 million to $1.1 million.

Bredmeyer M was of the opinion that the administrator had made no independent examination of Mr Turner’s claims in relation to the invalidity of the charge or the company’s counter-claim. He looked at the scope of an administrator’s duties under section 438A of the Corporations Law and noted that an administrator is not required to make as careful an investigation of a company’s affairs as a liquidator. He concluded that there was no failure in the administrator’s investigative duties, when one considered the short time available to do this (some 21 - 28 days) and that it was a reasonable commercial decision in the circumstances.

The third allegation was that the administrator did not investigate adequately Mr Turner’s claims to be owed $18 million. Bredmeyer M noted that Mr Turner had borrowed $18 million from the Teachers Credit Society and had on-lent that sum to the company. The Society had subsequently released Mr Turner from the debt for a payment of $100,000. However that release did not release the company from its debt to Mr Turner and technically it still owed him $18 million. Mr Turner was willing to waive this claim if a deed of company arrangement was agreed, however he was intent on enforcing it if the company went into liquidation. Bredmeyer M described this as "no doubt a powerful factor" in the administrator’s opinion in favour of the deed.

The fourth argument suggested for removal of the administrator was his supposed failure to investigate adequately the reasons why Mr Turner was to be given a priority payment of between $100,000 and $250,000 from the money received by the company in an action called the Burnett action. Bredmeyer M found that this payment could be justified on commercial grounds, namely that he traded his $18 million unsecured debt for the $100,000-plus preferential payment. He went on to say that the preferential treatment was at the expense of Vision, a secured creditor, by arrangement with Vision. It was not at the expense of the unsecured creditors such as the applicant.

The fifth complaint was that the administrator had made no investigation of the merits of the Burnett action. Bredmeyer M was, however, of the opinion that there was no need for the administrator to have done more - he had no funds for independent legal advice and the action was the only asset of the company available to those creditors. He drew attention to the fact that the action was being handled by a competent solicitor and was moving along through the interlocutory stages.

The final complaint concerned an amendment made at the last minute at a meeting of creditors to include Mrs Turner as an unsecured creditor for $330,000. While Bredmeyer M noted that this was, of course, harmful to the applicant’s chances of recovering any money, such a decision was clearly permitted by the Corporations Law on a majority vote.

Accordingly, the application to replace Mr Lyford was dismissed.

(D) CAN SHAREHOLDERS INFORMALLY GIVE ADVANCE RATIFICATION OF A DIRECTOR'S BREACH OF DUTY?

(By Ron Schaffer, Partner, [Clayton Utz](http://www.claytonutz.com.au), Sydney and Alister Abadee, Barrister, Sydney)

Pascoe Limited (In Liquidation) v Peter Lucas [1999] SAC 519, Supreme Court of South Australia, Lander, Millhouse and Duggan JJ, 9 December 1999

The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/sa/1999/december/1999sac519.html>.

A recent decision of the Full Court of the Supreme Court of South Australia examined the liability of a director of a small company established for a particular purpose, for entry into a transaction where the company had arguably authorised the director's conduct.

(1) Background

The factual background to the proceedings involved complex inter-company transactions within the Bond Group and, in particular, its takeover of the Bell Group Limited in August 1988.

The appellant, Pascoe Limited ("Pascoe") was incorporated in the Cook Islands on 15 November 1988. The respondent, Lucas, was a director of Pascoe from 18 November 1988 to 11 December 1989.

The Bell Group Limited's subsidiaries included various companies within the JN Taylor Holdings Limited Group, including Dolfinne Finance Pty Limited ("Dolfinne"). Dolfinne was a wholly-owned subsidiary in the JN Taylor Holdings Limited Group and was also the sole shareholder of Pascoe at all material times. As a result of the transactions which were the subject of the proceedings, the Bond Group's holding company, Bond Corporations Holdings Limited ("BCH"), controlled the ultimate holding company of JN Taylor Holdings Limited, which, in turn, was the ultimate holding company of Dolfinne and Pascoe.

Before 15 November 1988, the treasury company with the JN Taylor Holdings Group ("JNTF"), indirectly lent the sum of A$126.8 million to the treasury company of the Bond Group ("BCF").

At trial and on appeal, the court found that the sole purpose of Pascoe's incorporation was to unwind the effect of this indirect loan. The contemplated scheme for unwinding the loan involved Pascoe obtaining funds from JNTF and, through intermediaries, lending those funds to Catton Finance Limited ("Catton"), another company incorporated in the Cook Islands and a wholly owned subsidiary of BCF, which would then on-lend those funds to BCF. By 23 November 1988, JNTF had lent $100 million to Dolfinne which, in turn, took up $100 million of redeemable preference shares ("RPS") in a wholly-owned subsidiary which, in turn, took up $100 million RPS in Pascoe.

On appeal, the court found that Dolfinne acquired the RPS and capitalised Pascoe for the sole purpose of having Pascoe on-lend the moneys, through subsidiaries, to companies within the Bond Group on a limited-recourse basis. The court also found that the transactions involving Pascoe were orchestrated by two of its directors, Mr Couttie and Ms Noonan, neither of whom was called to give evidence. Pascoe was incorporated for the sole purpose of these transactions, obtaining its capital from Dolfinne and acting at its behest.

In May 1989, Pascoe resolved to extend the term of its loan to Dolfinne to 24 November 1989, while reserving its right to recall the loan on one month's notice. In August 1989 the board of Pascoe resolved to require repayment of the loan to Dolfinne.

On 14 September 1989, BCF drew 2 promissory notes, drawn in favour of Catton. Catton endorsed them in favour of Dolfinne which endorsed them in favour of Pascoe. On the same day, Pascoe wrote to Dolfinne, advising it that it accepted the notes in full and final satisfaction of the amount owed by Dolfinne to Pascoe. BCF later replaced the 2 promissory notes, at Pascoe's request, so that the promissory notes were from BCF to Pascoe directly. Consequently, BCF became indebted to Pascoe.

By August and September 1989 the general financial position of the Bond Group was precarious, a fact known by Lucas.

Pascoe brought proceedings against Lucas for breach of his statutory duty to act honestly pursuant to section 229 of the Companies (Western Australia) Code [see now section 232 of the Corporations Law], breach of his fiduciary duty to Pascoe and for negligence in respect of the transactions. Pascoe contended that Lucas' conduct and breaches of his duties were neither authorised nor ratified by Pascoe's members in general meetings. Pascoe alleged that, by reason of those breaches, it suffered loss or damage in the sum of A$50 million, together with interest of A$2.8 million.

Pascoe's case against Lucas was that he breached his statutory and fiduciary duties to Pascoe in three ways: first, by authorising the loan by Pascoe to Dolfinne in November 1988, whereby moneys were repayable only on a limited recourse basis; secondly, by causing Pascoe to extend the date for repayment of the loan in May 1989; and thirdly, by allowing Pascoe to accept promissory notes from BCF in satisfaction of Dolfinne's obligation to repay the loan.

(2) Judgment at First Instance

The trial judge found, inter alia, that Pascoe was incorporated for the sole purpose of the series of transactions and acted at the behest of its sole shareholder, Dolfinne, at times when it was solvent.

He found the acts of both Pascoe and Lucas to be intra vires and not performed in bad faith. Further, the trial judge rejected allegations that Lucas acted dishonestly and that Pascoe had suffered any loss. The basis for this latter finding was that the true nature of the series of transactions was a restructuring of JNTF's lending arrangements with BCF, and that Pascoe was incorporated and capitalised for that purpose alone.

(3) Appeal

Justice Lander found that there were three issues for determination in the appeal. First, whether a solvent corporation could impugn the conduct of its directors in circumstances where at the time of the relevant conduct, the corporation's shareholders (or ultimate shareholder) authorised the conduct in issue. If so, could the directors' conduct be excused pursuant to section 1318 of the Corporations Law? Secondly, whether the sole or ultimate shareholder of Pascoe authorised Lucas to make the impugned resolutions. Thirdly, whether or not Lucas was in breach of his duty owed to Pascoe, did Pascoe suffer a loss as a consequence of the impugned resolutions.

Justice Lander (with whom Millhouse and Duggan JJ agreed) found that the trial judge was right in rejecting Pascoe's submission that Lucas' conduct was dishonest or involved a breach by him of any duties owed to Pascoe.

Lander J also found that there was nothing to suggest that when the transactions were entered into Pascoe was insolvent. Although by the time the two promissory notes were drawn (in mid-September 1989) BCF's financial position was precarious, and although it was likely at that time that Pascoe could not have recovered the face value of those promissory notes, this did not mean that Pascoe was, either at that time or immediately before that time, insolvent. Another important consideration was that Lucas was not, at the relevant times, associated in any way with Dolfinne. Summarising the factual findings on this point, Lander J found that Pascoe acted at the behest of its sole shareholder, Dolfinne, and was incorporated and capitalised for the sole purpose of those transactions. Those transactions were entered into at the direction of its sole shareholder and at the time neither its sole shareholder nor Pascoe was acting unlawfully; nor was either of them acting outside of their own internal rules.

Lander J further found that where, as was the case in these proceedings, the directors had caused the company to enter into a transaction, the unanimous vote of the shareholders of the company, if passed prior to the transaction, could amount to an authorisation and, if passed after the transaction, could amount to a validation. In this case, subject to four qualifications, there was only one shareholder, so that the approval of that shareholder, in advance of the transaction could amount to an authorisation for the company to enter into the transaction even if entry into the transaction gave rise to a breach of fiduciary duties on the part of the director.

Those qualifications were: first, the company must be solvent ; secondly, the transaction itself must be intra vires; thirdly, the directors must make full disclosure to the shareholders and fourthly, the directors must be acting in good faith. For this purpose, Lander J held that it was unnecessary for a formal decision of the shareholders to be made, nor was there any requirement for a formal meeting. Informal consent was sufficient.

His Honour distinguished these circumstances from the case where directors would not be protected by any purported authorisation or ratification, where consent was unanimously given by its shareholders, if the directors acted recklessly and that recklessness amounted to fraud. This situation did not, however, apply since there was no allegation that Lucas had acted recklessly. In short, Lucas was not liable to Pascoe since Pascoe had been incorporated for the sole purpose of the transaction which it entered into, at all material times it was solvent, its sole shareholder, Dolfinne, authorised its directors to enter the transaction, the transaction was intra vires and there was no suggestion that the directors acted in bad faith vis a vis Pascoe.

Justice Lander also rejected Pascoe's submissions that Dolfinne itself lacked authority to authorise the transaction and that Dolfinne being part of a group which was under the control of the directors BCH was not capable of authorising the transaction. This was because of the finding that the conduct of the shareholder is not relevant for the purpose of determining whether or not the company is entitled to bring an action against its directors. So long as shareholders had not "so acted for the purpose of disadvantaging creditors of the company" it was irrelevant that the shareholders, or as in this case the single shareholder, might have had some collateral purpose. In short, Pascoe was not entitled to rely upon any want of authority by Dolfinne, as sole shareholder, for the purpose of allowing it to proceed against its directors.

These findings were sufficient to dispose of the appeal, but Lander J went on to consider the issue of exoneration by the court under section 1318 of the Corporations Law and, further, the relief under the equivalent provisions of the International Companies Act (which applied to companies in the Cook Islands). Essentially, section 214 of the International Companies Act enables the Court to relieve a person found to be in breach of his or her duty to a company and to be excused for the breach in circumstances where he or she has acted honestly and reasonably, having regard to all the circumstances of the case. Section 214(3) expressly provides that that relief is available to directors of a company.

Lander J took into account the circumstances, including that there was no suggestion that Lucas had used his position to benefit himself and, more importantly, the consideration that Pascoe did not otherwise have any creditors which would benefit from the proceedings other than Dolfinne and it would be "curious" if Dolfinne, which incorporated a company for the sole purpose of the transaction, appointed its directors and authorised its directors to enter a transaction, could later claim against the directors for any loss suffered by reason of those directors complying with the authorisation. Had it been necessary to make such a finding, the court would have allowed Lucas the benefit of section 214.

Finally, Lander J concluded that Pascoe did not suffer any loss in entering the transaction. The court found that, as at 14 September 1989, Pascoe had an asset, being a receivable from JNTF and still had capital of $50 million owned by Dolfinne. Although the receivable was probably irrecoverable in full, given the precarious financial position of the Bond Group at the time, the court found that it was not permissible to treat Pascoe's capital as though it was a receivable capable of being set off against the receivable due from JNTF.

(4) Conclusion

This decision limits the scope for later shareholders of solvent companies or liquidators of subsequently insolvent small, single-purpose companies to turn to directors to recover losses where the conduct of those directors, subject to certain qualifications has been authorised or ratified.

(E) ASIC SECTION 730 MODIFICATION MUST BE JUSTIFIED BY THE APPLICANT'S PARTICULAR CIRCUMSTANCES

(By Lance Sacks, Solicitor, [Clayton Utz](http://www.claytonutz.com.au), Sydney)

Sabatica Pty Ltd v Allstate Explorations NL and Australian Securities and Investments Commission [2000] FCA 92, Federal Court of Australia, Beaumont, Emmett & Hely JJ, 11 February 2000.

The full text of this judgment is available at: <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/february/2000fca92.html>.

Sabatica Pty Ltd was incorporated in Australia. It was a wholly-owned subsidiary of Mid-East Minerals Limited which itself was incorporated in Australia and listed on the Australian Stock Exchange ("ASX"). Otter Gold Mines Ltd was incorporated in New Zealand and listed for quotation on both the New Zealand Stock Exchange and on ASX.

Sabatica had a 19.87 per cent relevant interest in the issued share capital of Otter and wished to acquire further shares in Otter. Ordinarily, as Otter was incorporated in New Zealand, such an acquisition would not be regulated by the Australian Corporations Law. However, Otter itself had a 58.58 per cent relevant interest in the issued share capital of Allstate Exploration NL, an Australian company listed on ASX. This meant that Sabatica's proposed acquisition would result in it being deemed to have acquired more than 20% of the issued share capital in Allstate, which would contravene section 615 of the Corporations Law.

Section 629 of the Corporations Law allows downstream acquisitions resulting from an upstream acquisition of a company which is incorporated in Australia and listed on ASX. (The CLERP Act, when it commences on 13 March 2000, will allow downstream acquisitions resulting from an upstream acquisition in a body corporate wherever incorporated, provided that it is listed on the ASX or a foreign stock exchange approved by the Australian Securities and Investment Commission ("ASIC").)

To avoid having to make a separate takeover offer for Allstate, Sabatica obtained an ASIC modification to section 629 (under section 730 of the Corporations Law). This modification provided that:

(i) the reference to "the other body corporate" in paragraph (a) of section 629 included a reference to a body corporate that was listed on ASX; and

(ii) the acquisition of shares in the "other body corporate" in paragraph (b) of section 629 was by takeover offer made in accordance with the Companies Amendment Act 1963 (NZ) or a market exchange transaction in accordance with the "Minority Veto Provisions" of the NZSE Listing Rules.

The Administrative Appeals Tribunal ("AAT") subsequently set aside this modification. The Federal Court dismissed an appeal against the AAT's decision, for the following reasons.

Firstly, the AAT was correct in finding that unrestricted relief could not be granted by ASIC because not all the (factual) requirements of paragraph 13 of ASIC Policy Statement 71 had been satisfied in the present circumstances:

- Otter's shares in Allstate comprised a substantial part of the assets of Otter;

- Control of Allstate was one of the main purposes of the takeover of Otter by Sabatica; and

- New Zealand does not afford a comparable level of investor protection to that under the Corporations Law and the ASX Listing Rules.

In addition, the Federal Court agreed with the Tribunal that the requirements in paragraph 13 of Policy Statement 71 are cumulative.

Secondly, because the CLERP Act was going to liberalise downstream acquisitions, it was argued that ASIC could grant relief in anticipation of the CLERP Act coming into effect. On this point, the Federal Court held that the Tribunal was correct in not taking the CLERP reforms to section 629 into consideration.

If ASIC were to use its powers under section 730 to accelerate the operation of amendments to the general law in relation to a particular case because the general law should be changed, or will in the future be changed, then it would be using the power for a purpose other than that for which it was conferred, and contrary to the intention of Parliament as declared in the enactment of the CLERP reforms. The power was conferred for the purpose of creating exceptions to the Law generally applicable; not for the purpose of accelerating, in relation to a particular case, the date for the operation of changes to that Law in advance of that fixed by Parliament.

Importantly, the Federal Court limited the scope of section 730 by stating that:

"Section 730 proceeds upon the basis that, whilst the Law generally applicable is as declared by Chapter 6, there may be justification for the modification of the operation of Chapter 6 in relation to a specified person or classes of persons, either generally or in particular circumstances. The assumption underlying section 730 is that there is something in the circumstances of the particular case of cases which makes it appropriate that there should be a departure from the general rule, although the general rule continues to apply in all other cases."

This finding on section 730 should be compared with the High Court's decision in ASIC v DB Management [2000] HCA, 10 February 2000 – see the discussion of this decision earlier in this Bulletin.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

G Gilligan, H Bird and I Ramsay, ‘Civil Penalties and the Enforcement of Directors’ Duties’ (1999) 22 University of New South Wales Law Journal 417

A Corbett, ‘Self-Regulation, CLERP and Financial Markets: A Missed Opportunity for Innovative Regulatory Reform’ (1999) 22 University of New South Wales Law Journal 506

(1999) International Company and Commercial Law Review. Special Issue on Electronic Commerce. Articles include:

- The Regulation of E-Commerce in Poland, the Czech Republic and Hungary

- Recent Developments in the Australian E-Commerce Framework

- Digital Signatures: Legal Aspects from a Danish Perspective

- The European Union Proposed Legal Framework for E-Commerce

- E-Commerce in Finland

- Formation and Proof of Electronic Agreements in France

- Legal Aspects of Doing E-Commerce Business in Germany

- Financial Trading on the Internet: International Jurisdiction in the Netherlands

- Current E-Commerce Issues in New Zealand

- An Overview of E-Commerce Laws and Policies in South-East Asia

- Electronic Commerce in Spain

- Electronic Commerce: A United Kingdom View

A Szecskay, ‘Capital Markets and Corporate Takeover Legislation in Hungary’ (1999) 27 International Business Lawyer 443

K Rastawicki, ‘Harmonisation of Polish Company Law with European Union Law’ (1999) 27 International Business Lawyer 453

S Brooks, ‘Russia’s Struggle with Bankruptcy Law’ (1999) 27 International Business Lawyer 468

A Loke, ‘Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures’ [1999] Journal of Business Law 538

A Pritchard, ‘Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers’ (1999) 85 Virginia Law Review

J Doe and C Luk, ‘Disclosure and Market Reform in Hong Kong’ (1999) 10 International Company and Commercial Law Review 316

T Frankel, ‘The Internet, Securities Regulation, and Theory of Law’ (1999) 73 Chicago Kent Law Review 1319

S Gleeson and H Bloomenthal, ‘The Public Offer of Securities in the United Kingdom’ (1999) 27 (No 3) Denver Journal of International Law and Policy

M Steinberg, ‘Corporate Counsel: Roles and Liabilities’ (1999) 64 (No 3) Journal Air Law and Commerce

L Bebchuk and A Guzman, ‘An Economic Analysis of Transnational Bankruptcies’ (1999) 42 Journal Law and Economics 775

D Bayne, ‘Insider Trading: Ginsburg’s O’Hagan – Insider Trading Ignored’ (1999) 53 University of Miami Law Review 423

W Bratton and J McCahery, ‘Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference’ (1999) 38 (No 2) Columbia Journal of Transnational Law

T Hans, ‘The Regulation of Unit Trusts and Trustees’ Powers to Invest in Them’ [1999] Singapore Journal of Legal Studies 148

A Loke and F Hoong, ‘Share Repurchase – Some Policy and Legal Issues’ [1999] Singapore Journal of Legal Studies 180

T C Han, ‘Piercing the Separate Personality of the Company: A Matter of Policy?’ [1999] Singapore Journal of Legal Studies 531

H Kee and L Luh, ‘The Par Value of Shares: An Irrelevant Concept in Modern Company Law’ [1999] Singapore Journal of Legal Studies 552

M Chew, ‘The Securities Regulator in Civil Pursuit: Quaere A New Enforcement Option’ [1999] Singapore Journal of Legal Studies 596

S Chan and L Law, ‘Interests of the Company as a Whole: An Economic Appraisal of Fiduciary Controls’ (1999) 20 University of Queensland Law Journal 186

C Feasby, ‘Corporate Agents’ Liability in Tort: A Comment on ADGA’ (1999) 32 Canadian Business Law Journal 291

The Company Lawyer, Vol 20 No 10, November/December 1999. Articles include:

- Creditors’ Interests and ‘Core’ Company Law

- Corporate Finance and Receivership

- O’Neill v Phillips: Closing the Categories of Unfair Prejudice

- Insolvency: International Insolvency Assistance

- Bank Fraud: BCCI – Still Counting the Cost

- Malaysia: The Position of Share Buy-Backs in Malaysia and Recent Amendments to the Malaysian Companies Act

L Aste, ‘Reforming French Corporate Governance: A Return to the Two-Tier Board?’ (1999) 32 George Washington Journal of International Law and Economics 1

B Gordon, ‘Leveraged Buy-Outs and Risks for Lenders in an Australian Context After the Company Law Review Act 1998’ (1999) 10 Journal of Banking and Finance Law and Practice 282

Journal of Corporation Law, Vol 24 No 4, Summer 1999. Special Symposium Issue on Team Production in Business Organisations. Articles include:

- M Blair and L Stout, ‘A Team Production Theory of Corporate Law’

- S Wallman, ‘Understanding the Purpose of a Corporation: An Introduction’

- M Eisenberg, ‘The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm’

- J Coates, ‘Measuring the Domain of Mediating Hierarchy: How Contestable are US Public Corporations?’

- L Mitchell, ‘Trust and Team Production in Post-Capitalist Society’

- E Rock and M Wachter, ‘Waiting for the Omelette to Set: Match-Specific Assets and Minority Oppression in Closed Corporations’

- D Smith, ‘Team Production in Venture Capital Investing’

- V Dinh, ‘Co-Determination and Corporate Governance in a Multinational Business Enterprise’

- E Talley, ‘Taking the ‘I’ Out of Team’: Intra-firm Monitoring and the Content of Fiduciary Duties

N Johnson and R Albert, ‘Dejavu All Over Again: The Securities and Exchange Commission Once More Attempts to Regulate the Accounting Profession Through Rule 102(e) of Its Rules of Practice’ [1999] Utah Law Review 553

J O’Keeffe, ‘Environmental Issues in Corporate Transactions in the United Kingdom’ (1999) 10 International Company and Commercial Law Review 343

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7. CENTRE FOR CORPORATE LAW CLERP SEMINARS

(A) CLERP AND TAKEOVERS

Speakers:

Rodd Levy, Partner, Freehill Hollingdale & Page  
Alison Lansley, Partner, Mallesons Stephen Jaques  
Richard Cockburn, National Coordinator, Fundraising and Mergers and Acquisitions Australian Securities and Investments Commission  
Simon McKeon, Executive Director, Macquarie Bank; President, Corporations and Securities Panel

Date: Thursday 9 March 2000

Time: 5.30-7.00 pm. Refreshments will be served afterwards.

Venue:

Mallesons Stephen Jaques  
Level 28 Conference Room  
525 Collins Street  
Melbourne Vic 3000

Admission: $60

Seminar Topic:

The Corporate Law Economic Reform Program Act 1999 commences on 13 March 2000. It introduces fundamental changes to the existing takeover laws. The major changes include:

- an enlarged role in dispute resolution for the Corporations and Securities Panel;

- extension of the circumstances where compulsory acquisition of securities is permitted;

- extension of takeover regulation to listed managed investment schemes;

- introduction of a new statutory regime of liability for a defective disclosure document relating to a takeover;

- abolition of the concept of Part A, B, C and D Statements; and

- widening of the downstream acquisition exemption.

This important seminar brings together leading speakers to discuss the impact of CLERP on existing regulation.

Speaker Details:

Rodd Levy: is a Partner in the Melbourne office of Freehill Hollingdale & Page. He practises extensively in takeovers and takeover defences. Rodd is the author of the book Takeovers Law and Strategy. He has been involved in a number of significant transactions including Anglogold’s takeover of Acacia Resources and Normandy Mining’s joint bid for Great Central Mines.

Rodd will discuss: (i) the new rules for acquiring shares before launching a takeover and (ii) the new compulsory acquisition procedures.

Alison Lansley: is a Partner in the Melbourne office of Mallesons Stephen Jaques where she specialises in advising large corporations and government instrumentalities. Alison advises on: takeovers, prospectuses and large-scale corporate reconstructions as well as contractual matters such as sales and purchases of businesses including private and government companies. Alison is extensively involved in all aspects of the securities markets in Australia, including as a former member of the National Listing Committee of the Australian Stock Exchange.

Alison will discuss (i) the new disclosure obligations for bidder’s statements and target’s statements (ii) the new takeover procedure rules and (iii) general issues relating to communication throughout a takeover.

Richard Cockburn: is the National Coordinator, Fundraising and Mergers and Acquisitions, at the Australian Securities and Investments Commission. He is also a member of the Regulatory Policy Group in ASIC which is the Group that decides operational and administrative policy across the Commission. Richard has been responsible for many major commercial projects undertaken by ASIC including the "Good Advice" Securities Industry Review, the CRA/RTZ merger, and the Qantas and Telstra floats.

Richard will discuss the CLERP takeover amendments in relation to: (i) ASIC’s attitude to transitional issues (ii) ASIC policy statements and their current status (iii) ASIC’s attitude to the Corporations and Securities Panel (iv) hints and traps for takeover players and (v) how ASIC is administering the requirement to nominate experts for the new compulsory acquisition provisions.

Simon McKeon: is an Executive Director of Macquarie Bank and heads up its mergers and acquisitions business in Melbourne. Last year, Simon was appointed by the Federal Government as President of the Corporations and Securities Panel (also known as the Takeovers Panel). Prior to joining Macquarie Bank, Simon practised as a solicitor with Blake Dawson Waldron where he focused on mergers and acquisitions. He is on the Editorial Board of the Company and Securities Law Journal and has responsibility for the takeovers section of the Journal.

Simon will focus on one of the major CLERP changes which is the enhanced role for the Corporations and Securities Panel in place of the courts as the main forum for resolving disputes in relation to takeovers. Simon will discuss the Panel’s powers and procedures in light of the CLERP changes, together with the philosophy underlying the Panel.

(B) CLERP AND FUNDRAISING

Speakers:

Jon Webster, Partner, Arthur Robinson & Hedderwicks  
Michael Ziegelaar, Partner, Freehill Hollingdale & Page  
Deborah Hambleton, National Listings Counsel, Australian Stock Exchange  
John Price, Principal Lawyer, Regulatory Policy Branch, Australian Securities and Investments Commission.

Date: Thursday 30 March 2000

Time: 5.30-7.00 pm. Refreshments will be served afterwards.

Venue:

Arthur Robinson & Hedderwicks  
Level 34 Conference Room  
530 Collins Street  
Melbourne Vic 3000

Admission: $60

Seminar Topic:

The Corporate Law Economic Reform Program Act 1999 commences on 13 March 2000. It introduces fundamental changes to the regulation of fundraising by companies. The major changes include:

- permitting shorter disclosure documents;

- liberalising the advertising restrictions for issues of quoted securities;

- clarifying the liability provisions and extending the defences based on due diligence and reliance on others;

- facilitating access to capital by small and medium-sized enterprises by removing restrictions on small-scale offers and offers to "sophisticated investors"; and

- removing the requirement that a prospectus be not merely lodged but registered by ASIC.

This seminar brings together leading speakers from major law firms, ASIC and ASX to discuss the implications of CLERP for fundraising.

Speaker Details:

Jon Webster: is a Partner of Arthur Robinson & Hedderwicks practising in the areas of fundraising, mergers and acquisitions. He is a member of the Listings Advisory Panel of the Australian Stock Exchange. Jon also teaches Securities Regulation in the Master of Laws program at The University of Melbourne and co-edits the Corporate Governance section of the Company and Securities Law Journal. He is a former Chairman of the Corporations Committee of the Law Council of Australia and was a member of the Consultative Group to the Corporations Law Simplification Task Force.

Jon will speak about the new liability provisions and the new defences with a particular focus upon (i) the new liability regime for disclosure documents (ii) the continuing application of section 995 (iii) elimination of the reverse onus of proof for forecasts in disclosure documents (iv) restricted liability for financial advisers, accountants and lawyers (v) the due diligence and lack of knowledge defences and (vi) general defences for disclosure documents.

Michael Ziegelaar: is a Partner in the Mergers and Acquisitions section of Freehill Hollingdale & Page. His practice encompasses advising on floats, business acquisitions and disposals, joint ventures, takeovers, management buy-outs and other commercial law related matters. Michael has advised on a number of high profile floats including, most recently, the Telstra 2 sale where he was part of the Freehills team that advised the Commonwealth Government.

Michael will discuss (i) the principles behind the new legislation (ii) the new prospectus disclosure test (iii) different types of disclosure documents (iv) prospectus publicity (v) excluded offer changes and (vi) incorporation by reference.

Deborah Hambleton: is National Listings Counsel at the Australian Stock Exchange. She is a member of the Companies and Business Organisations Committee of the Law Institute of Victoria and a member of the Corporations Law Committee of the Law Council of Australia. Deborah’s responsibilities at the ASX include the listings rules and dealing with submissions on law reform proposals affecting listed entities, including CLERP.

Deborah will focus on the impact of CLERP upon the ASX rules and procedures. She will provide an overview of the ASX review following CLERP and the changes introduced including procedural changes relating to new listings.

John Price: is a Principal Lawyer in the Regulatory Policy Branch of the Australian Securities and Investments Commission. He works primarily in the Disclosure Practice Group and has been involved in the drafting of the new policy statements and the amendment of existing fundraising class orders in light of CLERP. Prior to joining ASIC, John worked at Corrs Chambers Westgarth.

John will speak about ASIC’s new policy statements on lodgment and the exercise of its discretionary powers. The policy statements deal with issues such as the new process for lodgment; making disclosure documents "generally available"; the exposure period required by section 727(3) of the Corporations Law; the prohibition on giving preference to application forms received or dated during the exposure period; the lodgment of a defective disclosure document and its implications; and ASIC’s role in the new fundraising process.

REGISTRATION DETAILS

Send registration form and payment details by Tuesday 7 March 2000 for the CLERP and Takeovers Seminar and Tuesday 28 March for the CLERP and Fundraising Seminar to: Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Faculty of Law, Baldwin Spencer Building, The University of Melbourne, Vic 3010, fax: 8344 5285, tel: 8344 5281, email: "[a.graham@law.unimelb.edu.au](mailto:a.graham@law.unimelb.edu.au)". No refunds unless cancellations notified by 7 March for the CLERP and Takeovers Seminar and 28 March for the CLERP and Fundraising Seminar.

REGISTRATION FORM

Seminar attending (please indicate)

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Card number: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name on card: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Expiry date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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