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EDITORS’ NOTE

This is the final issue of the Bulletin for 1999. The next issue will be published in January 2000. We take this opportunity to thank the supporters of the Bulletin – ASIC, ASX and, in particular, our sponsoring law firms listed above. The Editors have been very pleased with the success of the Bulletin. Since it commenced, the number of subscribers has grown rapidly to over 1500 with a readership estimated at over 2000 (as the Bulletin is distributed widely within companies, regulators, government departments and law firms).

We also thank the major professional associations (the Australian Institute of Company Directors, the Australian Corporate Lawyers Association and the Institute of Chartered Secretaries) who have supported the Bulletin this year.

The Editors wish all of our readers an enjoyable Christmas and a happy and prosperous new year.

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) MULTIMEDIA PROSPECTUSES AND OTHER OFFER DOCUMENTS: ISSUES PAPER

On 7 December 1999 ASIC and the Centre for Corporate Law and Securities Regulation at The University of Melbourne published an Issues Paper seeking comments on multimedia prospectus and other offer documents. The Issues Paper was written by Dr Elizabeth Boros and ASIC.

The Issues Paper examines recent developments both in Australia and in other jurisdictions in this area and highlights areas where electronic commerce developments will create opportunities for companies, as well as challenges for regulators.

The issues on which comment is sought include:

- whether the information that the Corporations Law requires issuers to provide to investors should be required to be in text form or be able to be reduced to words;

- whether all investors should have access to the same information in the same form; and

- what changes ASIC might need to make in the way it administers the Corporations Law in relation to prospectuses and other offer documents.

Comments on the Issues Paper are due by 18 February 2000 and should be sent to Mei-Lin Loh, Multimedia Prospectuses Project, ASIC, GPO Box 5179AA, Melbourne, Vic 3001; email "mei-lin.loh@asic.gov.au".

The Issues Paper forms part of a collaborative research project between ASIC and the Centre for Corporate Law and Securities Regulation which is investigating the impacts for the administration of corporate and securities laws in Australia of developments in electronic communications. In November, a Discussion Paper titled "The Online Corporation: Electronic Corporate Communications" was published as part of the collaborative research project. That Discussion Paper examined the following issues:

- electronic delivery of documents such as annual reports, notices of meeting and prospectuses;

- electronic voting and company meetings; and

- electronic lodgment of documents with ASIC.

Both the Issues Paper and the Discussion Paper are available from the websites of the Centre for Corporate Law and Securities Regulation and ASIC at:

"<http://cclsr.law.unimelb.edu.au/research_papers>"  
"<http://www.asic.gov.au>".

(B) SEC PROPOSES RULE TO BAN SELECTIVE DISCLOSURE OF MATERIAL INFORMATION; ADOPTS RULES TO ENHANCE AUDIT COMMITTEE EFFECTIVENESS

On 15 December 1999 the United States Securities and Exchange Commission announced it had proposed new rules to ban selective disclosure of material information and to clarify insider trading rules, and adopted rules to enhance the effectiveness of corporate audit committees.

Securities and Exchange Commission Chairman Arthur Levitt said, "The all-too-common practice of selectively disseminating material information is a disservice to investors and undermines the fundamental principle of fairness. This practice leads to potential conflicts of interest for analysts and undermines investor confidence in our markets. The rules we passed today are positive steps in the direction of even greater integrity in the financial reporting and public disclosure process."

(1) Rules proposed to ban selective disclosure and clarify insider trading laws

- Selective disclosure: The Commission proposed a new rule, Regulation FD (Fair Disclosure), which would bar companies from selectively disclosing material information.

- Use/possession issue: The Commission proposed a new rule that says insider trading liability arises when a person trades while "aware" of material nonpublic information. Under current law, courts have split on the issue of whether insider trading liability requires trading while in "knowing possession" of material nonpublic information, or proof that the trader "used" the information in trading.

- Misappropriation of information theory involving family and other personal relationships: The Commission proposed a rule to clarify when a person (family member or other personal relationship) receiving confidential information would owe a duty of trust or confidence to the person giving the information and therefore could not trade on that information.

(2) Rules adopted to enhance audit committee effectiveness

The Commission also adopted new rules to enhance audit committee effectiveness, to improve disclosure about audit committees, and to enhance the reliability of financial statements. These rules include requirements that: companies' interim financial statements be reviewed by independent auditors before being filed with the Commission; companies provide in their proxy statements a report from the audit committee that discloses whether it recommended to the Board that the audited financial statements be included in Forms 10-K and 10-KSB for filing with the Commission; companies disclose in their proxy statements whether the audit committee has a written charter, and file a copy of their charter every three years; companies whose securities are listed on the NYSE or AMEX or are quoted on Nasdaq disclose certain information about any audit committee member who is not "independent"; and all companies disclose whether the audit committee members are "independent."

Detailed fact sheets about these rules are available on the Commission's website at "http://www.sec.gov".

2. RECENT ASIC DEVELOPMENTS

(A) AREAS OF CONCERN REMAIN IN FINANCIAL REPORTING

On 21 December 1999 ASIC released the results of a recent ASIC surveillance on 210 financial reports. Areas of concern include amortisation of intangible assets, environmental reporting and directors’ emoluments.

Problems with amortisation of intangible assets included some entities refusing to amortise intangible assets such as brand names, mastheads, licences, patents and trademarks.

Another area which was identified as needing improvement was that of environmental reporting, as outlined in ASIC Practice Note 68. Inadequate reporting by a large number of entities in this area included:

- no disclosure or insufficient disclosure of the environmental regulations, risks and issues;

- no statement whether the entity had complied with the relevant environmental requirements;

- disclosures only in respect of the parent entity.

ASIC was also concerned with the disclosure of directors’ emoluments where some companies did not:

- disclose the value and terms of options granted to directors and officers;

- disclose the emoluments of all or some of the five executive officers receiving the highest emoluments;

- adequately state the policy for determining the nature and amount of emoluments or did not discuss the relationship between that policy and the company’s performance.

One company disclosed emoluments in a foreign currency, contrary to the intent of the Corporations Law and in a manner which was potentially misleading. Only a handful of those companies which issued share options to directors and executive officers placed a value on those options. The Corporations Law requires the amount of all emoluments to be disclosed, including the value of options. All options granted have some value at the time of issue. Many companies did not attribute values to options issued in the current year, even though the exercise price was less than half of the market price of the shares at the date of issue and the options were exercisable in one or two years’ time.

Other matters of concern related to:

- not disclosing recent valuations of land and buildings;

- making a rotating revaluation of assets in a class of property, plant and equipment over a period exceeding three years;

- not separately disclosing revenue from operating activities.

- recording six months of profits from an entity which became controlled after year end; and

- companies and trusts reporting negative reserves.

ASIC intends to focus on the following areas in reviewing financial statements of entities balancing in the second half of 1999:

- recognition and amortisation of intangibles;

- disclosure of directors’ and officers’ emoluments;

- negative reserves;

- concise financial reports.

For further information contact Jan McCahey, ASIC Chief Accountant, tel (03) 9280 3265.

(B) ASIC ACCEPTS ENFORCEABLE UNDERTAKING FROM WESTPAC

On 16 December 1999 ASIC announced it would accept an enforceable undertaking from Westpac Banking Corporation following an ASIC surveillance earlier this year. Westpac is one of the largest banking groups in Australia which also offers retail investment advisory services to its customers.

Westpac has a system of remuneration based on financial incentives that are related to the products and services recommended. ASIC considers that in its Advisory Services Guide (ASG) Westpac did not make the level of disclosure to its retail investment customers that is required by the Corporations Law. Although Westpac had legal advice to the contrary ASIC was concerned that Westpac did not adequately describe the extent to which remuneration of advisers was based on the value of the products and services recommended.

Arising out of what ASIC believes to be deficiencies in Westpac’s training and supervision of advisers and planners, some instances were identified in the review where products recommended by advisers appeared to be inappropriate.

Westpac has undertaken to amend a number of consumer disclosure documents and have them reviewed by a consumer consultant. This review will include having the disclosure documents consumer tested. These documents will include the Advisory Services Guide. Westpac has also agreed to upgrade its compliance and engage an external independent compliance consultant to review and report to ASIC on Westpac’s compliance and training programs during the next 18 months. Westpac has also agreed to contact all of its financial advice customers and inform them of ASIC’s concerns through an ASIC approved notice in its newsletter, advise them of the existence of a new ASG and tell them how to bring a complaint in relation to any recommendation they received while the previous ASG was in place.

Westpac will regularly report to ASIC through its Managing Director about the actions taken to comply with the enforceable undertaking.

(C) INTERIM POLICY ON MUTUALS DECIDED

On Thursday 9 December 1999 APRA and ASIC agreed on an interim policy for the treatment of mutual organisations under the Corporations Law and the Banking Act. Changes in responsibilities for supervision of some mutuals came about with the 1 July 1999 implementation of the Financial Sector Reform (Amendments and Transitional Provisions) Act (No 1) 1999.

ASIC now has responsibility for the supervision of any demutualisation of a building society, credit union or friendly society under the Corporations Law. APRA consent is necessary for the use of certain restricted words such as credit union and building society under the Banking Act. To use the name "credit union", the applying company must have a mutual structure.

The Interim Mutuality Policy agreed to by ASIC and APRA will be used as the basis for decisions made by both organisations until further consultations are made with interested parties and a permanent policy can be set in place next year. The interim policy is based on the previous Australian Financial Institutions Commission Standard on Credit Union Mutuality. It includes key elements of that document, as well as a combination of principles set out in Corporations Law.

The policy is available on the APRA and ASIC web sites "<http://www.apra.gov.au>" and "<http://www.asic.gov.au>".

(D) ASIC TO FORM POLICY PROPOSAL ON TIME-SHARING

On 6 December 1999 ASIC issued a policy proposal paper seeking public comment on its proposals for how time-sharing schemes should be regulated under the new Managed Investments Act.

ASIC is seeking comments from interested parties, industry bodies and consumer groups to ensure the final policy is both workable for the industry and has a high consumer protection focus.

In the paper ASIC has tried to strike a balance between consumer protection and regulatory costs. For example, the paper provides for mandatory cooling-off notices which allow the investor to reconsider their purchase and obtain a full refund of any money paid to promoters. The paper also encourages member-controlled clubs to play a significant role in supervising management of time-share properties.

ASIC proposes to give provisional exemptions from the Managed Investments Act for some existing schemes where the club running the scheme is a member of an approved external complaints system.

The Managed Investments Act provides for a single responsible entity to replace managers and trustees of schemes. ASIC has already extended the deadline to 1 March 2000 for either the manager or trustee to resign from existing time-share schemes.

ASIC intends to have the policy statement published prior to the 1 March deadline. The policy statement will supersede ASIC’s existing Policy Statement 66, based on the prescribed interests legislation which was repealed when the Managed Investments Legislation became law.

The consultation period will run until 24 January 2000 and all submissions from professional bodies should be directed to Darryl Staib at "darryl.staib@asic.gov.au" or GPO Box 4866, Brisbane, Queensland 4000. Copies of the policy proposal paper can be obtained by contacting the ASIC Infoline on 1300 300 630 or from the ASIC website at "<http://www.asic.gov.au>".

3.RECENT ASX DEVELOPMENTS

(A) ASX PROPOSES NEW REPORTING REQUIREMENT FOR INITIALLY CASH-RICH COMPANIES

On 20 December 1999 the ASX announced that the market will be consulted shortly about the proposed introduction of a new listing rule. This proposed listing rule is intended to apply to those companies that were admitted since 1 July 1999 where the company had assets at least half of which were in the form of cash or in a form readily convertible to cash. The new rule will require these companies to keep shareholders fully informed by providing a quarterly cash flow statement in the first two years following their admission.

"The reason for the new rule is that these companies have businesses in the early stages of development, typically based on new technology or other intellectual property investments, so information about their cash flows is highly relevant for investors", said Mr John McMurtrie, ASX’s Executive General Manager, Companies.

The exposure draft for the new rule will be available in early January 2000 on ASX’s website and interested parties are asked to respond by 14 February 2000. If the listing rule is approved, the first of the quarterly cash flow reports will be available for the March 2000 quarter, by 30 April 2000.

(B) ACCESS TO SEATS FOR RIOTS AND CROSSINGS IN THE OPTIONS MARKET

ASX has released an Exposure Draft containing proposed amendments to the ASX Business Rules. The Exposure Draft is divided into two parts.

Part A discusses a proposal to provide Registered Independent Options Traders (RIOTS) with access to SEATS. The proposal is intended to enable RIOTS to perform their functions as a Market Maker in the Options market more efficiently. Part B discusses reforms to crossing conventions in the Options market. The reforms are designed to make the conventions more suitable to the derivatives automated trading system ie CLICK.

ASX will finalise the Rules after any submissions made have been considered. It is envisaged that the proposals contained in Part A of the Exposure Draft will be brought into effect in early March 2000 and that the proposals contained in Part B will be brought into effect in April 2000.

Submissions on the Exposure Draft should be sent no later than 10 January 2000 to Tony Hunter, National Derivatives Manager by Fax on (02) 9227 0460 or email "derivatives@asx.com.au".

The Exposure Draft is available on the ASX website "<http://www.asx.com.au>" and is located under the icon ‘What’s New"

4. RECENT CORPORATE LAW DECISIONS

The full text of the following decisions can be accessed from the new Centre for Corporate Law judgments website at (<http://cclsr.law.unimelb.edu.au/judgments/>).

(A)ACCRUED JURISDICTION - THE APPLICATION OF RE WAKIM

(By Jeremy Kingsley and Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Edensor Nominees Pty Ltd v Australian Securities and Investments Commission [1999] FCA 1722, No V352 of 1999, Federal Court of Australia, Hill, Sundberg & Mansfield JJ, 10 December 1999.

This was an appeal from orders made by a single Judge of the Federal Court holding that the appellant had breached section 615 of the Corporations Law and section 52 of the Trade Practices Act 1974 (Cth). The appellant argued that in making the orders pursuant to sections 737 and 739 of the Corporations Law, the Federal Court purported to exercise State jurisdiction, and accordingly, the orders were invalid as a consequence of the judgment of the High Court in Re Wakim; Ex parte McNally (1999) 163 ALR 270.

(1) Background

On 12 January 1999, Yandal Gold Holdings Ltd ("Yandel") made a bid to take over Great Central Mines. Edensor Nominees Pty Ltd ("Edensor"), the appellant, held a majority shareholding in Yandel. The remaining interest in Yandel was held by the Normandy Group.

The second to seventh respondents, being the Yandel and Normandy Group of companies, entered into a shareholders’ agreement prior to the takeover offer being made. A consequence of the shareholders’ agreement was that both Edensor’s and Normandy’s entitlement to relevant interests in shares in Great Central Mines increased from 12.56% to 40.37%. Prior to the agreement, the two companies held a combined interest of 40.37%.

The takeover offer made on 9 February 1999 was conditional upon Yandel becoming entitled to not less than 90% of the shares in Great Central Mines and not less than three quarters of the persons to whom offers were made accepting the offers. This would enable Yandel to compulsorily acquire the remaining shares in Great Central Mines, pursuant to section 701 of the Corporations Law. The Part A statement stated that Edensor and Normandy Mining Holdings had advised Yandel that they would not accept the offers in respect of their holdings ("the non-acceptance agreement").

In the initial proceedings, the Australian Securities and Investments Commission ("ASIC") claimed that the shareholders’ agreement and the "non-acceptance" agreement were in contravention of section 615 of the Corporations Law. Further, ASIC sought declarations that in issuing and dispatching the Part A statement to the shareholders, Yandel had engaged in conduct in trade and commerce that was misleading and deceptive in contravention of section 52 of the Trade Practices Act 1974 (Cth) ("the TPA").

The primary Judge found in favour of ASIC and made the following orders, among others:

- that accepting shareholders were entitled to withdraw from the offer;

- that shareholders whose shares had been compulsorily acquired could give notices of avoidance and return the consideration received;

- that Yandal, Edensor and Normandy Mining be restrained from acting upon or giving effect to the 'non-acceptance' and 'retention' agreements;

- that Edensor was required to pay ASIC $28.5 million for payment, on a pro rata basis, to the shareholders in Great Central Mines who had not withdrawn their acceptance, or avoided the acquisition.

(2) The submissions on appeal

Edensor appealed from these orders. Yandel Gold and the Normandy Group did not appeal and were joined by ASIC as respondents. The appellant argued that, as a result of the decision in Re Wakim, the primary Judge did not have the power to make the orders and declarations made under the Corporations Law.

The appellant submitted that, to the extent that the orders relating to the shareholders’ agreement were based on sections 737 and 739 of the Corporations Law, they were made without jurisdiction. These sections confer power on "the Court" to make orders. Section 58AA defines "the Court" as the Federal Court exercising State jurisdiction.

The respondents submitted two arguments:

- that the jurisdiction accrued to the Federal Court as a result of the claim under the TPA; or alternatively

- that as ASIC was the Crown in right of the Commonwealth, section 75 of the Constitution vested jurisdiction in the High Court, and as a result, by section 39B of the Judiciary Act 1903, the Federal Court possessed the original jurisdiction of the High Court.

(3) Accrued jurisdiction

The respondents argued that jurisdiction accrued to the Federal Court as a consequence of the claim under the TPA. The jurisdiction accrued because the claims made against the appellant comprised a single controversy. The Full Court reviewed the established law on accrued jurisdiction citing, in particular, Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261, as authority for the position that where the Federal Court exercises accrued jurisdiction, that jurisdiction extends to the whole of the controversy of which the federal claim is a part.

Their Honours also considered the issue raised in Fencott v Miller (1983) 152 CLR 570 in relation to identifying what falls within accrued jurisdiction. The test for accrued jurisdiction, while necessarily taking into account the conduct of and relationship between the parties and the laws which attach to their conduct and relationships, is finally "a matter of impression and practical judgment". Their Honours agreed with the primary Judge that the matter at first instance consisted of "a common substratum of facts" justifying the application of accrued jurisdiction to the whole of the controversy. This conclusion was based on the fact that the injunctive relief sought against Edensor was ‘enlivened’ by both the Corporations Law and the TPA.

However, their Honours went on to consider the argument raised by the appellant that the definition of "Court" in section 58AA of the Corporations Law when applied to the orders made under sections 737 and 739, precludes a valid exercise of jurisdiction by the Federal Court. This is because the sections taken together require the Federal Court to make the relevant orders exercising State jurisdiction. Their Honours noted that this issue could not reasonably have been considered by the primary Judge as, at that time, the Court was bound by the decision in Gould v Brown (1988) 193 CLR 346 and the judgment of the High Court in Re Wakim had not been delivered.

The Full Court returned to the judgment in Stack v Coast Securities in deciding this point in favour of the appellant. Stack v Coast Securities establishes that where a Federal Court validly exercises accrued jurisdiction, it is federal jurisdiction.

"But the jurisdiction which the legislation in the present proceedings purports to confer upon the Federal Courts is not accrued federal jurisdiction. It is an attempt to confer State jurisdiction in respect of controversies that fall outside the realm of federal jurisdiction".

The Full Court went on to consider the judgment of the High Court in Smith v Smith (1986) 161 CLR 217. In that case, the High Court held that the Family Court could not exercise accrued jurisdiction to make an order under section 31 of the Family Provision Act 1982. The impediment was that the definition of "Court " in the Family Provision Act clearly referred to the Supreme Court. An order made by the Family Court exercising accrued jurisdiction is not an order of the Supreme Court. Their Honours held that a different but parallel impediment applied in this case, namely, the Corporations Law attempts to confer State jurisdiction on the Federal Court. As a result of the decision in Re Wakim, this conferral was not valid, consequently, orders made under this power are also not valid.

(4) Section 39B of the Judiciary Act

The second argument put by the respondents was that section 39B of the Judiciary Act confers the original jurisdiction of the High Court on the Federal Court.

The Full Court concluded that this argument failed for the same reason as the argument based on accrued jurisdiction. The orders made under the Corporations Law were, by definition, made by the Federal Court exercising State jurisdiction and this was not constitutionally valid.

(5) Section 22 of the Federal Court of Australia Act 1976 (Cth)

Finally, their Honours considered whether section 22 of the Federal Court of Australia Act 1976 (Cth) provided a source of power for the order made by the primary Judge. Their Honours cited the judgment of Gibbs J in Phillip Morriss Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457. In that case, His Honour held that section 22 was fundamentally directed to the "avoidance of a multiplicity of proceedings". Their Honours noted that Gibbs J and other members of the Court held that section 22 does not confer jurisdiction on the Federal Court.

(6) Conclusion

For the reasons outlined above, the Full Court held that the Federal Court had accrued jurisdiction to decide the controversy between the parties, but not to make orders pursuant to section 737 and 739 of the Corporations Law. In their conclusions, their Honours further found that section 22 of the Federal Court Act does not allow a court, when exercising accrued jurisdiction, to provide statutory relief which is only available in another jurisdiction. The appeal was allowed.

(B) INSIDER TRADING – WHEN IS THERE AN "AGREEMENT" TO BUY SHARES?

(By Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation)

R v Evans and Doyle [1999] VSC 488, Supreme Court of Victoria, McDonald J, 15 November 1999.

In the November issue of this Bulletin we noted that on 16 November 1999, former J B Were dealer, Greg Doyle and Mining Project Investors Pty Ltd director, Alan Evans were found not guilty of charges of insider trading brought by ASIC following a direction from Justice McDonald. In this case note, we elaborate on the reasons given by McDonald J.

ASIC alleged that Evans and Doyle were guilty of insider trading in that they had breached section 1002(G)(2)(a) of the Corporations Law by entering into an agreement to purchase shares in Mt Kersey Mining NL. Under section 1002G, an "insider" must not, among other things, enter into an agreement to purchase or sell securities if the insider possesses information that is not generally available but, if it were, a reasonable person would expect it to have a material effect on the price or value of the securities.

At the time of the alleged insider trading, Doyle worked as a dealer for the stock broker J B Were and Evans was finance director of MPI Pty Ltd, a company engaged in the business of exploring for minerals, including nickel.

The prosecution alleged that the inside information possessed by Doyle and Evans was that MPI Pty Ltd had discovered high grade nickel sulphide on one of its mining leases in Western Australia. The mining lease was adjacent to areas in which Mt Kersey Mining NL had either mining leases or had applied for mining leases. The prosecution introduced into evidence recordings of telephone conversations between Evans and Doyle at 2.00 pm and 2.07 pm on Monday 20 November 1995. In the first conversation, Evans gave Doyle orders to purchase shares in Mt Kersey. The prosecution alleged that by these two telephone conversations, the two had entered into an agreement to purchase shares in Mt Kersey. At the time of these telephone conversations, McDonald J stated that there was evidence on which a jury could conclude that at those times, Doyle knew or ought reasonably to have known that the information possessed by him was not generally available. It was on 20 November 1995 that MPI had planned to publicly announce its discovery of the high grade nickel sulphides. However, the evidence was that the media release published by MPI was not faxed until 2.49 pm on 20 November and that a journalist who was to be briefed by a director of MPI did not attend at the MPI office until between 2.30 pm and 2.40 pm on that day.

Other evidence before the court concerned when the purchases were actually made on the Stock Exchange on 20 November. The evidence was given by a SEATS operator at J B Were who received the purchase orders from Doyle. The first bid entered by this operator was at 2.31 pm and it was matched almost immediately by an offer for fewer shares than those bid for. Matching of offers and trades on SEATS in relation to the orders received from Doyle occurred during the period from 2.31 pm to 3.11 pm.

The critical issue was whether, when the two telephone conversations between Doyle and Evans occurred at 2.00 pm and 2.07 pm, there was an "agreement" to purchase shares as required by section 1002G(2)(a). The question was critical because if the agreement was held to take place when the purchase of shares occurred on the Exchange, then at this stage there was an argument that the information was generally available and therefore not confidential.

McDonald J quoted from Bell Group Ltd v Herald and Weekly Times Ltd [1985] VR 613 where Kaye J stated that the consequences of a client giving instructions to a stock broker for buying or selling shares on the Exchange involves the creation of two separate contracts. The first is one of agency between the client and the broker for the sale or purchase of shares and can be referred to as an agency contract. The second contract is one for the sale and purchase of the shares, being made by the broker, in the performance of the agency contract. McDonald J also quoted from a well-known book on securities industry law where this analysis was also adopted.

McDonald J then concluded that because a broker’s client does not acquire rights as a seller or buyer of shares on the Exchange until a contract has been concluded in conformity with the rules of the Exchange, it is at that time that an agreement to purchase and sell shares or other securities is entered into for the purposes of the insider trading provisions. McDonald J noted that one could readily think of circumstances where following a buyer instructing his or her broker to purchase shares, matters may intervene which preclude a trade being entered into. For example, there may be no shares at the authorised price being offered for sale.

The conclusion of McDonald J was that where a person authorises, or instructs a broker to purchase securities in a company whose securities are quoted on the Exchange and thereby enters into an agreement with the broker to purchase such securities, there is not entered into an agreement to purchase those securities within the meaning of section 1002G(2) of the Corporations Law. The agreement to purchase the securities is entered into by the buying broker on behalf of the client when the agreement is concluded with the selling broker. In other words, it is only if and when a trade or agreement to purchase the securities has been achieved by the broker that the broker enters into an agreement to purchase securities causing the principal also to enter into an agreement to purchase securities.

Consequently, the conversations at 2.00 pm and 2.07 pm which amounted to an instruction from Evans to Doyle to purchase shares in Mt Kersey, although constituting an agency contract or agreement between these two, did not constitute an agreement for the purposes of section 1002G(2).

As noted in the November issue of this Bulletin, McDonald J did not allow the prosecution to amend its case to allege that the agreements to purchase the Mt Kersey shares were entered into when the purchases were actually made on the Exchange on the basis of the prejudice that this would cause the defendants following a lengthy trial. McDonald J subsequently directed the jury to deliver verdicts of not guilty in respect of both Evans and Doyle.

(C) SUMMONS TO SET ASIDE A STATUTORY DEMAND DISMISSED BECAUSE OF NON-COMPLIANCE WITH THE CORPORATIONS LAW

(By Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation)

Benonyx Pty Ltd v Fetrona Pty Ltd [1999] NSWSC 1181, New South Wales Supreme Court, Santow J, 29 November 1999, judgment revised, 8 December 1999.

On 29 July 1999 the defendant served a statutory demand on the plaintiff demanding payment for a debt. The plaintiff then made an application to the court under section 459G of the Corporations Law for an order to set aside the statutory demand. However, the copy of the application by the plaintiff which was served on the defendant as required by section 459G(3), omitted the return date as the summons by the plaintiff to set aside the statutory demand had not at that stage been filed.

Santow J held that the plaintiff’s summons should be dismissed as it had not complied with section 459G. He stated that the defendant could not be said to have received proper notice of the court proceedings for which its attendance was required when the defendant was not told of the important fact of the return date for the application to set aside the statutory demand.

The judgment emphasises the need for strict compliance with the formalities in this area of the law.

(D) EXTENSION OF TIME GRANTED TO LIQUIDATOR TO COMMENCE PROCEEDINGS IN RESPECT OF A VOIDABLE TRANSACTION

(By Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation)

Richard Walter Pty Ltd (in liquidation); ex parte Gregory Winfield Hall [1999] NSWSC 1179, New South Wales Supreme Court, Santow J, 18 November 1999, judgment revised, 2 December 1999.

The liquidator of Richard Walter Pty Ltd applied to the court for an extension of time under section 588FF(3)(b) of the Corporations Law within which to make an application in respect of a voidable transaction concerning the company. The reason for the extension of time was that the liquidator was awaiting the judgment of the Full Federal Court in a case involving the company and the Commissioner of Taxation. The outcome of this judgment would determine whether or not assets under the control of the liquidator would be subject to a charge in favour of certain claimants and the outcome of the judgment would also have a bearing upon whether there were sufficient funds available for the liquidator to pursue remedies on behalf of creditors of the company.

Santow J, drawing upon previous judgments, noted that the following guidelines applied to the type of application before him:

1. Is there a satisfactory explanation for delay?

2. Is there a sufficiently arguable case of a voidable transaction, on a preliminary review of the facts, to justify the continued exposure of the possible defendants to legal action? (Santow J noted that this point does not always apply).

3. Is there some likely actual prejudice to the possible defendants which arises from the delay which outweighs the case which justifies an extension of time?

4. Is a preliminary review of the case inappropriate because the liquidator has not completed investigations into transactions which might be voidable?

Santow J granted the extension sought by the liquidator. The extension granted by him was the earlier of 20 November 2000 or three months after the judgment of the Full Federal Court (this three months allowing time for further investigation).

Santow J stated that there was no evidence of any prejudice which would result from granting the extension.

(E)DISCRETIONARY FACTORS IN COURT APPROVAL OF ENTRY INTO A CONTRACT FOR FUNDING LITIGATION BY A LIQUIDATOR

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

In the matter of Imobridge Pty Ltd (in liquidation) [1999] QSC 342, 12 November 1999, Fryberg J.

This was an application by the liquidator of Imobridge Pty Ltd ("the Applicant") under section 477(2B) of the Corporations Law for court approval to enter into an agreement on the company’s behalf for the funding of an action against Westpac Banking Corporation ("Westpac") for the recovery of preferential payments allegedly made to Westpac in reduction of the company’s debt. Under the agreement, the funder would provide funds for the conduct of the litigation in return for payment of a share of the net proceeds of the litigation. The respondent to the application was a former director of Imobridge Pty Ltd who alleged that she was one of the company’s largest creditors. The application was opposed on discretionary grounds only. It was not challenged as a champertous contract.

(1) Background to the winding up

The respondent and her husband were directors of Imobridge which carried on a building business. The company encountered financial difficulties by early 1994 and its account with Westpac was overdrawn by $100,000. The respondent and her husband gave personal guarantees for the debt in October 1993. An overdraft limit was only formally approved in February 1994, with a limit of $160,000. The directors became aware at this time that Imobridge had incurred substantial trading losses, and in early March 1994, Westpac refused to extend the company’s level of credit.

At this time, the company had a number of unfinished building projects on foot including the construction of a house on land at Plainlands. Imobridge was party to the contract to purchase the land and had been unable to complete the transaction. However the contract remained on foot.

A meeting of the company’s directors resolved that the respondent would personally purchase the Plainlands land and pay the company for the house under construction on the land. The respondent undertook to pay all amounts incurred to complete the house. However, the company was to remain liable for all unpaid amounts on the house. In the same meeting, the respondent was asked to provide the details of all company creditors that she had paid from her personal funds, and it was resolved that monies loaned by her be recorded as an unsecured loan to the company.

In early April, Westpac extended an overdraft facility to the respondent and her husband personally, for the purpose of paying-out the company’s debts, purchasing the Plainlands property, completing the house on that land and providing working capital. On 18 April, Westpac then credited the company’s account by book entry with the sum of $163,438.44 and debited to it a small sum for bank charges. The balance of the account was zero. At the same time, the personal account of the respondent and her husband was debited the sum of $163,438.44.

The members of Imobridge resolved that the company be wound up on 24 May 1994, and the applicant was appointed as liquidator. Imobridge was clearly insolvent, with realisable assets of less than $9,000 and amounts owing to creditors exceeding $241,000.

(2) The proposed litigation

The Applicant recovered $31,574.95 from the respondent in preferential payments in November 1994. The proceedings which were the subject of the agreement for litigation funding were commenced in the liquidator’s own name against Westpac in the District Court on 21 May 1998, for $180,026.03 pursuant to section 588FA, plus interest and costs. It was claimed that between 8 December 1993 and 18 April 1994, the company’s debt to Westpac was reduced by the amount claimed. The particulars of payment included the payment of $163,438.44 on 18 April. It was alleged that both the company and Westpac were parties to each of the transactions. The statement of claim pleaded that Imobridge was insolvent when each of the payments were made, which resulted in Westpac receiving more from the company in respect of its unsecured debt than it would have if the transactions were set aside and Westpac were to prove for the amount. A further 22 payments were pleaded.

The company’s creditors were first presented with the contract for funding of litigation against Westpac by a report signed by the Applicant on 1 June 1998. This report stated that the Applicant had received legal advice that as liquidator, he had a claim against Westpac for recovery of unfair preferences in the sum of $180,000 and that a proposal for funding the action was received from Insolit Pty Ltd ("Insolit"). The agreement was explained as providing the means to finance the action and provide an indemnity to the Applicant in his capacity as liquidator to run the action, with Insolit receiving a share in proceeds if the litigation was successful.

A creditors’ meeting was held on 11 June 1988. Only nine of the forty unsecured creditors attended the meeting. The respondent claimed over $203,000 from the company and Downs Timber Sales claimed over $39,000. The balance of creditors in attendance all had claims of under $1,000. The Applicant did not attend the meeting. His representative did not disclose that proceedings had already been issued against Westpac, or the basis upon which the amount claimed was calculated. Neither advice allegedly received from Counsel or the contract for funding was tabled. All creditors in attendance except Downs Timber Supplies voted against the Applicant entering into the agreement on the company’s behalf.

Fryberg J accepted that the respondent procured the company’s rights to purchase the Plainlands property in return for $45,000 and that her obligation to pay that amount was satisfied by the book entry made in the company’s account with Westpac on 18 April 1994. His Honour was satisfied that the Applicant had an arguable case against Westpac for the recovery of that amount. Counsel for the respondent conceded that there was an arguable case of unfair preference in respect of amounts paid by the company into its account with Westpac, which exceeded payments out during the relevant period.

(3) Submissions

The Applicant submitted that the Court should exercise its discretion to approve the funding agreement unless a lack of good faith on the part of Applicant in entering into the contract could be proved, or there was an error of law or there were real and substantial grounds for doubting the prudence of the Applicant’s conduct.

Fryberg J rejected the Applicant’s restricted interpretation of the court’s discretionary powers and held due weight should also be given to the Applicant’s commercial judgment. However, his Honour observed that it would be impracticable for him to examine a liquidator’s commercial judgment in any depth.

The Applicant relied on Re Spedley Securities Ltd (in liquidation) (1992) 9 ACSR 83, in which Giles J endorsed the judgment in Re Mineral Securities Australia Ltd [1973] 2 NSWLR 207 that in attempting to "second guess" the liquidator’s exercise of powers, the court would not interfere unless a lack of good faith, error in law or principle, or real or substantial grounds for doubting the prudence of the liquidator’s conduct could be shown. In that case, complex commercial considerations were involved and the compromises in issue were not rejected by any of the company’s creditors. In those circumstances, the court would not "second guess" the liquidator’s conduct.

The Applicant also relied on Re Movitor Pty Ltd (in liquidation) (1996) 64 FCR 380 and Re Addstone Pty Ltd (in liquidation) (1998) 16 ACLC 1, 320. Re Movitor held that section 477(2)(c) of the Corporations Law authorised an agreement that was otherwise void for champerty and that a transaction that was not a bona fide exercise of power under that section was not authorised by it. In Fryberg J’s opinion, the Applicant was not assisted by that case as it dealt with the issue of whether conduct that was not bona fide fell within the section. The court’s discretion to approve such agreements would clearly not arise in circumstances where the liquidator was not acting bona fide. Fryberg J considered that Re Addstone also dealt with an application under section 479(3) and the issue of whether the liquidator had the power to enter into the transactions concerned. His Honour distinguished those cases on the basis that in the present application, the issue was not whether such a power exists, but whether the Court should approve its exercise.

(4) Exercise of the discretion

Fryberg J held that in the exercise of his discretion to approve the funding agreement, he would give due weight to the liquidator’s commercial judgment, the prospects of success of the litigation, the benefits to creditors other than the respondent, possible oppression of the respondent and the circumstances behind the making of the funding contract.

(5) Prospects of success

In considering the litigation’s prospects of success, his Honour was conscious that he should not attempt to try the action.

His Honour considered that this was a significant factor in the application. Good prospects of success favoured granting the application, and poor prospects of success would dictate against granting the orders sought. Prospects of success will be relevant to the applicant’s good faith, the possible oppression of the respondent to an application, and the possible waste of court resources.

In order to succeed in the claim against Westpac, the Applicant would have to prove that the payments made to Westpac were unfair preferences within the meaning of section 588FA of the Corporations Law. This required proof that the payments were in fact made, and secondly that the company was party to them. On the evidence before him, Fryberg J was not convinced that the Applicant had a reasonable prospect of successfully proving that the respondent made the sum of $163,438.44 available to the company. However, there were reasonable prospects of establishing that Westpac accepted an obligation of the respondent and her husband to pay that amount to the bank if the company’s account was credited with the same amount. There were also good prospects of establishing that the respondent incurred liability to Westpac in the sum of $45,000 in relation to assignment of the company’s rights under the Plainlands contract. The company could be considered a party to this transaction, because the respondent admitted that $45,000 of the $163,438.44 credited to the company’s account on 18 April 1994 was intended to discharge that liability. Fryberg J was satisfied that there were good prospects of success in recovering $61,587.59 from Westpac. However, his Honour was of the view that the company could not be shown to be a party to the arrangement between Westpac and the respondent to an extent greater than $45,000. In the present case, there was no corresponding act of the company that could evidence it being a party to the transaction on 18 April 1994.

(6) Creditors other than the respondent

The Applicant contended that if the action were successful, a dividend of 12.5 cents in the dollar was possible to the benefit of the company’s unsecured creditors. However, it became apparent in cross-examination that recovery would enable the liquidator’s costs and solicitors’ costs to be paid as well as the costs of running the action. Although the Applicant denied that this was the main reason for the proposed action, Fryberg J considered that his affidavit was "positively misleading and that his concealment of the true position until cross-examination reflected poorly upon him". However, his Honour did not consider the fact that the litigation would likely benefit only the professionals involved was reason to stifle the litigation. The chance that creditors would receive a dividend was a factor that supported the case for running the action against Westpac.

Fryberg J endorsed earlier cases in taking the views of creditors into account when exercising his discretion to approve the funding agreement. Eighty per cent of the creditors of Imobridge did not express a view as to whether the Applicant should enter into the agreement on the company’s behalf. His Honour also considered that the creditors’ meeting had been significantly mislead, and thus the weight to be given to the support of some creditors to the funding agreement was diminished.

(7) Possible Oppression of the Respondent

Fryberg J was of the view that the respondent had a substantial interest in opposing the Application, as there was a likelihood that Westpac would bring third party proceedings against her if litigation was commenced against it. His Honour considered that the considerable delay in pursuing the case against Westpac had probably benefited, rather than harmed the respondent.

(8) Making of the Contract

It became apparent in cross-examination that apart from Insolit, there were four insurance companies, which provided funding for litigation in return for a share in the net proceeds. Tenders had not been called by the Applicant, an approach to GIO was unsuccessful and it was suggested that FAI refused to fund actions against Westpac. The Applicant approached a firm of solicitors in Sydney, the Walker Law Group, two principals of which were the owners of Insolit. The Applicant had not made inquiries into whether Insolit would be able to meet the costs of litigation. Fryberg J was unwilling to go behind the Applicant’s commercial judgment of the appropriate level of remuneration for Insolit from the proceeds of the litigation.

His Honour also considered the issue of whether a liquidator could part with statutory powers of recovery, or allow third parties to exert control over their exercise. While the contract for funding placed control of the litigation with the Applicant, his proposal to have the Walker Law Group conduct the litigation would result in the agreement being ineffective in this regard. Fryberg J was concerned that the Applicant have independent legal advice, which could be dealt with by a direction. His Honour was also concerned that Insolit would be unable to meet its obligations under the funding agreement and decided that the Applicant should procure a bank guarantee before proceeding with the claim.

(9) Orders

Fryberg J granted approval for the Applicant to enter into the contract with Insolit to finance the action against Westpac, subject to a number of directions. His Honour directed that the Applicant procure a bank guarantee or other security for the performance of Insolit’s obligations under the contract; and that the Applicant not appoint the Walker Group as his solicitors but to appoint solicitors wholly independent of Insolit.

(F) FEDERAL COURT SETS ASIDE DECISION FOR WANT OF JURISDICTION

(Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Douglas Robert McNeill Robins & Ors v Incentive Dynamics Pty Ltd (in Liquidation) [1999] FCA 1651, N 684 of 1999, Federal Court of Australia, Branson, Sackville & Kiefel JJ, 26 November 1999.

Pagby Pty Ltd (ACN 005 203 136) v Incentive Dynamics Pty Ltd (in Liquidation) & Anor , V387 of 1999, Federal Court of Australia, Branson, Sackville & Kiefel JJ, 26 November 1999.

(1) Background

The appellants sought an order that the decision of the primary Judge be set aside and an order dismissing the original proceedings for want of jurisdiction. Two separate notices of appeal were filed. The first on behalf of five appellants and the second on behalf of the remaining sixth appellant. Incentive Dynamics Pty Ltd (in liquidation) ("Incentive") and the liquidator were respondents to both appeals. The appeals were heard together. The appellants were the directors of Incentive and relatives of those directors.

The proceedings in the first instance were brought by Incentive for:

- breach of fiduciary duty;

- claims in regard to advances made to directors and other appellants; and

- claims that the certain funds were held on trust for Incentive.

The claims for breach of fiduciary duty and constructive trust were rejected by the primary Judge. His Honour found in favour of Incentive in regard to the advances and accordingly found that the appellants were indebted to Incentive. This appeal was made on the basis that the decision of the primary Judge was made without jurisdiction.

The judgment was handed down the day before the judgment of the High Court in Re Wakim ; Ex parte McNally (1999) 163 ALR 270. The effect of that judgment was to render unconstitutional section 42(3) of the Corporations (NSW) Act 1990 (NSW), section 56(2) of the Corporations Act 1989 (Cth), section 41(1) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) and section 9(2) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth).

(2) The State Jurisdiction Act 1999

Following Re Wakim, the Federal Courts (State Jurisdiction) Act 1999 (NSW) ("the Act") was assented to on 6 July 1999 and commenced on 9 July 1999. A major purpose of the Act is to validate past judgments of the Federal Court on the basis of cross-vested State jurisdiction. These judgments are defined as ineffective judgments by section 4 of the Act. Section 6 of the Act allows such judgments to be treated as if they were valid judgments of the relevant Supreme Court.

Section 4(2) provides, among other things, that if a Full Court of the Federal Court has purported to affirm, reverse or vary an ineffective judgment, the original judgment is an ineffective judgment for the purposes of the Act, only to the extent that it purports to have effect.

Section 11 of the Act provides a procedure whereby a proceeding in a federal court may be treated as a proceeding in the Supreme Court. An important consequence of the section is that the proceeding is deemed to have commenced in the Supreme Court on the day on which it commenced in the Federal Court. The section provides that a party to a proceeding in which a "relevant order" is made, may apply to the Supreme Court for an order that the proceeding be treated as a proceeding in that court. A relevant order is defined, among other things, as an order dismissing, striking out, or staying a proceeding for want of jurisdiction, or a declaration made by a federal court that it has no jurisdiction in relation to a proceeding.

On 27 August 1999, the respondents in this matter (Incentive and the Liquidator) filed a summons in the Supreme Court of NSW seeking a declaration that the rights of the parties arising from the original decision of the Federal Court are the same as they would be had the judgment been a valid judgment of the Supreme Court of NSW. The respondents also sought a declaration that the proceedings be treated as a proceeding of the Supreme Court. Santow J adjourned the hearing pending the outcome of the appeal to the Full Federal Court.

(3) The submissions

The parties agreed that section 24(1) of the Federal Court Act confers on the Full Court, appellate jurisdiction to determine whether a judge who has purported to exercise the original jurisdiction of the court acted correctly. The appellants argued further that since a challenge to the decision at first instance had been made within time, the Full Court was under a duty to determine the issue and to set aside the orders made by the primary Judge. Counsel for the appellants argued further that the State Jurisdiction Act had no bearing on the duty of the Court, acting in its appellate jurisdiction, to correct the error of the primary Judge.

The respondents noted that the appellants had foreshadowed that if the primary judgment was set aside, they would argue in the Supreme Court that section 4(2) of the State Jurisdiction Act would prevent the court from giving effect to the orders of the primary judge. A significant part of the argument put by the respondents was that the Full Court should prevent the appellants from utilising this "unmeritorious tactical advantage".

The respondents argued that the primary judgment was an ineffective judgment under the provisions of the State Jurisdiction Act and therefore the primary judgment had the same standing as a judgment of the Supreme Court of NSW. They argued that the court should either make a declaration that the primary judge lacked jurisdiction or make an order staying the proceedings for want of jurisdiction. Either of these orders would fall within s 11 of the Act and would therefore preserve the commencement day of the proceedings in the Federal Court for the purposes of any limitation period.

The respondents further argued that the Full Court did not have a duty to quash the decision of the primary judge, but only a discretion to do so arising from section 28(1) of the Federal Court Act.

(4) The decision

The Full Court rejected the respondents’ arguments and upheld the appeal. The decision was based on five main points.

First, the Full Court considered the case law as it relates to the exercise of a broad discretion such as that provided under section 28(1) of the Federal Court Act. Section 28(1)(b) provides that the court may "give such judgment or make such order as, in all the circumstance, it thinks fit, or refuse to make an order". The Full Court considered the judgment of the High Court in Johns v Australian Securities Commission (1993) 178 CLR 408. The Full Court cited the judgment of Brennan J with whom Dawson J agreed, pointing out that when the court has a discretion, that discretion should be exercised in the interests of justice. In this context, Brennan J held that "justice" means justice according to the law.

The Full Court found that as a matter of law the orders of the primary Judge should not have been made because of a lack of jurisdiction. Therefore, as section 24(1)of the Federal Court Act confers appellate jurisdiction on the Full Court and the appellants had appealed within the time specified in the Federal Court Rules, they were entitled to relief.

Secondly, the Full Court cited the finding of Grifith CJ in Federated Engine-Drivers and Firemen’s Association of Australasia v The Broken Hill Proprietary Company Limited (1911) 12 CLR 398. Grifith CJ held that it is " the first duty of every judicial officer…to satisfy himself that he has jurisdiction…". The Full Court found that to deny relief from an order made without jurisdiction, simply on the basis that the appellants may act in an ‘unmeritorious’ way, would be contrary to the law.

Thirdly, their Honours found that making a decision to adjourn the proceedings in order for the respondents to make a further application to the Supreme Court would undermine the decision made by Santow J to adjourn the proceedings in the Supreme Court, pending the decision of the Full Federal Court.

Fourthly, the Full Court considered the respondents’ argument that allowing the appeal would amount to the court shutting its eyes to the intent of the remedial legislation. Their Honours noted that the appellants had accepted that if the Court decided to set aside the orders of the primary Judge, it would be appropriate for the proceedings to be dismissed for want of jurisdiction. As an order in this form would be a "relevant order" under section 11 of the Act, it would preserve the respondents’ position in respect of limitation periods.

In this context, the Full Court commented on the appellants’ interpretation of section 4(2) of the Act. Their Honours noted that the use of the word "purported" in section 4(2) limits the section to a purported exercise by a Full Court of State judicial power. Therefore, the exercise of actual federal judicial power in setting aside a judgment for want of jurisdiction, would not come within the meaning of the section. They considered this view to be supported by section 14(a) of the Act which recognises that the legislation applies to judgments of the Federal Court which have been quashed for want of jurisdiction.

Finally, their Honours concluded that, even if the decision in the appeal prejudiced the respondents in the Supreme Court proceedings, this could not interfere with the court’s duty to give effect to the rights of the parties according to the law. They found that the appellants had been prejudiced by a decision made without jurisdiction, and therefore, the court was bound to set the decision aside and dismiss the proceedings for want of jurisdiction.

5. CORPORATE LAW TEACHERS CONFERENCE

10th Annual Australasian Corporate Law Teachers Association Conference CLTA 2000

Dates: 11 - 13 February 2000

Venue: Faculty of Law, University of Wollongong

Convened jointly by the Faculty of Law, University of Wollongong and the Faculty of Law, University of Western Sydney, Macarthur:

Conference website: "<http://www.uow.edu.au/law/law_web_main/clta.htm>"

Conference Theme

'Australasian Corporate Culture and Compliance'

Confirmed speakers include Mr Alan Cameron, Chairman, ASIC; Justice Kim Santow, New South Wales Supreme Court; Justice Robert Austin, New South Wales Supreme Court; and Mr John Kluver, Executive Director, Companies and Securities Advisory Committee

Convenors:

Damien Considine, Sub-Dean, Faculty of Law, University of Wollongong

Email: damien\_considine@uow.edu.au

Professor Rob Woellner, Dean, Faculty of Law, UWS Macarthur

Conference Administrator:

Ms Shelley Johnson, Faculty of Law, University of Wollongong, Ph. 0242 214122; Fax 0242 213188  
Email: shelley\_johnson@uow.edu.au

6. RECENT CORPORATE LAW JOURNAL ARTICLES

M Whincop, ‘Trading Places: Thoughts on Federal and State Jurisdiction in Corporate Law after Re Wakim’ (1999) 17 Company and Securities Law Journal 489

Federal systems enable the minimisation of cross-border externalities and the exploitation of economies of scale. Because of the limited information or foresight of the founding fathers, various inefficiencies arise over time. One means of addressing these is "constitutional trade" between state and federal governments. In this article, I explore the effect of constitutional interpretation on these trades, illustrated by reference to the decision in Re Wakim. After criticising the High Court’s decision, I discuss two means of addressing the case’s inefficiency, including Commonwealth legislation under the corporations power, and enabling the parties to corporate contracts to take responsibility for forum selection.

C Saunders, ‘In the Shadow of Re Wakim’ (1999) 17 Company and Securities Law Journal 507

In Re Wakim, the High Court held that State jurisdiction could not constitutionally be conferred on federal courts. The decision severely truncates the general arrangements for the cross-vesting of jurisdiction between federal, state and territory courts. It also affects cross-vesting in the context of cooperative schemes, including the Corporations Law, which was in issue in Re Wakim itself. The reasoning in the decision suggests that it may have implications for other aspects of cooperative schemes as well, the extent of which is not yet clear. The article explains the bases for the decision in Re Wakim, in order to evaluate the wider application it may have.

R Baxt - Note, ‘The Wakim Decision: What Should Be Done to Overcome Its Impact? (1999) 17 Company and Securities Law Journal 518

E Boros - Note, ‘Disclosure of Information on Company Websites’ (1999) 17 Company and Securities Law Journal 522

J O’Donovan - Note, ‘Receivers’ Duties in Carrying on the Business: Good Faith or Due Diligence? (1999) 17 Company and Securities Law Journal 528

G Peirson - Note, ‘Accounting Interpretations’ (1999) 17 Company and Securities Law Journal 531

V Goldwasser, ‘The Enforcement Dilemma in Australian Securities Regulation’ (1999) 27 Australian Business Law Review 482

This article examines the problems of enforcing the prohibitions against securities manipulation. Although the specific orientation is stock market manipulation, the issues raised are equally pertinent across a broader range of market misconduct prohibitions, such as insider trading and short selling. At the heart of the matter is the criminalisation of the securities laws, which has been a significant theme in the regulation of stock market activity worldwide. The difficulties created by criminal enforcement of securities malpractice are discussed. The powers of the regulators are examined and comparisons drawn with the enforcement powers and approach of United States and United Kingdom regulators. The suggestion is made that the current direction of enforcement in Australia be reassessed. The ongoing depletion of skilled manpower from the national regulator should also be reversed. The aggressive pursuit of securities violators requires, above all, the injection of greater resources into the enforcement program and the concerted development of a professional regulatory elite and esprit de corps modelled on the United States Securities and Exchange Commission.

A Keay, ‘Jurisdictional Chaos: The Fallout from the Australian High Court’s Decision in Re Wakim’ (1999) 10 International Company and Commercial Law Review 269

G Hall, ‘Are Chinese Walls Ever Effective?’ (1999) 10 International Company and Commercial Law Review 276

A Griffiths, ‘Interlocking Directorships and the Danger of Self-Dealing: The Duties of Directors With a Conflict of Interest’ (1999) 10 International Company and Commercial Law Review 280

M Matthews, ‘The Shareholder Derivative Suit in Arkansas’ (1999) 52 Arkansas Law Review 353

J Kobayashi, ‘Another Referendum or a New National Corporations Law?’, Asia-Pacific Legal Developments Bulletin, Vol 14 No 3, September 1999, 1

D Gingerich and D Wulan, ‘Holding Company Restrictions Abolished’, Asia-Pacific Legal Developments Bulletin, Vol 14 No 3, September 1999, 9

J Sauer, ‘A Tear in the Corporate Veil: Liability of Corporate Officers for Patent Infringement’ (1999) 37 Duquesne Law Review 89

R Rosen, ‘US Securities Litigation in a Time of Legislative Change’, International Financial Law Review, Vol 18 No 9, October 1999, 19

D Soliven, ‘Regulating Tender Offers in The Philippines’, International Financial Law Review, Vol 18 No 9, October 1999, 49

M Begleiter, ‘Does the Prudent Investor Need the Uniform Prudent Investor Act? – An Empirical Study of Trust Investment Practices’ (1999) 51 Maine Law Review 27

A Saundes, A Srinivasan, I Walter and J Wool, ‘The Economic Implications of International Secured Transactions Law Reform: A Case Study’ (1999) 20 University of Pennsylvania Journal of International Economic Law 309

D Moll, ‘Shareholder Oppression v Employment at Will in the Close Corporation: The Investment Model Solution’ (1999) University of Illinois Law Review 517

D Rose, ‘The Bizarre Destruction of Cross-vesting’ (1999) 11 Australian Journal of Corporate Law 1

D Noakes, ‘Dogs on the Wharves: Corporate Groups and the Waterfront Dispute’ (1999) 11 Australian Journal of Corporate Law 27

P von Nessen, ‘Securities Regulation for Interests in Managed Investment Schemes’ (1999) 11 Australian Journal of Corporate Law 63

J Cilliers and S Luiz, ‘Comments on the Test Determining the Validity of an Alteration of Articles of Association’ (1999) 11 Australian Journal of Corporate law 89

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