**CORPORATE LAW ELECTRONIC BULLETIN  
Bulletin No 55, March 2002**   
  
Published by LAWLEX on behalf of  
Centre for Corporate Law and Securities Regulation,  
Faculty of Law, The University of Melbourne  
(<http://cclsr.law.unimelb.edu.au>)

with the support of

The Australian Securities and Investments Commission (<http://www.asic.gov.au>),  
The Australian Stock Exchange (<http://www.asx.com.au>)

and the leading law firms:

Blake Dawson Waldron (<http://www.bdw.com.au>)  
Clayton Utz (<http://www.claytonutz.com>)  
Corrs Chambers Westgarth (<http://www.corrs.com.au>)  
Mallesons Stephen Jaques (<http://www.msj.com.au>)  
Phillips Fox (<http://www.phillipsfox.com>)

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

ACCESS TO BULLETIN

As a subscriber, you may view and print the latest Bulletin immediately from the archive site on the Internet at:

<http://www.lawlex.com.au/cclsr/archive>

CHANGE OF EMAIL ADDRESS

Subscribers who change their email address should notify LAWLEX at "cclsr@lawlex.com.au".

COPYRIGHT

Centre for Corporate Law and Securities Regulation 2002. All rights reserved. You may distribute this document. However, it must be distributed in its entirety or not at all.

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#1.recentcorporatelawdevelopments)  
(A) [Centre for Corporate Law website - research resources](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28A%29centreforcorporatelawwebsite)  
(B) [Telephone monitoring in takeovers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28B%29telephonemonitoring)  
(C) [Department of Foreign Affairs and Trade Report - "Changing Corporate Asia - What Business Needs to Know"](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28C%29departmentofforeign)  
(D) [President Bush's plan to improve US corporate responsibility](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28D%29president)  
(E) [Offshore investment by Australian firms](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28E%29offshore)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#2.recentasic)  
(A) [ASIC and RBA sign Memorandum of Understanding](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28A%29asicandrba)  
(B) [ASIC calls for comment on 'truth in takeovers'](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28B%29asiccallsfor)  
(C) [ASIC concludes investigation into WMC Ltd](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28C%29asicconcludes)  
(D) [ASIC gives interim relief from prospectus disclosure for certain secondary sales](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28D%29asicgivesinterim)  
(E) [Australian markets licences under Financial Services Reform Act](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28E%29australianmarkets)

3. [RECENT TAKEOVERS PANEL MATTERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#3.recenttakeoverspanel)  
(A) [Application by Westgold NL](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28A%29applicationby)  
(B) [Panel releases Guidance Note on its consultation procedures](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28B%29panelreleases)

4. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#4.recentcorporatelawdecisions)  
(A) [HIH Insurance - related party transactions, financial assistance and directors' duties](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28A%29hihinsurance)  
(B) [Attempt to remove receiver appointed under loan documents](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28B%29attempttoremove)   
(C) [When can shareholders bring an action for personal loss?](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28C%29whencan)  
(D) [When are holding locks justified?](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28D%29whenare)  
(E) [Three stages to promulgate and give effect to a scheme of arrangement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28E%29threestages)  
(F) [Some clarification on market manipulation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28F%29someclarification)  
(G) [Ansett - should a court give directions to an administrator in respect of a purely commercial or business decision](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#%28G%29ansett)

5. [NEW BOOK ON SECURED FINANCE BY CENTRE FOR CORPORATE LAW MEMBER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#5.newbook)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#6.recentcorporatelawjournal)

7. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#7.contributions)

8. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#8.subscription)

9. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0055.htm#9.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CENTRE FOR CORPORATE LAW WEBSITE - RESEARCH RESOURCES

The Centre for Corporate Law and Securities Regulation at The University of Melbourne has a wealth of resources on its website dealing with corporate law, corporate governance and securities regulation. These resources include links to:

(1) Asian-Pacific corporate law and securities regulation sites (links are provided, on a country by country basis, to sites such as stock exchanges, securities commissions, corporate law legislation and corporate law judgments for each of these countries);

(2) world securities commissions (links to approximately 60 securities commissions);

(3) world stock exchanges (links to approximately 110 stock exchanges);

(4) corporate governance (links to a range of organisations which are involved in corporate governance issues);

(5) professional and interest bodies; and

(6) financial news.

The Centre for Corporate Law website also provides free access to corporate law judgments of the High Court, Federal Court and the State Supreme Courts. There are approximately 1,000 judgments on the website. An advanced search engine allows convenient searching for key words in all judgments. In addition, it is possible to search for judgments loaded onto the website within specified periods of time (eg in the last day, last week, last two weeks or last month).

Also on the website is a range of topical research papers dealing with matters such as the Financial Services Reform Act, the Takeovers Panel, dual listed companies, and directors' duties.

The address of the Centre for Corporate Law website is <http://cclsr.law.unimelb.edu.au/>.

(B) TELEPHONE MONITORING IN TAKEOVERS  
(By Rodd Levy, Partner, Aaron Kenavan, Partner, and Damien Bruce, Solicitor, [Freehills](http://www.freehills.com))

Telephone monitoring requirements apply from 11 March 2002 to bidder and target companies in company takeovers. These requirements are onerous and require participants to be well-prepared before any telephone canvassing of shareholders can commence.

In inserting takeover telephone monitoring requirements into the Corporations Act as part of the Financial Services Reform Act, Parliament has placed onerous and expensive obligations on bidder and target companies who talk to shareholders during the course of a takeover bid.

The telephone monitoring provisions were designed to increase protection for small shareholders from misleading or deceptive conduct where the bidder or target (themselves or through professional communications consultants) contact shareholders to determine the shareholders' response to the bid. However, the result of including these provisions is likely to have a much wider application than the legislature intended.

The provisions were not included in the exposure draft of the Financial Services Reform Bill (FSRB), and hence have not been subject to an adequate level of public scrutiny. In particular, the requirement to record incoming calls was not even contained in the initial FSRB, but was introduced at a later stage. This has led to many companies not being prepared to deal with the new laws.

(1) The requirements

The provisions require a bidder or target (known as a recorder) to make a recording of all outgoing telephone calls to a shareholder (and all incoming calls if these calls are 'invited'), which are made during the bid period, to discuss the takeover bid.

There are highly prescriptive procedures a recorder must follow - they must verbally notify the holder that the call is being recorded (a beeping signal will not be sufficient) and recordings will need to be appropriately identified, indexed and stored for 12 months following the close of the bid period.

Importantly, the index and recordings must be destroyed one day after the 12 months expires - failure to do so will, in and of itself, constitute an offence.

The provisions refer to the new Criminal Code for determination of liability. Section 1311 of the Corporations Act would appear to make an offence under the telephone monitoring provisions one of strict liability - ie, a person would at least have a defence of honest and reasonable mistake against such a breach.

(2) The carve-out

The requirement does not apply to telephone calls with shareholders who are classed as 'wholesale holders'. Broadly, these are shareholders who hold securities with a value of at least $500,000; have net assets of $2.5 million or gross income of $250,000; or are professional investors (which is defined to include, amongst other things, financial service licensees and listed entities).

In practice, these tests would most likely only exclude institutions.

The point also raises a further practical issue for a recorder, namely the level of proof they require to satisfy themselves that a shareholder meets these requirements. Presumably, as for prospectuses, a representation in writing would be a minimum.

(3) The issues

The provisions raise some interesting issues.

(a) What is an 'invitation'?

A pivotal question is what constitutes an 'invitation' to shareholders to call for the purposes of discussing the bid. It seems clear that the establishment and advertisement of an 'infoline' will be classed as an invitation. But what if an adviser puts their name on a bidders statement? Or an independent expert?

If these constitute an invitation, the ramifications could be dramatic. It would mean that all advisers to a bidder or target company would be required to install recording facilities and retrain their staff - or turn away shareholders who make such enquiries.

It would seem to be difficult to interpret merely putting ones name on a takeover document as constituting an invitation. However, if the name is accompanied by a telephone number, it may be more likely to be construed as such. Importantly for advisers such as investment banks, this will also apply to press releases which, typically, would contain such details. As the legislature has not defined what constitutes an 'invitation', it will be interesting to see the approach adopted by the courts on this issue.

(b) Anomalies

The legislation also has a raft of anomalies. For example, the provisions only relate to calls during the bid period which, for an off-market bid, commences when the bidder's statement is served on the target (not when the bid is announced). This means that a bidder could quite easily contact shareholders to 'promote' the offer between announcement and service of the bidder's statement.

Further, the provisions only apply to telephone recordings - no similar provisions exist if shareholders are contacted in person or by other means.

Finally, the provisions only relate to the 'holder' of shares. Thus, as an example, a bidder speaking to a beneficial holder of shares who holds their shares through a nominee would not be caught by the requirements.

(c) Onerous nature of provisions

The Explanatory Memorandum to the FSRB showed that Parliament was aware of the costs associated with training of staff, provision of recording devices, and identification and storage of the records. However, Parliament adopted the view that these costs were offset by the additional protection provided to small shareholders and the cost savings the recorders would realise in not having to endure costly legal disputes on potentially misleading and deceptive actions. Parliament has not provided any details on these supposed 'cost savings'. More to the point, these provisions might actually give rise to a greater number of spurious claims, significantly increasing ASIC's costs in having to sort through and listen to recordings.

In addition to the financial costs of compliance, the provisions make the mechanics of a takeover significantly more clumsy. Advisers who speak to clients may be reluctant to have entire conversations (across a variety of issues) taped, and so may be required to make separate calls to clients when they want to discuss the takeover bid.

As advisers are unlikely to install expensive recording equipment, it is likely that 'infolines' will no longer refer shareholder questions directly to professional advisers. Instead, answers to shareholders will need to be obtained offline, with 'infoline' staff calling shareholders back with the answer - a far from efficient method, particularly where follow-up questions are required.

(d) Provision of information to shareholders

One of the guiding principles of the takeover provisions is that shareholders be given enough information to enable them to assess the merits of the proposal. It is difficult to see how the new provisions are consistent with this principle. Any bidder, target or adviser who either cannot afford or cannot establish the new facilities will not be able to discuss a takeover bid with shareholders - and will have to turn them away.

(4) Conclusion

It is curious that the legislature has targeted takeovers as the test vehicle for telephone monitoring. It would appear that several other areas of the Corporations Act are much more suited to such provisions. For example, it is notoriously difficult to obtain an insider trading conviction. A telephone monitoring requirement on persons possessing inside information would appear to be a much more fruitful application for these provisions.

There will always be occasions when shareholders will seek further information. Takeover documents are generic and designed to meet the legal disclosure requirements, not provide all the information every shareholder may desire. As such, to put bidders or agents in the position of being unable to answer these queries over the telephone seems to conflict with a fundamental tenet of takeover law.

(C) DEPARTMENT OF FOREIGN AFFAIRS AND TRADE REPORT - "CHANGING CORPORATE ASIA - WHAT BUSINESS NEEDS TO KNOW"

On 7 March 2002 the Minister for Foreign Affairs, Alexander Downer, launched the latest report by the Economic Analytical Unit, Department of Foreign Affairs and Trade, "Changing Corporate Asia,What Business Needs to Know".

The report highlights how the East Asian financial crisis undermined East Asian economies' relationship-based business models, but rules based models are emerging only slowly to take their place. Emerging economies risk being caught in limbo unless governments act quickly.

The crisis made many major banks and companies insolvent. Such companies are not repaying loans or suppliers, so many regional businesses can no longer rely on relationships to do business. Few foreign or local banks are willing to lend to corporates. Hence, regional investment and growth continue to languish.

The report analyses how major regional economies are responding to this crucial challenge, detailing recent market opening and regulatory reforms in all 11 major East Asian economies and Australia. To help their economies return to robust growth, governments increasingly recognise they must construct a viable rules based business environment. However, with vested interests seeking to shield themselves from corporate restructuring and building competitive pressures, governments are finding they need strong political will to maintain reform momentum.

(1) Implications for Australia

- Australian businesses will be well advised to focus on those regional economies making the fastest progress in moving to a rules based business model as they are likely to be the first to return to robust growth and will offer the fairest and most efficient business environment for foreign traders and investors.  
- Economies implementing stronger securities market regulations and insolvency regimes gradually should protect minority investors and creditors better, reducing risks for Australian portfolio investors and financial institutions, and becoming safer destinations for Asia's own vast savings.  
- Australian accountants, lawyers and other business consultants can access significant opportunities helping East Asian corporates comply with the 'regulation revolution' under way across the region.

(2) Key points

- Family companies dominate most East Asian economies and frequently a few families own a large share of corporate assets; this often generates poor corporate governance and minority shareholder protection concerns.  
- Hence, since the crisis, most regional governments are strengthening listing, corporate accounting and disclosure rules and insolvency regimes to protect small shareholders and creditors. In many regional economies including Hong Kong, Singapore, Malaysia, the Republic of Korea, Japan and Taiwan, new company reporting, accounting and auditing standards entail company disclosure levels approaching international norms. Eventually these reforms should make regional share markets and banks a safer destination for East Asia's vast savings.  
- Hong Kong and Singapore are market leaders in enforcing corporate law and prudential regulations. However, most middle income and emerging regional economies still lack the capacity to implement bankruptcy and other new commercial laws fairly and efficiently. Lack of institutional infrastructure such as strong courts and well trained and resourced regulators, powerful vested interests and a lack of political will to prosecute non-compliers still often prevent new standards being applied consistently. These issues are most acute in developing regional economies.  
- Despite ongoing problems, many regional regulatory authorities and non-government professional bodies now give high priority to enforcing better corporate governance standards and most are making real, though gradual progress.

(3) Regional economy studies

- The second volume of the report examines in detail recent reforms and developments in corporate laws, regulations and market forces impacting on corporate behaviour in 11 major regional economies; Japan, China, the Republic of Korea, Taiwan, Hong Kong, Indonesia, Thailand, Malaysia, Singapore, the Philippines and Vietnam, and in Australia. As would be expected, the most developed economies, Hong Kong, Singapore and more recently Japan, Taiwan, Malaysia and the Republic of Korea are making the most progress in lifting corporate governance standards. China is making good progress from a relatively low corporate regulatory and enforcement base. The Philippines, Thailand, Indonesia and Vietnam also are undertaking considerable regulatory reform, but in these economies implementing these new laws and regulations and changing corporate cultures will be a much longer term task.   
- Most regional economies also are reducing trade, competition and investment barriers, particularly in their financial sectors. This is increasing market discipline on corporates to better protect the interests of minority shareholders, creditors and consumers. However, most regional economies would benefit from further deregulation, privatisation and market opening to reinforce regulators' efforts to boost corporate governance standards.

For further information contact:

Brendan Berne  
Director  
EAU  
Tel: (02) 6262 3723  
Email: brendan.berne@dfat.gov.au

(D) PRESIDENT BUSH'S PLAN TO IMPROVE US CORPORATE RESPONSIBILITY

On 7 March 2002, President Bush announced his plan to improve corporate responsibility in the United States. Following is a summary of his 10 point plan.

(1) Better information for investors

Proposal No 1: Each investor should have quarterly access to the information needed to judge a firm's financial performance, condition, and risks. The Securities and Exchange Commission (SEC) should ensure that public companies are responsible for providing investors a true and fair picture of themselves, and that this information is provided in "plain English." A company should disclose information in its control that a reasonable investor would find necessary to assess the company's value, without compromising competitive secrets. Today, disclosure practices have fallen behind the advanced techniques of corporate finance, allowing some firms to conceal the true risks faced by investors. And too many firms have mistaken GAAP compliance for proper disclosure.

Proposal No 2: Each investor should have prompt access to critical information. Under this proposal, the SEC would expand the list of significant events requiring prompt disclosure between reporting periods.

(2) Making corporate officers accountable

Proposal No 3: CEOs should personally vouch for the veracity, timeliness, and fairness of their companies' public disclosures, including their financial statements. CEOs would personally attest each quarter that the financial statements and company disclosures accurately and fairly disclose the information of which the CEO is aware that a reasonable investor should have to make an informed investment decision. Currently, CEOs typically sign only a bare-bones certification regarding the annual financial statements.

Proposal No 4: CEOs or other officers should not be allowed to profit from erroneous financial statements. Under this proposal, CEO bonuses and other incentive-based forms of compensation would be disgorged in cases of accounting restatements resulting from misconduct.

Proposal No 5: CEOs or other officers who clearly abuse their power should lose their right to serve in any corporate leadership positions. This proposal, which would require legislation, would authorize the SEC to ban individuals from serving as officers or directors of publicly-held corporations if they engage in serious misconduct. At present, the SEC needs to seek court approval in certain types of cases.

Proposal No 6: Corporate leaders should be required to tell the public promptly whenever they buy or sell company stock for personal gain. This proposal would cause companies to disclose significant transactions involving officers' and directors' purchase and sale of the company stock within two business days of execution. Currently, corporate leaders can go as long as a year or more without disclosing personal transactions with the company and as long as 40 days for open-market transactions.

(3) Developing a stronger, more independent audit system

Proposal No 7: Investors should have complete confidence in the independence and integrity of companies' auditors. Under this proposal, the SEC would establish guidelines for audit committees to prohibit an external auditor from performing any other service to an audit client, if the service compromises the independence of the audit. The SEC would also set forth prohibitions against the performance by an outside auditor of internal audit functions for the same client. In addition, the client would be forced to disclose in greater detail all fees paid to the auditing firm and its affiliates. Finally, the audit committees would directly report their recommended choice of auditor to the shareholders.

Proposal No 8: An independent regulatory board should ensure that the accounting profession is held to the highest ethical standards. Under this proposal, an independent regulatory board would be established, under the supervision of the SEC, to develop standards of professional conduct and competence. This board would have the ability to monitor, investigate, and where needed, enforce its ethics principles by punishing individual offenders.

Proposal No 9: The authors of accounting standards must be responsive to the needs of investors. Under this proposal, the SEC would exercise more effective and broader oversight of the Financial Accounting Standards Board, insure its independence, and require prompt promulgation of standards that reflect economic reality rather than compliance with technical requirements. This change would help ensure that the accounting standards are more responsive to the needs of investors, rather than based on the interests of professional accountants.

Proposal No 10: Firms' accounting systems should be compared with best practices, not simply against minimum standards. Under this proposal, auditors would be required to compare the quality of a company's financial controls with the best practices of the industry and communicate its findings to the audit committee. The audit committee would be obligated to discuss these findings and the improvement of practices with management, the Board of Directors, and the auditor, and to act independently to require improvement where necessary.

(E) OFFSHORE INVESTMENT BY AUSTRALIAN FIRMS

The establishment by Australian firms of operations overseas typically complements their domestic activities, according to a research paper published by the Productivity Commission.

The Commission research paper - Offshore Investment by Australian Firms: Survey Evidence (released on 26 February 2002) - presents the findings of a new survey by the Commission on what motivates Australian firms to operate or relocate their headquarters offshore, and the implications for Australia.

The survey confirms that relatively few firms are relocating their headquarters offshore. The main influences on relocation decisions were improved access to overseas markets and proximity to foreign equity interests. The Australian taxation regime was the next most important influence, outweighing other government-related factors.

Summary:

(1) With responses from 201 of Australia's largest firms, the survey provides a reasonable basis for assessing the reasons for, and the effects of, offshore investment by Australian firms.

(2) Offshore production is becoming more prevalent, with 50 per cent of respondents currently having, or planning, such investment.

- However, relatively few Australian firms (only 4 per cent of respondents) are moving their headquarters offshore. That said, these are amongst the largest Australian firms.

(3) Commercial (or market-related) factors are more important overall than matters subject to government control in influencing decisions about offshore production.

- Improved access to overseas markets is by far the most important commercial factor influencing decisions by Australian firms to produce offshore.  
- Although much less important, foreign and domestic tax regimes are next in line and the leading government-related influences.

(4) For those (few) firms involved in headquarters relocation, improved access to world markets and proximity to investors are the main motivations.

- The Australian tax regime again emerged as the most important influence subject to government control.

(5) Australian mergers regulation did not rate as a major influence on respondents' decisions to produce or relocate offshore. However, for those firms that have relocated headquarters offshore, or are planning to do so, it was seen as the most important regulatory impediment to domestic expansion.

(6) Relatively few respondents reported a fall in their domestic activity or overall profitability as a result of establishing production facilities offshore. A larger number reported an increase, although a majority of firms reported 'no change' in their Australian activity.

The full report is available at <http://www.pc.gov.au/research/commres/offshinvest/offshinvest.pdf>

2. RECENT ASIC DEVELOPMENTS

(A) ASIC AND RBA SIGN MEMORANDUM OF UNDERSTANDING

On 20 March 2002 ASIC and the Reserve Bank of Australia released a Memorandum of Understanding covering their respective responsibilities under the Corporations Act in relation to licensed clearing and settlement facilities.

Under the new regulatory regime established by the Financial Services Reform Act (FSR Act), clearing and settlement facilities for financial markets must hold a licence. ASIC is presently responsible for monitoring compliance with many of the legislative obligations imposed on licensed clearing and settlement facilities. With the commencement of the FSR Act, ASIC has new powers for the enforcement of compliance with these obligations.

Under the new regime the Reserve Bank receives new responsibilities to establish and monitor compliance with financial stability standards, as well as to ensure that clearing and settlement facilities do all things reasonably practicable in order to reduce systemic risk.

The Memorandum of Understanding sets out a framework for co-operation between ASIC and the Reserve Bank to help prevent unnecessary duplication of effort and to minimise the regulatory burden on licensed facilities.

It covers information sharing, notification and other arrangements intended to achieve these aims.

A copy of the memorandum is available on ASIC's website at <http://www.asic.gov.au>.

For further information contact:

Malcolm Rodgers  
Executive Director Policy & Markets Regulation  
ASIC  
Tel: (02) 9911 2680  
Mobile: 0411 549 011

(B) ASIC CALLS FOR COMMENT ON 'TRUTH IN TAKEOVERS'

On 20 March 2002 ASIC released a draft of updates to Policy Statement 25 on misleading statements in takeovers.

The policy statement deals with 'last and final statements'. These are statements by a bidder, target or substantial holder (market participant) that it will or will not do something in the course of the bid. For example, a bidder may say that it will not increase the price it offers for shares under the bid ie, that its offer is final.

The update reflects legislative amendments, recent experience and current enforcement practice. It does not signal a shift in the direction of ASIC policy.

The updates to Policy Statement 25 confirm that ASIC will hold a market participant to its last and final statement. A market participant may not depart from its statement if an event such as a rival bid occurs, unless it has specifically reserved the right to do so.

ASIC's position is consistent with decisions of the Takeovers Panel and with the London Code on Mergers and Acquisitions.

The draft policy statement also discusses correcting or updating statements using supplementary bidder or target statements.

Copies of the draft updated Policy Statement 25 can be obtained from the Markets and Corporate Finance/Takeovers page of the ASIC website at <http://www.asic.gov.au>.

Comments on the policy statement are due by 1 May 2002 and should be directed to:

Andrew Fawcett  
Regulatory Policy Branch  
ASIC  
GPO Box 5179AA  
Melbourne Vic 3001

Fax: (03) 9280 3306  
Email: andrew.fawcett@asic.gov.au

For further information contact:

Richard Cockburn  
Director Corporate Finance  
ASIC  
Tel: (03) 9280 3201  
Mobile: 0411 549 034

(C) ASIC CONCLUDES INVESTIGATION INTO WMC LTD

On 7 March 2002 ASIC announced that it had finalised its investigation into a suspected breach of WMC Limited's (WMC) market disclosure obligations in October 2001 and will be taking no further action.

ASIC's investigation followed an Australian Stock Exchange (ASX) referral relating to price movements in WMC shares and speculation about possible takeover discussions between WMC and Alcoa Inc (Alcoa) in October 2001. The specific issues centred on WMC's responses to ASX queries on 12 October 2001 and 17 October 2001.

In its response to the 12 October query, WMC referred to general speculation about possible asset break-ups or takeovers but stated that it did not need to make any announcement to the ASX.

In response to the 17 October query, WMC announced that it was in discussion with a number of parties, including Alcoa, which might lead to a takeover offer or reconstruction.

ASIC has been advised by senior counsel that although there is a good arguable case that WMC breached the ASX continuous disclosure rules in the period prior to 17 October 2001, there is considerable doubt that any effective remedy is available to ASIC under the Corporations Act. 'ASIC is disappointed that a company of WMC's stature appears to have adopted a technical and narrow approach to its disclosure obligations on this occasion', ASIC Chairman Mr Knott said. 'ASIC considers that one of the obvious purposes of the ASX's query on 12 October 2001 was to elicit WMC's response to market speculation about discussions with Alcoa. Such discussions were in fact taking place and the market in WMC securities at the time was uninformed. However, it was only when ASX explicitly required WMC to confirm or deny speculation of takeover discussions on 17 October 2001 that the company confirmed its discussions with Alcoa. There appears to be no good reason why the disclosure made on 17 October should not have been made on 12 October. The efficacy of Australia's continuous disclosure rules depend in large part upon the willingness of our corporate community to observe their spirit and purpose. Failure to do so undermines public confidence in the disclosure regime and will increase pressure for more prescriptive disclosure obligations. This case further highlights the need to review the sanctions available to the ASX and ASIC to underpin disclosure', Mr Knott said.

(D) ASIC GIVES INTERIM RELIEF FROM PROSPECTUS DISCLOSURE FOR CERTAIN SECONDARY SALES

On 7 March 2002 ASIC released a new Class Order giving interim relief from the secondary sales provisions of the Corporations Act (the Act) that came into effect on 11 March 2002.

The new Class Order (CO 02/0272) gives limited relief for an interim period of six months from 11 March 2002 from the extended operation of section 707(3) and (4) of the Act. These provisions (as amended by the Financial Services Reform Act) require prospectus disclosure for the secondary sale of securities if:

(1) the secondary sale takes place within 12 months after the issue;

(2) the securities were first issued without a prospectus;

(3) either the issuer issued, or the person to whom the securities were issued acquired, the securities with the purpose of their being on-sold (whether or not there were other purposes for the issue or acquisition); and

(4) the secondary sale is to a retail investor (ie none of the exemptions from prospectus disclosure under the Act apply).

Class Order (CO) 02/0272 modifies section 707(3) and (4) to remove their extended application to certain secondary sales. This interim relief is of two basic types:

(1) Technical Relief - ASIC has given relief on this ground if the initial issue of securities has the benefit of ASIC prospectus relief exemptions or statutory exemptions and the grounds for those initial exemptions clearly extend to the secondary sale of the securities. Examples are securities issued under employee share schemes (CO 00/220, 00/223 or 02/264) and share purchase plans (CO 00/194) and statutory exemptions available for dividend reinvestment and bonus plans (section 708(13), schemes of arrangement (section 708(17)) and takeovers (section 708(18)).

(2) More Substantive Relief - ASIC has given relief where adequate information is available to the market through alternative means. This relief may be available if securities are in a class of quoted securities of a listed body and those securities:

(a) are not debt securities of the body; and

(b) were issued under a completed contract of sale; and

(c) satisfy one of the following additional conditions:

(i) The body issuing the securities is included in the ASX/S&P 200 index; or

(ii) The body is listed on the ASX and there is a complying prospectus issued in relation to the class of securities which is no more than six months prior to the secondary sale; or

(iii) Information of the kind required under section 713(5) is provided to the market operator.

In order for this latter type of relief to be activated a notice needs to be provided to ASIC by the issuer of the securities at the time of their issue.

During the period of six months while the interim relief will be available, ASIC will undertake further stakeholder consultation about this matter. ASIC expects to release a Discussion Paper on section 707(3) and (4) shortly to facilitate consultation on the relevant issues.

CO 02/0272 can be obtained from the ASIC website at <http://www.asic.gov.au>.

For further information contact:

Richard Cockburn  
Director of Corporate Finance  
ASIC  
Tel: (03) 9280 3553  
Mobile: 0411 549 034

(E) AUSTRALIAN MARKETS LICENCES UNDER FINANCIAL SERVICES REFORM ACT

On 6 March 2002 ASIC released ASIC Policy Statement 172: Australian market licences: Australian operators.

This policy statement sets out ASIC's role in, and approach to, financial market regulation under the new financial services reform (FSR) legislation. It deals with a range of issues relevant to Australian operators of financial markets. A separate policy will deal with issues specific to overseas operators.

Copies of PS 172 are available from the FSR page of the ASIC website at <http://www.asic.gov.au>, by emailing ASIC's Infoline at infoline@asic.gov.au or by calling 1300 300 630.

For further information contact:

Malcolm Rodgers  
Director Policy and Markets Regulation  
ASIC  
Tel: (02) 9911 2680  
Mobile: 0411 549 011

3. RECENT TAKEOVERS PANEL MATTERS

(A) APPLICATION BY WESTGOLD NL

On 21 March 2002 the Takeovers Panel advised that it had decided not to proceed with hearing an application by Westgold in relation to a non-renounceable rights issue prospectus, dated 15 February 2002, issued by Precious Metals Australia Ltd (PMA). The application was received on 7 March. It related to concerns that Westgold asserts about the effect on the level of control of PMA that an underwriting agreement for the rights issue may have if there is a significant shortfall in the rights issue.

On Friday, 15 March the Panel was advised that Westgold had commenced proceedings in the Supreme Court of Western Australia in relation to the prospectus, and the application of the related party provisions of the Corporations Act to the underwriting agreement.

The Panel stated that the majority of the issues raised, the evidence to be considered, and the remedies sought in the Supreme Court action overlap with those in the application before the Panel. The Panel is intended to be a quick, commercial forum for resolving disputes in relation to the control of companies. There is little point in the Panel considering the issues within its timeframes if overlapping issues are being litigated on a different timetable. Similarly, the Panel is intended to be a cost effective forum. There is no cost effectiveness in similar issues involving similar remedies being considered almost simultaneously in two separate fora.

In light of the court proceedings initiated by Westgold, it is inappropriate to have overlapping facts and issues traversed in two separate proceedings.

The sitting Panel in this matter was constituted by Elizabeth Alexander AM (sitting President), Kathleen Farrell (sitting Deputy President) and Luise Elsing.

(B) PANEL RELEASES GUIDANCE NOTE ON ITS CONSULTATION PROCEDURES

On 7 March 2002 the Panel released for public comment a draft Guidance Note on the its procedures for consulting the public and interested parties on the Panel's rules and advice to the market.

The Panel may make rules under section 658C of the Corporations Act (Act) concerning the operation and function of the takeovers provisions of the Act. It can also make rules under section 195 of the ASIC Act, for how it will conduct proceedings before it. So far the Panel has published its procedural rules, but has made no rules under section 658C.

The Panel also published Guidance Notes on how it is likely to treat various issues if they come before it in an application for a declaration of unacceptable circumstances. The Panel has published four general Guidance Notes on such issues as unacceptable circumstances, the Panel's rulemaking powers, and its remedy and enforcement powers. The Panel has also published Guidance Notes on specific issues such as break fees.

An issue which the Panel has raised for the first time in the draft Guidance Note on Consultation is whether or not comments on its draft documents should be available publicly.

The draft Guidance Note is available on the Panel's website at <http://www.takeovers.gov.au/Content/guidance/guidance.asp>

Comments on the draft Guidance Note are invited by Friday 26 April 2002. Comments may be sent by post, fax or email to:

Nigel Morris  
Director  
Takeovers Panel   
Level 47 Nauru House, 80 Collins Street  
Melbourne Vic 3000  
Tel: 61 3 9655 3501  
Fax: 61 3 9655 3511  
nigel.morris@takeovers.gov.au

4. RECENT CORPORATE LAW DECISIONS

(A) HIH INSURANCE - RELATED PARTY TRANSACTIONS, FINANCIAL ASSISTANCE AND DIRECTORS' DUTIES  
(By Jason Lang and Giselle McHugh, [Mallesons Stephen Jaques](http://www.msj.com.au))

ASIC v Adler [2002] NSWSC 171, New South Wales Supreme Court; Santow J; 14 March 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/march/2002nswsc171.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

In an action commenced by ASIC following the collapse of HIH Insurance (HIH), Santow J held that HIH, its wholly owned subsidiary HIHC and, inter alia, certain directors of HIH, Rodney Adler, Ray Williams and Dominic Fodera, had contravened the related party provisions of Chapter 2E of the Corporations Act and the financial assistance provisions of Part 2J.3 when HIHC advanced $10 million to a trust controlled by entitites associated with Adler and part of that amount was used to purchase shares in HIH.

Adler, Williams and Fodera were also found to have breached their duties as directors and officers of HIH and HIHC under Division 1 of Part 2D.1 in connection with their involvement in the above transactions, the trust's purchase of shares in certain unlisted technology and internet entities from entities associated with Adler, and loans from the trust to other entities associated with Adler.  
  
(2) Facts

In June 2000, Adler was a non-executive director, Williams was a director and the chief executive officer, and Dominic Fodera was a director and the finance controller, of HIH. On 15 June 2000, Adler requested, and Williams and Fodera arranged, the advance of $10 million from a wholly owned subsidiary of HIH, HIHC (of which Williams and Fodera were also directors and Adler was held by Santow J to be an officer), to Pacific Eagle Equity Pty Limited ("PEE"), a company newly formed (and controlled) by Adler for the stated purpose of making profitable trades and investments for HIHC. During the next 15 days, PEE purchased HIH shares to the value of approximately $3.9 million. ASIC contended that Adler's purpose in purchasing these shares was to support HIH's share price for the benefit of his personal HIH shareholding. On 7 July 2000, the Australian Equities Unit Trust ("AEUT") was established, by execution of a Trust Deed, with PEE as trustee. Units of different classes were issued to HIHC and Adler Corporation, a company controlled by Adler. The $10 million investment by HIHC, including the HIH shares purchased with it, then became part of this trust. The HIH shares were subsequently sold on 26 September 2000 for a loss of more than $2.1 million.

Between 25 August 2000 and 26 September 2000, Adler caused AEUT to buy from Adler Corporation certain investments in unlisted technology and internet companies (namely, dstore Limited, Planet Soccer International Limited and Nomad Telecommunications Limited) at cost. AEUT suffered a loss on all three investments totalling more than $3.8 million.

Between 26 July 2000 and 30 November 2000, Adler also caused PEE to make three unsecured loans totalling more than $2 million to companies or funds associated with him, which ASIC alleged were to AEUT's disadvantage.

ASIC brought proceedings against, inter alia, Adler, Williams and Fodera alleging contravention of the related party transaction, financial assistance and directors' duty provisions of the Corporation Act (then the Corporations Law).

(3) Related party transactions (Chapter 2E)

Santow J held that HIH and HIHC contravened section 208 of the Corporations Act because the payment of $10 million by HIHC to PEE on 15 June 2000 amounted to the giving of a "financial benefit" to each of PEE, Adler Corporation and Adler within the meaning of section 229 and the terms of that financial benefit were not "arms length" for the purposes of the exception in section 210. This followed regardless of whether the initial payment of $10 million to PEE before the trust was established was by way of an unsecured loan or, as Adler argued, a resulting trust. Further, the subsequent entering into of the Trust Deed was similarly not within the arms length exception in section 210 because the Trust Deed lacked proper safeguards in circumstances where Adler had a potential conflict of interest and was significantly one-sided against HIHC.

Santow J held that the factual evidence before him supported the conclusion that the transaction was carried out at Adler's initiative and with Williams' concurrence and direction and that, per the definition of involvement in section 79, both had contravened section 209(2) by being involved in the contravention of section 208 by HIH and HIHC.

Santow J also found Fodera in breach of section 209(2). He had sufficient knowledge of the essential elements of the contravention and his attempts to subsequently distance himself from the transaction by referring matters to others did not alter this.  
  
(4) Financial assistance (Part 2J.3)

Santow J held that HIHC suffered material prejudice as a result of financially assisting PEE to acquire shares in HIH and, in so doing, contravened section 260A of the Corporation Act. In reaching this conclusion, Santow J adopted the commercial approach advocated in Charterhouse Investment Trust Ltd v Tempest Diesels Ltd [1986] PCLC 1; namely, in assessing material prejudice it is necessary to look at all interlocking elements in a transaction as a whole and to determine where the net balance of financial advantage lies. In the present case, material prejudice arose from the fact that the rights which HIHC obtained from PEE (being either unsecured indebtedness or equitable rights by way of resulting trust) were of a materially lesser value than the cash handed over; such rights would be likely to be difficult to enforce. Material prejudice also resulted from the one-sided nature of the AEUT Trust Deed, including its lack of safeguards to protect against Adler's potential conflict of interest, and the fact that a loss on the HIH shares traded by PEE was inherently likely from the inception, and did in fact occur.

Santow J found Adler and Williams to have been sufficiently involved in the contravention of section 260A to have breached section 260D(2). Fodera's involvement was more remote and, on the facts, Santow J was not able to conclude that Fodera, while having knowledge that financial assistance was given, also had knowledge that it would materially prejudice HIHC. However, as the onus lay on the defendants to prove that giving the financial assistance was not materially prejudicial, this element of section 260A was essentially a defence, and proof of knowledge of material prejudice was therefore not necessary for section 260D(2). Accordingly, Fodera was also found to have breached section 260D(2). In making these findings Santow J stated that "a combination of suspicious circumstances and the failure to make appropriate enquiry when confronted with the obvious, makes it possible to infer knowledge of the relevant essential matters".

(5) Duty of care and diligence (section 180)

Santow J held that a reasonably careful and diligent director or officer in the position of Adler would not have caused the payment of $10 million by HIHC to PEE to be applied in part in purchasing HIH shares. The semi-covert bypassing of proper corporate safeguards for these arrangements reflected consciousness of impropriety on Adler's part. Furthermore, the facts demonstrated that Adler's object was to support the HIH share price (doing so for his own substantial shareholding in HIH), rather than to enable HIH to obtain, through its interests in AEUT, the benefit of a quick profit on the resale of the HIH shares.

In the case of Williams, he was aware the $10 million was to be used in whole or in part to pay for shares in HIH and permitted that amount to be paid in advance of any documentation and with no stipulation of any necessary safeguards to deal with Adler's potential conflicts of interest, which is a circumstance requiring special vigilance. While the primary responsibility will fall on the director proposing to enter into the transaction, this does not excuse other directors or officers who become aware of the transaction. It was only common sense that a reasonably careful and diligent director would have brought the issue of a $10 million payment being made to a director, to be used at his discretion, before the Board or at least the HIH Investment Committee. Similarly, Fodera was in breach of section 180.

None of the directors could make use of the "business judgment rule". In Adler's case, there was no "business judgment"; moreover, Adler clearly had a material personal interest in the "subject matter of the judgment". Williams either failed to make a business judgment at all or, to the extent that he did, he failed to meet the criteria set out in section 180(2).

(6) Duty of good faith (section 181)

Santow J found Adler to be the only defendant to breach section 181. This was because Adler, quite apart from failing to make proper disclosure, promoted his personal interest by making or pursuing a gain (of maintaining or supporting the HIH share price) when there was a substantial possibility of a conflict between his personal interests and those of the company in pursuing a profit. The interests of HIH and HIHC were put at risk by illegality under sections 208 and 260A, and by concealing from the market that HIHC was funding the purchase of HIH shares, not Adler or his interests.

(7) Use of position to gain advantage for oneself or another or to cause detriment to the corporation (section 182)

Santow J concluded that both Adler and Williams were in breach of section 182. Adler's conduct evinced his improper purpose in supporting the share price in HIH. This included passing up an early opportunity for AEUT to make a profit on the sale of HIH shares, as well as maximising the ultimate loss for AEUT by selling his own interests in HIH ahead of AEUT's when the market was falling.

Williams likewise breached section 182 in authorising the $10 million payment without proper safeguards and without the knowledge or approval of the HIH Investment Committee.

More generally, Adler was also found to have breached his duties under sections 180 to 182 in relation to PEE's acquisition of the three unlisted technology and internet investments from Adler Corporation. No reasonable director in Adler's position and possessing his knowledge would have committed PEE to acquire investments in Nomad, dstore and Planet Soccer at the prices Adler Corporation paid for them. The known radical change in market conditions relating to technology stocks, the lack of any due diligence, and the misleading statements and omissions made by Adler in relation to the on-sale of these investments, supported this conclusion. Despite being clearly aware of the financial dire straits of these investments, Adler and Adler Corporation extricated Adler Corporation from its position, at no loss to Adler Corporation, but to the disadvantage of PEE, HIH and HIHC.

Adler was in further breach of sections 180 to 182 in relation to the three unsecured loans from AEUT to entities associated with Adler. These loans were not adequately documented and not one of them was even within the scope of the vaguely sketched mandate for AEUT discussed by Adler and Williams to pursue investment in "venture capital" or "share trading".

(8) Improper use of information (section 183)

Adler was also found by Santow J to have breached his obligations under section 183, both in relation to the acquisition of the three unlisted investments from Adler Corporation and the loans to Adler-associated entities. Adler improperly used information obtained by him to gain an advantage for himself.

(B) ATTEMPT TO REMOVE RECEIVER APPOINTED UNDER LOAN DOCUMENTS  
(By Alex Vynokur, [Baker & McKenzie](http://www.bakernet.com))

541 Kent Street Pty Ltd, HMP Finance Pty Ltd, 191 Cleveland Street Pty Ltd & Clarence Street Properties Pty Ltd v Westpac Banking Corporation and John Raymond Gibbons [2002] NSWSC 147, Supreme Court of New South Wales, Bergin J, 1 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/march/2002nswsc147.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary of application

An interlocutory application was filed by the four plaintiffs, 541 Kent Street Pty Ltd, HMP Finance Pty Ltd, 191 Cleveland Street Pty Ltd and Clarence Street Properties Pty Ltd ("plaintiffs"), to remove a receiver, the second defendant, appointed by Westpac Banking Corporation, the first defendant. The application was made under sections 418(1), 418(2) and 434A of the Corporations Act and general law.

Each of the plaintiffs entered into loan facilities with the Westpac Banking Corporation ("the Bank"). Each of the loans was secured by charges or mortgages. The plaintiffs claimed that the Bank had no relevant power under the securities to appoint a receiver. Alternatively, the plaintiffs claimed that if there was a power to appoint a receiver the Bank was in breach of an implied duty of good faith in relation to the exercise of that power, and/or the exercise of the power in the circumstances of the case was unconscionable.

The plaintiffs' interlocutory application was later changed in that they sought only to have the receiver removed for a period of 60 days to provide the opportunity to the plaintiffs to re-finance and pay out the existing loans from the Bank.

(2) Facts

Mr Graham Meehan was a director of each of the plaintiffs up until 4 November 2000. It was apparent from the evidence that in providing the facility to each of the plaintiffs the Bank was of the view that Mr Meehan's connection to, influence of and management and control of each of the plaintiffs was the "single most influential aspect" in the Banks relationship with the plaintiffs.

Woodload Investments Ltd ("Woodload") was another entity in which Mr Meehan had an interest. The Bank has also made loans to Woodload, and those loans were in default in the latter part of 2001. On 19 September 2001 officers of the Bank met with Mr Meehan and asked him whether the Woodload loan funds were used for other purposes, such as commercial property purchases through other entities, including 541 Kent Street Pty Ltd. Mr Meehan informed the bank officer that was the case and claimed that the Bank was always aware of that fact.

In December 2001 the receiver and managers of Woodload served statutory demands on each of the plaintiffs in this case. The amounts claimed were $7.975 million and were said to be intercompany loans. The plaintiffs have appeared on one occasion or were about to appear in respect of an application to set aside those statutory demands.

On 26 February 2002 the plaintiffs were notified of the basis upon which the receivers had been appointed to the plaintiffs. There were three stated bases:

(i) change of control - the Bank advised the plaintiffs that it had formed the opinion that there had been a substantial change in the management or control of the plaintiffs which occurred upon the resignation of Mr Meehan as a director of the plaintiffs on 4 November 2000.

(ii) misrepresentation was said to have been made by Mr Meehan on 8 February 2001 that he was a director of HMP Finance when in fact he had resigned on 4 November 2000.

(iii) the "trustee status" - the plaintiffs, with the exception of HMP Finance, had failed to disclose to the Bank that each was relevantly a trustee, and did not have beneficial ownership.

(3) Decision

The decision of the court dealt with the following issues:

(a) Trustee misrepresentation

Her Honour accepted the evidence of the defendants in respect of the failure to disclose the trustee status. It was found that three of the four plaintiffs represented to the Bank that they did not hold any assets as trustee of a trust when it was held to be the case that they acted solely as trustee of a trust.

(b) Misrepresentation as to the directorship

Her Honour was of the opinion that a reasonable reader of the facility documents would be reasonably led to believe, not only that Mr Meehan was a current director, but that he had signed the documents on behalf of the particular plaintiff and as a director had stated and confirmed that such plaintiff did not hold any assets as the trustee of a trust.

(c) Serious issue to be tried

The plaintiffs submitted that what the Bank was entitled to do in the circumstances was to sue the plaintiffs in relation to the statements for their breach of warranties pursuant to what was said in the General Conditions of the loan documents. The plaintiffs argued that the powers must be read to mean that only the default events which are not also considered as warranties can be the basis upon which a receiver may be appointed. If conduct amounting to a default event, for example, the provision of misleading or incorrect information, is also a warranty under the General Conditions, it was submitted the General Conditions should be construed as limiting the Banks rights to bring proceedings and precluding its capacity to appoint a receiver.

Her Honour held that that such a construction was not available, citing the decision in Pan Foods Company Importers and Distributors Pty Ltd v Australian and New Zealand Banking Group Limited (2000) 170 ALR 579. Bergin J agreed with the reasoning of the High Court in that case, stating that commercial documents comprising agreements for loans should be approached fairly and broadly, without being too astute or subtle in finding defects. According to Her Honour, General Conditions should be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction. Bergin J was of the view that acceptance of the plaintiffs' submissions in relation to the Bank's powers under the General Conditions would result in a construction that is artificial and commercially unrealistic. Thus, it was held to be not a serious issue to be tried.

The plaintiffs also submitted that the defaults that have been identified were merely "technical breaches" since there had been no breaches or defaults by way of money not being paid. It was argued that the appointment of a receiver on the basis of these "technical" defaults demonstrated that the Bank had acted in bad faith or capriciously. However, on the evidence, Her Honour was not satisfied that there was a serious issue to be tried that the Bank acted capriciously.

(d) Balance of convenience

Her Honour concluded that the balance of convenience favoured the continuation of the appointment of a receiver because the plaintiffs, at the time of the judgment, did not have other substantial ongoing relationships with other parties, they each effectively collected rents and paid the bills and they did not employ a large number of employees. Bergin J was in any event satisfied that damages would be an appropriate remedy if at trial it was found that the receiver has been invalidly appointed or that there was any breach of any obligation by the receiver.

Therefore, the application for interlocutory relief was dismissed with costs.

(C) WHEN CAN SHAREHOLDERS BRING AN ACTION FOR PERSONAL LOSS?  
(By Andy Lowe and Teresa Chong, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Milfull v Terranora Lakes Country Club Limited [2002] FCA 178, Federal Court of Australia, Kiefel J, 1 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/march/2002fca178.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

A recent interlocutory decision of Kiefel J in the Federal Court supports the view that shareholders may only bring an action for a personal loss that is separate and distinct from the company's loss. For example, shareholders may not claim for a diminution in the value of their shares because that is merely a reflection of the loss suffered by the company and in those circumstances the company is the appropriate applicant.

Kiefel J's interlocutory judgment provides a useful example of a shareholder's personal loss that may be viewed as separate and distinct from the company's loss. Kiefel J also refused leave to shareholders to bring claims against the company's receivers and against advisers to the company's major creditor.

(2) Facts

The applicant was a holder of redeemable preference shares in Terranora Leisuretime Resort Management Limited ("Management"). The applicant purported to sue on behalf of a group of members who also held redeemable preference shares ("RPS Holders").

Management held a forty year lease of land from Terranora Lakes Country Club Limited ("Club") upon which a resort was to be developed by a third company, Terranora Timeshare Developments Pty Limited ("Developments"). The lease contained a provision that it would come to an end if an order was made winding up Management. Club held 74% of the ordinary shares in Management and 54% of the shares in Developments.

Each of the RPS Holders subscribed for their shares in reliance upon one or more prospectuses issued by Club. The shares had attached to them certain rights of accommodation and of the use of the resort on a timeshare basis (the "Timeshare Rights"). The extent of the Timeshare Rights depended upon the level of premium paid by the RPS Holders for their shares.

It was alleged in the statement of claim that a bank advanced monies to Developments and a guarantee of Development's obligations was provided by Management. Management also granted the bank a bill of sale, an equitable mortgage, a floating charge over its assets and a mortgage over its interest in the lease. Management's articles of association provided that Management's Board could not deal with the lease without a special resolution of the RPS Holders. Neither the floating charge nor the mortgage were sanctioned or approved by the RPS Holders.

In August 1992, Club paid out the amount owed to the bank by Developments and was subrogated to the bank's security over Management's assets. On 16 March 1994 Management was wound up on the application of Club and the lease was terminated.

The statement of claim alleged that Club received advice from accountants Coopers & Lybrand between July 1991 and April 1992. That advice included a number of options open to Club. One option involved winding up Management, terminating the lease and Club taking over the resort free of any timeshare rights. A second option involved a sale of the timeshare resort in a way which preserved the rights of existing timeshare holders. An offer of $3.5m was received for the timeshare resort, but it was alleged that Coopers & Lybrand recommended the first option to Club.

The $3.5m offer was also subsequently rejected by Management's receivers on the grounds that it was insufficient to pay out the secured debt to Club. The statement of claim alleged that the debt secured by the mortgage and charge over the lease was only $566,368.59 but that the receivers advised the RPS Holders that only a contribution of $5m would discharge the debt. That was a sum they could not raise, whereas $566,368.59 would have been achievable.

An action was brought by the applicant on behalf of the RPS Holders against Club, various directors of Club, Management's receivers and Coopers & Lybrand. The loss claimed against Club and its directors was the subscription price paid for the RPS shares and the Timeshare Rights. The loss claimed against the receivers and Coopers & Lybrand was only in respect of the Timeshare Rights.

(3) Decision

(a) Could the shareholders sue for the loss of their Timeshare Rights, or was that loss merely a reflection of the company's loss?

The receivers and Coopers & Lybrand submitted that the loss of the Timeshare Rights was merely a reflection of the loss suffered by Management. They claimed that the applicant was really seeking to bring a derivative action which could only be made by intervention in separate proceedings already brought by the company's liquidator.

The rule in Foss v Harbottle (1843) 2 Hare 461 is that prima facie a company should sue in its own name for injury to it. In Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] 1 Ch 204, the Court of Appeal held that shareholders could not recover a sum equal to the diminution in the market value of their shares because such a loss is merely a reflection of the loss suffered by the company.

Kiefel J considered two lines of authority arising from those decisions. In Gould v Vaggelas (1985) 157 CLR 215, the High Court agreed that shareholders could not recover damages which merely reflected the loss suffered by the company. However, it was held that Prudential was authority for the principle that shareholders could recover damages for loss which they had personally suffered and which was separate and distinct from the loss suffered by the company.

In the second line of authority, Christensen v Scott [1996] 1 NZLR 273, the New Zealand Court of Appeal was of the view that the fact that the company has suffered the same loss as a shareholder should not in itself prevent a shareholder from seeking recovery, provided there is no double recovery.

Kiefel J noted that, in Johnson v Gore Wood & Co [2001] 2 WLR 72, the House of Lords had recently confirmed the principles stated in Prudential and, in so doing, had declined to take up the course suggested in Christensen v Scott. Kiefel J considered himself bound to follow the decision in Gould v Vaggelas, concluding:

"In my view, [Christensen v Scott] is not consistent with the principles stated in Gould v Vaggelas. It is only where personal loss may be seen as separate and distinct from the company's loss that it may be claimed."

The issue that remained to be determined by Kiefel J was whether, on the facts, the Timeshare Rights could be valued apart from the shares or the assets of the company.

The receivers and Coopers & Lybrand argued that the Timeshare Rights were a mere incident of the shareholding since they could only be ascribed by reference to the life of the lease. Kiefel J disagreed.

He noted that under Management's articles of association, the Timeshare Rights:

"…are said to be by way of licence, so that no relationship of landlord and tenant arises. An RPS holder is able to sub-license, allow others to use the accommodation and charge for it. So stated, it would seem to me that the [Timeshare Rights] might be valued separately from the shares themselves. Whilst it is necessary that redeemable preference shares be held, the rights may be seen to arise by virtue of a contract with Management or a licence granted by it."

Kiefel J concluded that:

"…[the] timeshare rights might be valued apart from the shares or the assets of the company. This is highlighted by a reference to what the company might recover in its action. It is not apparent to me that any valuation of the lease would include the timeshare rights. In my view therefore, the applicant may proceed with the claim [in regard to the loss of the Timeshare Rights]."

(b) Did Coopers & Lybrand owe the shareholders a duty of care?

Coopers & Lybrand provided advice to Club which favoured a course of action that would not preserve the Timeshare Rights over a course of action that would preserve those rights.

The applicant sought to plead that Coopers & Lybrand owed a duty of care to the RPS Holders. Coopers knew, or it was reasonably foreseeable, that loss would be suffered by the RPS Holders if Coopers & Lybrand did not take reasonable care.

Kiefel J held that no such duty was owed since "Coopers were merely pursing their role of advisers to Club." It was Club's actions, not those of Coopers & Lybrand, that caused loss to the RPS Holders and "even if Coopers was influential it has not been alleged that they were in a position of control [over Club]."

(c) Did the receivers owe a duty of good faith to the RPS Holders?

The applicant alleged that the receivers breached a duty of good faith to the RPS Holders by wrongfully rejecting the $3.5m purchase offer and failing to further negotiate with the purchasers. It was further alleged that Management would not have been wound up if the offer had been accepted.

No further basis for the existence of a duty of good faith was put forward and it was not alleged that any fiduciary relationship existed between the receivers and the RPS Holders. Kiefer J denied leave to plead against the receivers saying "it would seem to me that it is the company which should be suing the receivers if their actions caused it loss."

(D) WHEN ARE HOLDING LOCKS JUSTIFIED?  
(By Tammy Kingsley, [Phillips Fox](http://www.phillipsfox.com))

Albarran & McDonald as Liquidator of Internova Travel Pty Ltd v Envirostar Energy Ltd and Financial Options Group Inc Pty Ltd; Kizoz Pty Ltd v Envirostar Energy Ltd and Financial Options Group Inc Pty Ltd [2002] NSWSC 108, New South Wales Supreme Court, Barrett J, 22 February 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/february/2002nswsc108.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

A 'holding lock' is defined as a facility that prevents securities traded through CHESS from being transferred, settled or registered pursuant to a transfer or conversion and will be allowed only in certain specific circumstances outlined in ASX Listing Rule 8.10.1.

(1) Background

The defendant in both proceedings was Envirostar Energy Limited (EEL), a publicly listed company on the Australian Stock Exchange Limited (ASX), now in liquidation. EEL issued 2,748,769 shares to Financial Options Group Inc Pty Ltd (FOGI) at an agreed price of $1 million. FOGI later acquired a further 3,636,363 shares in EEL from another company associated with the director of EEL.

Subsequently, FOGI transferred all its 6,385,132 shares to Internova Travel Pty Ltd ("Internova"), now in liquidation, for $1 and also arranged for a substantial number of Internova shares to be issued to a newly formed Samoan company, owned by FOGI. The instrument of transfer, however did not reflect the additional consideration of an allotment of Internova shares to a party other than the transferor.

Internova then sought a loan from Kizoz Pty Ltd for $1 million in exchange for 3,333,333 EEL shares. Those shares were then registered in Kizoz's name.

Internova and Kizoz later traded shares on the ASX until they were advised that EEL had placed a holding lock on all its shares. Notice of the holding lock was given to the ASX and shareholders.

(2) Interlocutory relief sought

The plaintiffs, being Kizoz and the liquidator of Internova, sought the following relief:

(a) An interlocutory order to restrain EEL from convening a meeting of its members to cancel the shares. This was already in place and EEL did not oppose its continuation until trial;

(b) An interlocutory order compelling EEL to remove the holding lock, with the proceeds of the freed shares to be held by a stakeholder.

Internova also sought an order in the nature of advice and direction to the liquidators so that they may sell the shares so freed.

(3) Contested facts: transaction between EEL and FOGI

FOGI maintained an account on trust for various clients, including EEL. EEL claimed that a mere entry in the periodic statement of account did not, without movement of cash, amount to payment. Further, EEL claimed that FOGI misrepresented that it had deposited the $1 million into the account by notifying EEL in the same way as it notified them about other deposits that did in fact involve a physical passing of cash into their account.

EEL claimed that because FOGI had defaulted in failing to pay consideration for the issue of the shares, the allotment had been undermined in one way or another, and it was therefore entitled to have it cancelled.

Alternatively, FOGI maintained that it credited $1 million to EEL's account, in the sense of increasing the total amount for which FOGI acknowledged itself to be indebted to EEL in accordance with the treasury management arrangement between the two companies.

(4) Basis of EEL's application for a holding lock: ASX listing rule 8.10.1(a) - lien over securities

EEL claimed that it had the capacity under ASX Listing Rule 8.10.1(a) to apply for a holding lock, because it had a lien over the shares. The authority for imposing the lien was derived from Article 15 of its constitution:

"The company has a first and paramount lien on every partly paid share for…all due and unpaid calls and instalments in respect of that share".

However Listing rule 6.13 states that an entity must not have a lien on securities where any unpaid call or instalment is due but unpaid on those securities.

EEL attempted to argue that the shares were 'partly paid' according to article 15 of its constitution by analogy with the Corporations Act's definition of 'fully paid share' as the term 'partly paid share' is not defined. 'Fully paid share' is a 'share on which no amount remains unpaid'. Therefore a share on which any amount remains unpaid, including the whole amount, falls by default into the category of 'partly paid share'.

Both plaintiffs contended that this argument was tenuous and that EEL was estopped from claiming that the shares were unpaid because EEL has represented in correspondence that shares issued to FOGI were in fact 'fully paid'.

(5) Right to have holding lock removed

The plaintiffs contended that the holding lock should be removed because of EEL's breach of the ASX Listing Rules. Article 178 of EEL's constitution states that in the event of a conflict the ASX listing rules prevail over the constitution, and the plaintiffs contended that EEL was therefore in breach of section 140 of the Corporations Act, as it had breached, as against them, the statutory contract which the constitution represents.

Barrett J noted that the plaintiffs may also be able to seek an order to have the holding lock removed as "persons aggrieved" under section 777 of the Corporations Act.

It is interesting to note that Barrett J expressed some doubt about the proposition that every company on the official list of the ASX is under a contractual obligation to its shareholders to comply with the ASX rules. But in this case, he noted that the EEL constitution contained a clear provision to that effect.

(6) Issues to be decided

Having decided that there was a serious issue to be tried, Barrett J identified the central issues as being:

(a) Who should bear the risk of movement in the EEL share price while the proceedings remained unresolved?

(b) Who should bear the risk that shares in EEL would be cancelled or forfeited?

Barrett J decided that the plaintiffs had made out their entitlement to interlocutory relief, subject to the balance of convenience and any disentitling factors.

(7) Balance of convenience: basis of decision

Both FOGI and Internova were in liquidation and required funds from the sale of the shares. The holding lock not only denied them access to badly needed funds, but they also risked selling the shares for a lesser price due to market fluctuations.

However, Barrett J noted that the main factor in favour of enforcing the holding lock in the interim was to protect the defendant in the event that shares were sold to bona fide third parties and would thus be beyond the reach of cancellation or forfeiture, particularly if EEL could prove misrepresentation by FOGI regarding non-payment. The plaintiffs would always be able to quantify their losses and thus could be compensated in the event of a judgment in their favour.

In conclusion, while the interlocutory relief sought by the plaintiffs to have the holding lock removed was denied on the 'balance of convenience' because the parties would suffer less detriment in the interim, Barrett J suggested that the plaintiffs' arguments against EEL's justification for a holding lock were 'more than plausible', and that the status of the holding lock may very well change at trial.

(E) THREE STAGES TO PROMULGATE AND GIVE EFFECT TO A SCHEME OF ARRANGEMENT  
(By Nghi Tran, [Phillips Fox](http://www.phillipsfox.com))

Central Pacific Minerals NL [2002] FCA 239, Federal Court of Australia, Emmett J, 27 February 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/february/2002fca239.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The plaintiff, Central Pacific Minerals NL ('CPM'), sought orders pursuant to Part 5.1 of the Corporations Act 2001 (Cth) for approval of four schemes of arrangement proposed between CPM, and the holders of four different classes of securities issued by CPM.

The schemes are part of a proposal to combine two listed entities, being CPM and Southern Pacific Petroleum NL ('SPP'), as a result of which there would be only one publicly listed company, being SPP, which would be the holding company of CPM.

The schemes entail the delisting of CPM, the removal of the shareholding held by CPM in SPP and an option for security holders to defer participation in the relevant scheme for up to 10 years. Each of the existing securities in CPM, other than convertible notes, will be exchanged for 2.664 securities in SPP of an equivalent class. Convertible notes will become convertible at the ratio of 2.664 SPP shares for each CPM share that would have been issued upon conversion.

Initially, the two companies were formed to take advantage of a tax regime existing at the time; SPP being formed to pursue petroleum exploration and development and CPM to pursue mineral exploration and development. Both companies were listed on the Australian Stock Exchange in 1968.

Although CPM and SPP are separate companies, they are effectively operated and managed as a single entity. CPM and SPP have the same board of directors, management and facilities. Revenue, expenditure, capital, assets and liabilities are also allocated as closely as possible on a 50:50 basis. At the time of judgment, CPM owns approximately 30.7 per cent of SPPs issued capital, and SPP owns approximately 34.5 per cent of CPMs issued capital.

Emmett J outlined the statutory framework for approving schemes of arrangement under Part 5.1 of the Corporations Act 2001 (Cth). In effect, there are three stages in the promulgation and giving effect to a scheme of arrangement, such that the scheme will be binding on the parties to it. These stages are:

(1) the application to the Court to convene a meeting;

(2) the holding of the meeting to approve the scheme; and

(3) the application to the Court for its approval of the scheme.

The Court is therefore involved in two stages of the process.

Stage 1: The Court in exercising its discretion under section 411(1) to convene a meeting must be satisfied that:

(a) if the arrangement receives approval by the statutory majority at the relevant meeting, the Court will be likely to approve the arrangement on the hearing of any application that is unopposed;

(b) there is sufficient disclosure to those who will be affected by the arrangement, of its detail and effect (this requirement being of 'paramount importance');

(c) there has been reasonable opportunity for ASIC to examine the terms of the arrangement in compliance with section 411(2); and

(d) the arrangement, if given effect, will not involve any unfair or oppressive result.

In the present case, the first stage was completed before Hely J. Emmett J stated that the Court would assume that the appropriate principles for the exercise of the discretion were adopted and applied in convening the meeting pursuant to section 411(1). He also noted that while the same judge would commonly be involved at both stages, this need not be the case.

The Court will also have regard to such matters as the acceptability of the documentation, the commercial viability and morality of the arrangement, the bona fides of the proposals and any objections or submissions by ASIC.

As part of the role of the Court at this first stage, the Court will look to protect the interests of parties who will be bound by the arrangement and who might be careless of their own best interests, in terms of the technical or mechanical aspects of the arrangement. The Court will seek to ensure that the terms of the arrangement are enforceable even by security holders who have not agreed to the arrangement but are bound by it. The Court will also be very critical of provisions in the arrangement that without good reason create inroads to modify the benefits that security holders might legitimately expect. The mere fact that the Court has convened a meeting does not necessarily mean that the Court will approve the arrangement, even if the arrangement is unopposed at the third stage.

Stage 2: At the meeting convened in accordance with an order of the Court, a resolution in favour of the arrangement must be passed by a majority in number of the members in the relevant class present and voting, either in person or by proxy, and by 75 per cent of the votes cast on the resolution.

Stage 3: The Court in exercising its discretion to approve the scheme of arrangement must be satisfied that:

(a) the second stage has been fully completed;

(b) the resolutions have been passed in accordance with the statutory requirements;

(c) the arrangement is fair and equitable between different classes of security holders, and as between security holders and those who will benefit from it;

(d) the proposal is at least so fair and reasonable that an intelligent and honest person, who is a member of the class of security holders bound by the arrangement acting alone in respect of his or her interests, as such security holder, might approve it.

Emmett J noted that the jurisdiction of the Court in relation to an arrangement is supervisory, in the sense of ensuring the absence of oppression. Nevertheless, the Court is not "a mere rubber stamp" as the Court must be satisfied that the arrangement is a fair and equitable one.

The schemes relating to contributing shares, equity participation shares and convertible notes were conditional upon approval of the scheme relating to ordinary shares. Emmett J was satisfied that the conditions precedent had been satisfied.

The securities in SPP that will be issued as consideration are subject to the Securities Act 1933 (U.S). However, s3(a)(10) of the Securities Act 1933 contains certain exemptions for compliance with that Act. For the exemption to be effective, the court in question must have sufficient information to determine the fairness of the terms and conditions of the proposed exchange.

There was also an issue as to whether the procedural requirements of the order made by Hely J had been satisfied. Hely J ordered that meetings of the four different classes of securities holders be held on 24 January 2002 at 10:15am, 11am, 11:20am and 11:40am respectively. However, in the documentation security holders were told that the meetings would commence as soon as the previous meeting was adjourned starting from 10:15am. Emmett J was satisfied that there was no prejudice caused by that departure from the orders made by Hely J.

Evidence was provided by Mr Steve Scudemore of the accounting firm KPMG which consisted of a sworn report prepared in order to provide an opinion as to whether each of the schemes would be in the best interests of the persons who will be bound by them. Upon the basis of Mr Scudemore's evidence and the absence of any opposition to the application, Emmett J was satisfied that the Court should make the orders sought. Accordingly Emmett J approved the four schemes of arrangement.

(F) SOME CLARIFICATION ON MARKET MANIPULATION  
(By Stephen Magee)

R v Manasseh and Austin [2002] NSWCCA 27, New South Wales Court of Criminal Appeal, Sheller JA, Simpson and Howie JJ, 25 February 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/february/2002nswcca27.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Messrs M and A were charged with breach of section 998(1) of the Corporations Law (creation of false appearance of trading). The Crown case was that they had placed sell and purchase orders for shares held by companies that they controlled, but that the transactions had not changed the beneficial ownership of the shares.

The statutory basis for the charges was:

- section 998(1) - prohibited a person from creating a false or misleading appearance of active trading in listed securities;  
- section 998(5) - deemed a false and misleading appearance to have been created if a transaction did not involve any change in the beneficial ownership of the securities; and  
- section 998(7) - provided that there would be no change in beneficial ownership if a person who had an interest in the traded securities before the transaction had an interest in them after the transaction.

(These provisions do not differ substantively from their replacement provisions in section 1014B of the post-FSR Corporations Act 2001.)

M and A were convicted at a jury trial. They and the Crown appealed.

(2) Irrelevance of share ownership

The first limb of M's and A's appeal was based on the fact that they personally were not the owners of the shares that had been traded.

The Court of Criminal Appeal noted that section 998(1) could be read as covering only transactions by a principal or it could be read as covering transactions by agents as well. However, the authorities showed that the provision was aimed at the action of creating a false market, rather than trading in one's own securities - or, in the Court's words, "the nature of the activity not the status of the participants". Accordingly, the section did not require that the person alleged to have created the appearance of false trading was the owner of the shares. A person could create an appearance of false trading by placing buy or sell orders on shares that s/he doesn't own. On the basis of Donald v ASIC (2000) FCA 1142, it was not even necessary that the person was acting on the authority of the owner of the shares.

(3) Whose interest?

M and A argued that the "person" charged under section 998(1) had to be the same person whose beneficial interests hadn't changed under section 998(7). The Court simply ruled that this argument was untenable.

M and A did, however succeed on another section 998(7) point.

This had to do with the trial judge's directions to the jury. The substantive point was that, if it relies on section 998(7), the Crown must prove that the same person had the same beneficial interest before and after the transaction. A basic aspect of that requirement is indentifying who that person is and what that person's interest was:

"For the Crown to make the case it alleged, it was necessary to identify the person or persons said to have had unchanged beneficial ownership of the securities before and after a particular transaction and, if reliance was to be placed on subs (7), to explain what the Crown said was the interest of that person or persons in the securities before and after the purchase or sale. Only when these persons and their alleged interests were identified could the trial Judge rule on whether the person or persons so identified could be found to have had at the relevant times beneficial ownership within the meaning of subs (5)(a) or an interest within the meaning of subs (7). If the trial Judge ruled that the identified person or persons as a matter of law could be found to have such a beneficial ownership or such an interest, then it was a matter for the jury on the evidence to determine whether in fact they did and if so whether the beneficial interest changed and whether the interest continued after the transaction."

In this case, the trial judge's directions to the jury had failed to meet this requirement. Those directions had been in the nature of a general statement about the meaning of "beneficial ownership". In the Appeal Court's view, that direction would inevitably have led the jury to conclude that the section 995(7) issue was a simple one resolved by the Crown's evidence. However, said the Court, that evidence was not sufficient to allow the matter to be safely left to the jury.

The convictions were quashed.

(G) ANSETT - SHOULD A COURT GIVE DIRECTIONS TO AN ADMINISTRATOR IN RESPECT OF A PURELY COMMERCIAL OR BUSINESS DECISION  
(By Dannielle Coleman, [Blake Dawson Waldron](http://www.bdw.com.au))

In the matter of Ansett Australia Limited and Korda [2002] FCA 90, Federal Court of Australia, Goldberg J, 12 February 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/february/2002fca90.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) The facts

The facts were as follows. On 17 September the second administrators to the Ansett group were appointed. As soon as they were appointed the administrators commenced the process for the sale of the Ansett mainline airline business. Their objective was to keep the Ansett airline business in existence and to maximise the return to creditors. As it was a difficult time to sell an airline the administrators considered it necessary to recommence flying operations if they were to have any prospect of selling the airline. On 29 September 2001 the Ansett group recommenced flying operations. This remained the position until 31 January 2002.

Tesna was the successful party in the bid for the Ansett group. The Tesna sale agreement was subject to a number of conditions precedent and provided for settlement and completion on 31 January 2002. By 28 January 2002, the day before the holding of the second creditors meeting it became apparent to the administrators that the sale of Tesna would not be completed by 31 January 2002.

The administrators estimated that continued operation of the mainline airline would incur losses to the Ansett group during February 2002 of approximately $6m per week. However, the administrators accepted Tesna's position that it was critical to its plans that the Ansett mainline airline business be sold as a going concern. For this reason, and for the reason that they believed the Tesna sale would most likely occur, the administrators decided that they should continue to operate the mainline airline business, and incur the weekly losses referred to.

The administrators decided that at the second creditors meeting, they would recommend that the Ansett group continue trading at a loss so as to achieve settlement and completion of the sale with Tesna. At the second creditors meeting, the creditors received a report from the administrators in accordance with the provisions of section 439A(4) of the Corporations Act 2001 (Cth) ("Act") which disclosed a substantial excess of liabilities. The creditors were also informed of the benefits and disadvantages of extending the completion date of the sale to Tesna, including the fact that the Ansett group would incur losses of $6 million per week. A resolution was passed by the creditors that the completion date be 31 January 2002 or such other date as 'the administrators may agree'.

The administrators undertook a detailed and considered commercial evaluation of the decision whether to continue airline operations for another month in order to consummate the sale to Tesna. Their business judgment was consistent with the objects of Part 5.3A of the Act. The administrators considered that the benefits to creditors if the sale to Tesna was completed outweighed the disadvantages of continued trading during 2002.

The administrators applied to the Court for a direction pursuant to section 447D of the Act that they may properly and justifiably continue to operate the Ansett mainline airline business for a further period of time ending no later than 28 February 2002.

(2) Does the Court have jurisdiction to sanction business and commercial decisions?

The administrators were concerned that they would be moving outside the ordinary parameters of insolvency administration and the operation of Part 5.3A in making the decision to continue airline operations.

The administrators submitted that where difficult and potentially contentious decisions were required by liquidators, they have always been able to approach the Court for direction. The administrators relied upon a passage in Palmers Company Precedents, 16th ed 1952 where it was stated that:

"the power to apply for directions under the Act is not limited in any way, and the liquidator has a clear right to apply to the court for directions in regard to any particular matter, whether it involves a question of law or a question of discretion as to the management or realisation of the property of the company. The liquidator should, for his own protection, apply to the court in every case of doubt, and should do so, where large sums are involved, even if his advisers express no doubt upon the matter...the court has full jurisdiction to give directions in relation to any particular matter; and it would seem that to decline to exercise that jurisdiction merely because a matter does not involve a question of law is contrary to the intention".

Goldberg J accepted that principles and authorities relevant to the rights of liquidators, to seek directions from the Court, were applicable to issues arising in relation to the rights of administrators to seek directions pursuant to section 447D of the Act and so accepted the authorities applying to the construction and application of section 479(3) of the Act and its predecessor sections as relevant to the matter before the Court.

However, Goldberg J found that the authorities were not uniform on the issue. In some instances where directions had been given, it seemed that the distinction between a business decision and a non-business decision had become blurred. Nevertheless Goldberg J stated:

"it does not appear from the authorities that courts have given liquidators and administrators directions approving of business or commercial decisions in circumstances where no issue has arisen in relation to a legal matter or the propriety or reasonableness of the decision."

Goldberg J said there were two sound principles why this was particularly so in relation to administrators appointed in accordance with Part 5.3A:

(i) those decisions are particularly committed to administrators and withdrawn from officers of the company: section 437A and section 437C; and

(ii) a court is not qualified and, in any event, is ill equipped to make or approve such business decisions.

In particular, Goldberg J asserted that the Court was not privy to the negotiations and circumstances involved in the making of the business decision in respect of which the administrators sought approval.

The administrators submitted that a review of the relevant authorities demonstrated that there was no rule of law and no fixed principle that the consideration by the Court of commercial issues was precluded, although they did accept that the need to pass judgment on the commercial prudence of a transaction was a ground upon which the Court might decline to give directions, particularly if the liquidator or administrator was seeking to pass the actual decision making onto the Court.

Goldberg J considered the relevant authorities and concluded that the prevailing principle adopted by the courts, when asked by liquidators and administrators to give directions:

"is to refrain from doing so where the direction sought relates to the making and implementation of a business or commercial decision, either committed specifically to the liquidator or administrator or well within his or her discretion, in circumstances where there is no particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought. There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decisions. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance. There must be some issue which arises in relation to the decision. A court should not give its imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. There must be an issue calling for the exercise of legal judgment."

Goldberg J recognised that there may be times where the Court is necessarily drawn into consideration of commercial issues 'where there is a matter giving rise not only to the need to make a business or commercial decision but also to issues of propriety, power, reasonableness of conduct, contested issues of legal principle or procedure or challenges to the decision made by the liquidator or administrator'. Nevertheless, Goldberg J contended that there was a well-established principles that a court will not give directions approving of a commercial or business decision made by a liquidator or administrator where 'the decision is within the power of the liquidator or administrator and there is no challenge to it or other issue arising in relation to it such as propriety or reasonableness, or calling for the exercise of legal judgment'.

(3) Should the Court give directions where there is a legitimate apprehension of a subsequent accusation that the administrator had acted unreasonably?

Goldberg J did not deny that the Court may give directions where there is a legitimate apprehension of a subsequent accusation that the administrator had acted unreasonably. However, no-one had threatened to take proceedings against the administrators if they extended the time for the completion of the sale to Tesna and continue to operate the mainline airline business in the meantime. Further no-one had suggested that the administrators were not acting within their power in continuing to operate the mainline airline business at a loss or that they had not acted with propriety.

(4) Should the Court intervene given the supervisory nature of Part 5.3A?

The administrators submitted that as they were working within the framework of Part 5.3A of the Act the Court's intervention was warranted, notwithstanding the authorities and principles already referred to.

Goldberg J recognised that the Court would support and supervise the administrators if controversial legal issues or challenges to administrators' power or the propriety of their conduct arose, but he did not regard Part 5.3A as requiring the Court to support or confirm a decision for the administrators whenever the administrators are apprehensive, or anxious, or concerned that with hindsight someone might be critical of the administration.

(5) Should the Court give directions where the administrator considers their decision to be in the interests of creditors, but where the decision is unusual or controversial?

Goldberg J rejected the administrators' submission that that the Court could give directions where an administrator proposed to embark on a course which the administrator considered to be in the interests of creditors, but which was unusual or controversial. The decision to continue to operate the mainline airline business, even at a significant loss, was a decision which was in the administrators' power to make.

(6) Did trading at a loss take the administrators outside the ordinary parameters of insolvency administration?

The administrators contended that trading at a loss took them outside the ordinary parameters of insolvency administration and rendered them vulnerable to subsequent criticism. Goldberg J did not accept this submission for the reason that Part 5.3A contemplates that an administrator of a company may have to operate the business of a company under administration at a loss in order to further the objects of Part 5.3A. The control of the business of a company under administration is absolute in the sense that, while it is under administration, no other person can perform or exercise any function or power as an officer of the company, except with the written approval of the administrator. The discretion of the administrators to carry on the business of a company under administration is unfettered other than by a resolution of the creditors at a meeting convened pursuant to section 439A of the Act

5. NEW BOOK ON SECURED FINANCE BY CENTRE FOR CORPORATE LAW MEMBER

Dr Paul Ali, a member of the Centre for Corporate Law and Securities Regulation at The University of Melbourne, has recently authored a book entitled "The Law of Secured Finance: An International Survey of Security Interests over Personal Property" (Oxford University Press, March 2002. ISBN 0198299028).

This book is a detailed analysis of the juridical nature, creation, priority-ranking and enforcement of corporate security interests over personal property, under the laws of Australia, Canada, England and New Zealand. The book also considers the regulation of security interests under the laws of Hong Kong, India, Malaysia and Singapore, and recent international initiatives to harmonise the law relating to cross-border security interests. In addition, there is extensive discussion of the recent Privy Council decision, Agnew v CIR [2001] 3 WLR 454, concerning fixed charges over receivables.

Copies of the book may be ordered on-line from Oxford University Press, Melbourne: <http://www.oup.com.au>.

Dr Paul Ali recently joined the Centre for Corporate Law and Securities Regulation in the Faculty of Law, The University of Melbourne, as a senior lecturer. Paul's areas of research include financial markets, investment management and secured finance law.

In addition to his new book, Paul is also the author of "Marshalling of Securities: Equity and the Priority-Ranking of Secured Debt" (Oxford University Press, 1999). He has also published several articles on the legal design and regulation of derivatives, securitisations and other innovative financial products. Paul was previously a senior associate with a major Sydney law firm (where he was part of the legal team that worked on the demutualisation of AMP, the securitisation of AMP's shareholding in Westpac and the establishment of AMP Bank). He has also been a legal counsel to the securitisation group of a major United States bank and has worked for other leading law firms in Sydney in Auckland. He is currently a principal of Stellar Capital, a private capital firm.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

D O'Brien, 'Receivers' Duties When Selling Assets' (2001) 9 Insolvency Law Journal 180

The purpose of this article is to examine the nature and scope of receivers' duties when selling assets and, in particular, some recent developments in the law of which receivers should be aware. To this end, this article reviews the duties imparted on a receiver at general law and in statute and how the requisite duties differ or have altered in recent times. It also considers some specific issues which have received consideration in a number of recent judicial decisions dealing with receivers' duties when selling assets. Drawing upon the issues arising in the recent cases examined, this article highlights some practical issues for receivers to consider when seeking to ensure that they comply with their general law or statutory duties.

T O'Sullivan, 'Receivers' Duties in New Zealand - Statutory Impact on the Common Law Rules' (2001) 9 Insolvency Law Journal 194

This article outlines the duties of receivers which are now contained in sections 18 and 19 of the New Zealand Receiverships Act 1993 and discusses the differences between those sections and the common law rules which existed prior to the introduction of the Act. The conflicting views on the nature of receivers' duties apparent from the common law cases is considered. The essential conflict being a question of whether the duties are equitable or tortious. The New Zealand position on this question was settled by the Privy Council decision in Downsview Nominees Ltd v First City Corp Ltd [1993] 1 NZLR 513 which deems receivers' duties to be equitable in nature. This case is considered in detail and compared with sections 18 and 19. The article concludes by finding that sections 18 and 19 do reflect the rules expounded by the Privy Council in Downsview. The conclusion also expresses the writer's opinion that this essentially results in the application of different duties depending on the nature of the task a receiver is carrying out.

P Agardy, 'Voluntary Administrators' Reports' (2001) 9 Insolvency Law Journal 204

The Corporations Act 2001 (Cth) requires an administrator of a company to report to the creditors before the second meeting, at which the fate of the company is decided. There is minimal statutory guidance as to the content of the report. The author reviews the cases and commentaries. He suggests a checklist of matters which should be covered in the report.

R Ford, 'Will the Financial Services and Markets Act 2000 Sound the Death Knell for European Master Trust Structures?' (2001) 16 Journal of International Banking Law 265

M Jijun, 'New Legislative Development Concerning the Security Laws of the People's Republic of China' (2001) 16 Journal of International Banking Law 273

J Chen, 'An Overview of Asset Securitisation in Singapore' (2001) 16 Journal of International Banking Law 246

H Parry, 'Hedge Funds, Hot Markets and the High Net Worth Investor: A Case for Greater Protection?' (2001) 16 Journal of International Banking Law 255

M Kantor, 'The Increasing Role of Interest Groups in Investment Transactions Involving International Financial Institutions' (2001) 7 ILSA Journal of International and Comparative Law 291

H Sachse, 'Public Offers for Securities in the Netherlands' (2001) 29 International Business Lawyer 439

C Shumo and D Yingxia, 'Corporate Governance in China - Obstacles and New Developments' (2001) 29 International Business Lawyer 455

B Kochlewski and A Tomaszek, 'New Company Legislation in Poland' (2001) 29 International Business Lawyer 420

J Ziegel, 'Corporate Groups and Canada-US Cross Border Insolvencies: Contrasting Judicial Visions' (2001) 35 Canadian Business Law Journal 459

J Coates, 'Explaining Variation in Takeover Defences: Blame the Lawyers' (2001) 89 California Law Review 1301

J Franco, 'The Investment Company Act's Definition of "Security" and the Myth of Equivalence' (2001) 7 Stanford Journal of Law, Business and Finance 1

C Kertz and P Simko, 'Mutual Fund Investing and Tax Uncertainty: The Need for New Disclosures' (2001) 7 Stanford Journal of Law, Business and Finance 103

International and Comparative Corporate Law Journal, Vol 3 No 1, 2001. Articles includes:

- Managerial Liability, Risk and Insurance: An International View  
- Company Law and the Regulation of Financial Services in the 21st Century: A Socio-Legal Perspective  
- International Securities Markets, the Diversity of National Regulations and the Relevance of the Public/Private Law Dichotomy  
- CENTROS and its Consequences for Member State Legislatures  
- Principles of Attribution and Corporate Liability  
- Corporate Group Liability: A Malaysian Perspective

S Schwarcz, 'Indirectly Held Securities and Intermediary Risk' (2001) 6 Uniform Law Review 283

M Hammerson, 'What is a Shadow Director?' (2001) 151 New Law Journal 1703

H Walker, 'Corporate Liability for Manslaughter' (2001) 151 New Law Journal 1494

M Dunton and C Parker, 'Exchangeable and Convertible Bonds' (2001) 16 Journal of International Banking Law 287

K Mwenda and A Fleming, 'International Developments in the Organisational Structure of Financial Services Supervision: Part 1' (2001) 16 Journal of International Banking Law 291

N Callister-Radcliffe, et al, 'Rejection of the EU Takeover Directive - The Implications' (2001) 29 International Business Lawyer 338

K Moriarty, 'Exchange-Traded Funds: Legal and Structural Issues Worldwide' (2001) 29 International Business Lawyer 346

I MacNeil and A Lau, 'International Corporate Regulation: Listing Rules and Overseas Companies' (2001) 50 International and Comparative Law Quarterly 787

Washington University Law Quarterly, Vol 79 No 2, Summer 2001, Special Issue on Corporate Accountability. Articles include:

- Director Accountability and the Mediating Role of the Corporate Board  
- Seeking Sunlight in Santa Fe's Shadow: The SEC's Pursuit of Managerial Accountability  
- Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime  
- The SEC, the Audit Committee Rules, and the Market Places: Corporate Governance and the Future  
- Litigating Challenges to Executive Pay: An Exercise in Futility?  
- Credibility and Information in Securities Markets After Regulation FD

D Tarullo, 'Rules, Discretion, and Authority in International Financial Reform' (2001) 4 Journal of International Economic Law 613

Note, 'Fiduciary Duties Owed to Shareholders: The Court of Appeal Applies the Brakes (Peskin v Anderson)' (2001) Lloyd's Maritime and Commercial Law Quarterly 456

A Olazabal, 'Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?' (2000) 105 Dickinson Law Review 1

Note, 'Division of a Company on a "Share for Share" Basis - Is it a Scheme of Reconstruction? (Fallon v Felloys)' (2001) British Tax Review 409

C Lopez-Fernandini, 'Regulation FD of the SEC's Selective Disclosure and Insider Trading Rule: Finally, Full and Fair Disclosures' (2001) 53 Administrative Law Review 1353

L Villela and J Silva, 'Private Pension Funds in Brazil - A Brief Summary of Recent Normative Changes' (2001) 12 International Company and Commercial Law Review 300

A Szent-Ivany, 'Newly Codified Rules of Lien in the Hungarian Civil Code' (2001) 12 International Company and Commercial Law Review 305

S Sheikh, 'Company Law for the 21st Century - Part 1: A New Regime for Small and Private Companies' (2001) 12 International Company and Commercial Law Review 311

Note, 'Corporate Killing at Home and Abroad - Reflections on the Government's Proposals' (2002) 118 Law Quarterly Review 72

T Janger, 'Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design' (2001) 43 Arizona Law Review 559

F Tung, 'Fear of Commitment in International Bankruptcy' (2001) 33 George Washington International Law Review 555

T Thomas, 'The New Marital Property of Employee Stock Options' (2001) 35 Family Law Quarterly 497

I Ayers and J Bankman, 'Substitutes for Insider Trading' (2001) 54 Stanford Law Review 235

A Penk, 'Confidential Information in a Commercial Context: An Analysis of "Use" of Confidential Information and the Availability of a Proprietary Remedy for Breach of Confidence' (2001) 9 Auckland University Law Review 470

Public Law Review, Vol 12 No 4, December 2001. Special Issue on the Constitutional Challenges to Australian Corporate Regulation. The articles and their authors are:

- I Govey and H Manson, 'Measures to Address Wakim and Hughes: How the Reference of Powers Will Work'  
- M Whincop, 'The National Scheme for Corporations and the Referral of Powers: A Sceptical View'  
- C Saunders, 'A New Direction for Intergovernmental Arrangements'  
- B Selway, 'The Hughes Case and the Referral of Powers'

B Mescher, 'Powers of the Takeovers Panel and their Effect upon ASIC and the Court' (2002) 76 Australian Law Journal 119

OBTAINING COPIES OF ARTICLES

Subject to copyright restrictions, the articles listed above are available from The University of Melbourne Legal Resource Centre by fax or post for a fee. The charges for MelbLaw Express are $3.00 per page fax within 2 hours (+ GST); $2.50 per page fax within 4 hours (+ GST) and $1.50 per page mailed out (+GST but includes postage). This service is available 9-5, five days per week. Please note a minimum $15 charge applies to documents of 5 pages or less.

Please contact Sophy Kosmidis:

fax: int + 61 3 8344 5995;  
tel: int + 61 3 8344 7313, or   
email: lawlib@law.unimelb.edu.au

7. CONTRIBUTIONS

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

8. SUBSCRIPTION TO THE BULLETIN

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an email to "cclsr@lawlex.com.au".

9. DISCLAIMER

No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is provided on the terms and understanding that (1) the authors, editors and endorsers are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, authors, editors and endorsers expressly disclaim all and any liability and responsibility to any person in respect of anything done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.