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**CONTENTS**

1. [CENTRE FOR CORPORATE LAW SEMINAR](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#1.CentreSeminar)
(A) [CLERP 6 AND SECURITIES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#%28A%29CLERP6)

2. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#2.RecentCorporateLaw)
(A) [Legislation in response to cross-vesting decision](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#%28A%29Legislation)

3. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#3.RecentASIC)
(A) [ASIC issues CLERP Bill Policy Proposal Paper on Takeovers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#%28A%29ASICissues)
(B) [ASIC releases policy statement – takeovers provisions: warrants](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#%28B%29ASICreleases)

4. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#4.RecentASX)
(A) [ASX Listing Rules boost to competitiveness](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#4ARules)
(B) [Other developments](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#4BOtherDevelopments)

5. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#5CorpLawDecisions)
(A) [Valuation report in the context of a takeover and directors’ duties](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225AValuation%22%20%5Ct%20%22_top)
(B) [Remedy for oppressive conduct in a home unit company](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225BRemedy%22%20%5Ct%20%22_top)
(C) [Minister’s consent to prosecution not required](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225CMinister%22%20%5Ct%20%22_top)
(D) [Enforceable undertaking enforced with indemnity costs](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225DEnforceable%22%20%5Ct%20%22_top)
(E) [Interlocutory injunction for breach of enforceable undertaking](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225Einterlocutory%22%20%5Ct%20%22_top)
(F) [Invalid removal of director by director acting in two capacities](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm%22%20%5Cl%20%225Finvalid%22%20%5Ct%20%22_top)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#6CorpLawJournal)

7. [CENTRE FOR CORPORATE LAW SEMINAR](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#7CentreSeminar)

8. [CONFERENCE ON SME FINANCING](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#8Conference)

9. [NEW CENTRE FOR CORPORATE LAW PUBLICATION](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#9NewCentrePublication)

10. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#10Archives)

11. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#11Contributions)

12. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#12Membership)

13. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0024.htm#13Disclaimer)

1. CENTRE FOR CORPORATE LAW SEMINAR

(A) CLERP 6 AND SECURITIES

Speakers: Ms Pamela Hanrahan, Senior Lecturer in Law, The University of Melbourne; Ms Alison Lansley, Partner, Mallesons Stephen Jaques; Mr Alan Shaw, National Manager – Market Integrity, Australian Stock Exchange

Date: Thursday 9 September 1999

See Item 7 in the Bulletin for further details

2. RECENT CORPORATE LAW DEVELOPMENTS

(A) LEGISLATION IN RESPONSE TO CROSS-VESTING DECISION

On 24 August 1999, the Hon Daryl Williams, MP announced that the Government will introduce Commonwealth legislation in response to the High Court’s cross-vesting decision given on 17 June 1999. The High Court decided in Re Wakim that the States cannot confer jurisdiction on the Federal Court or the Family Court.

The legislation will ensure that the Federal Court can continue to review the lawfulness of decisions made by Commonwealth bodies and officers exercising powers under State laws. The State laws are part of various Commonwealth/State joint schemes such as the Corporations Law scheme.

The legislation will also address the separate issue of the use of administrative appeal procedures to delay the process of criminal proceedings. The legislation will allow State courts, instead of the Federal Court, to deal with administrative challenges that arise in the course of criminal trials in State courts.

The Attorney-General stated that criminal defendants, particularly those who are well-resourced, have used administrative law proceedings to delay and frustrate the proper processes of criminal proceedings in State courts by bringing challenges in the Federal Court to decisions in relation to criminal matters once charges have been laid. The legislation will ensure that any challenges to such decisions are handled by the Supreme Court of the State or Territory in which charges are laid. It will remove rights to review under the Administrative Decisions (Judicial Review) Act 1977 once charges have been laid but other review procedures will continue to be available. Any legitimate concerns about decisions made in relation to criminal matters will be able to be dealt with in the course of proceedings in the State court or in the course of the criminal trial.

The legislation will also remove from Commonwealth statutes provisions which permit States to confer jurisdiction on federal courts. Such provisions are now of no effect.

3. RECENT ASIC DEVELOPMENTS

(A) ASIC ISSUES CLERP BILL POLICY PROPOSAL PAPER ON TAKEOVERS

On 11 August 1999 ASIC issued a policy proposal paper entitled "Takeovers: Discretionary powers" regarding takeovers issues arising under the Corporate Law Economic Reform Program Bill (1998) (CLERP).

The policy proposal paper addresses those areas where ASIC may commonly be requested to exercise its discretionary powers in relation to takeovers. Under the Bill, ASIC remains the primary decision maker for modifications and exemptions in relation to takeovers.

In relation to modifications and exemptions of takeovers provisions (and the substantial security holding provisions during a bid) the review of ASIC’s decisions will move from the Administrative Appeals Tribunal to the Corporations and Securities Panel.

As part of the public consultation process the policy proposal paper will be available for public comment for approximately six weeks with written submissions due by Friday, 21 September 1999.

ASIC will prepare a policy statement on the policy proposals once it has considered public comments.

Copies of the policy proposal paper can be obtained from ASIC Infoline on 1300 300 630 and from the Policy Practice page of the ASIC internet homepage "http://www.asic.gov.au".

For further information contact:

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Summary of Policy Proposal

In the policy proposal paper ASIC sets out:

- circumstances in which ASIC expects it may commonly be requested to exercise its discretionary powers to grant relief in relation to the takeovers provisions of the Corporations Law following the commencement of CLERP; and

- the position of, and ASIC’s approach to, ASIC’s existing takeovers policies following the commencement of CLERP.

(1) New Policies and changes to existing policies

Set out below is a summary of the main issues raised in the policy proposals which introduce new policy or a change to existing policies.

(a) Deemed acquisitions and partly paid securities:should ASIC grant relief where a person contravenes the prohibition in s 606 due to a deemed acquisition resulting from an increase in a person’s voting power as a direct result of that person (or another person) responding to a call made on partly paid securities?

(b) Mandatory Bids:

- should ASIC allow a mandatory bid to be conditional on regulatory approvals?

- should ASIC grant relief from items 5(b) and (c) of s 611?

(c) Approval of nominees:should ASIC approve a nominee appointed under s 615 and s 619(3), that is a licensed securities dealer or a subsidiary of a licensed securities dealer?

(d) Class of securities:should ASIC give relief to allow two or more classes of securities to be treated as being of the one class where:

- the securities do not have identical rights or obligations but are substantially similar; and

- the differences between the classes of securities are temporary and can be equitably accounted for by a simple cash adjustment to the consideration offered?

(e) Securities issued during the currency of an off-market bid:should ASIC allow an off market bid to extend the securities issued during the bid period under circumstances which are not within s 617(2)?

(f) Changes to a bidder’s statement between lodgement and dispatch:should ASIC allow a bidder in certain circumstances, to send a replacement bidder’s statement (being a single document incorporating the initial bidder’s statement as amended by the supplementary bidder’s statement) to security holders instead of requiring the bidder to send the initial bidder’s statement and its supplementary statement to the security holder?

(g) Variation to allow a conditional increase in consideration:should ASIC grant class order relief to allow a bidder during the bid period to offer to increase the consideration to be paid to security holders subject to a minimum acceptance condition?

(2) Continuing policies

In the policy proposal paper ASIC lists those ASIC policies which it considers to be continuing, interim or superseded following the commencement of CLERP. Listed below are those policy proposals which ASIC proposes to continue to apply substantially unaltered and which have been separately identified in the policy proposal paper because they are perceived as applying to circumstances where ASIC may commonly be requested to exercise its discretionary powers.

(a) 3% creep in six months

(b) Unmarketable parcels

(c) Extension of time/bidder’s statement

(d) Extension of time/target’s statement

(e) Bidder’s statement content

(f) Receivers to assume obligations of target directors

(g) Adding scrip consideration to an off-market bid

(h) Adoption notice of variation by a resolution of the directors

(B) ASIC RELEASES POLICY STATEMENT - TAKEOVERS PROVISIONS: WARRANTS

On 4 August 1999 ASIC released a policy statement relating to the applicability of the takeovers provisions to quoted equity warrants.

Warrants, a rapidly growing class of securities in Australia, are equity derivatives which are largely being marketed to the retail investor, although often to the slightly more sophisticated end of the retail market. Warrants are essentially options over issued shares. The warrant is issued by a third party, not by the company that issues the share which is subject of the warrant. A call warrant entitles the holder to buy a fixed quantity of the underlying shares at a stated price. A put warrant entitles the holder to sell a fixed quantity of the underlying shares at a stated price.

The terms of warrant agreements set out the rights and obligations of the holders and writers of warrants, in relation to the underlying shares. For many warrants, the rights and obligations are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company.

ASIC has given Class Order relief for holders and issuers of call and put warrants in the following circumstances:

- In relation to call and put warrant holders and issuers, ASIC has given Class Order relief to disregard certain tenuous associations between holders and issuers, which arise as a result of the holder and issuer entering into a warrant agreement, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions.

- For call warrant holders, ASIC has given Class Order relief to disregard any relevant interests and entitlements which arise from a call warrant holder acquiring and holding warrants, for the purposes of the 20% takeovers prohibition.

This Class Order only applies where the holder does not have power to control the voting over the underlying shares.

ASIC has not given similar Class Order relief for call warrant holders in relation to the substantial shareholding provisions, except for disregarding certain associations between the holder and issuer (discussed above). This is because ASIC is of the view that information regarding substantial interests in shares and call warrants is useful market information. This distinction follows the amendments proposed in the Corporate Law Economic Reform Program Bill 1998.

- For call warrant issuers, ASIC has given Class Order relief to disregard any relevant interests and entitlements, which may arise from holding the underlying shares as a cover against the rights of the holders and the obligations of the issuer, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions. The Class Order only applies where the underlying shares are held on trust and the issuer does not retain any power to control voting over those shares.

- For put warrant holders, ASIC has given Class Order relief to disregard any relevant interest or entitlement, except for disregarding certain associations between the holder and issuer (discussed above). This is because put warrant holders will retain full power to control and dispose of the underlying shares.

- For put warrant issuers, ASIC has given Class Order relief to disregard relevant interests or entitlements arising solely from the warrant agreement of those put warrants they have issued, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions. This Class Order only applies where the issuer does not have power to control the voting over the underlying shares.

ASIC also has given Class Order relief to trustees who hold shares as a cover under a warrant agreement.

Copies of the Policy Statement are available from ASIC Infoline on 1300 300 630 or from the ASIC home page at "http://www.asic.gov.au".

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4. RECENT ASX DEVELOPMENTS

(A) ASX LISTING RULES BOOST TO COMPETITIVENESS

On 13 August 1999 the Australian Stock Exchange announced a number of changes to its listing rules to take effect on 1 September 1999. This move follows the release last February of an exposure draft of proposed changes for public comment.

The most substantive changes relate to ASX’s admission requirements. They reflect the growth of new industries, which are not sufficiently catered for by the existing rules.

The main changes to the admission requirements are summarised as follows.

- The introduction of a market capitalisation test of $10 million as an alternative to the existing net tangible assets ($2 million) and profit tests ($1 million).

- The removal of the requirement that businesses that are unable to meet the profits test must be in a position in which they are likely to generate revenue within three years of listing.

- A relaxation of the binding contracts requirement in the net tangible assets test. This required most entities with half or more of total tangible assets in cash to enter into binding contracts to reduce the proportion of cash to less than half. The requirement is now to have commitments rather than binding contracts, so that entities must state how they plan to utilise half or more of their cash and report against that plan in the next two annual reports.

- The introduction of an alternative to the existing spread test of 500 holders with a parcel of $2,000 of securities. The alternative is 400 holders with a parcel of $2,000 of securities, and 25% held by non-related parties.

(B) OTHER DEVELOPMENTS

(Contributed by the ASX)

(1) BLOX Exposure Draft

ASX has released an Exposure Draft of its proposed regulatory framework for the BLOX Trial. The Exposure Draft follows on from the Concept Paper and takes into account market responses to the Concept Paper.

The BLOX Trial includes a:

- Delayed Reporting Trial that has been designed to facilitate principal block trading by participants. This trial is scheduled to operate three weeks in November 1999; and

- BLOX Trading Facility Trial which is specifically designed to meet the needs of block traders. This trial is scheduled to operate for four weeks in November - December 1999.

The Exposure Draft comprises:

- overview of regulatory framework for trials;

- draft ASX Business Rules;

- draft Blox Access Agreements; and

- trading bands for Equity Securities.

Both the Exposure Draft and the Concept Paper are available on the ASX Internet Website (www.asx.com.au) and are located under the icon ‘What’s New?’

(2) CHESS DvP Settlement streamlines Initial Public Offerings

ASX has released a guide setting out the development of an electronic Delivery versus Payment (DvP) allocation facility for Initial Public Offerings (IPOs). From August 1999, the benefits of the Clearing House Electronic Subregister System (CHESS) DvP will be available to companies, underwriters, institutions and brokers for the settlement of specific components of IPOs, in particular broker firm allocations. SCH Business Rules to support the new process became effective on 13 August 1999. The service is one of the world’s first electronic DvP facilities developed to settle and process IPO’s. Copies of the guide can be obtained from ASX.

(3) Year 2000

ASX has requested all listed entities to make further disclosure concerning their Year 2000 readiness by 30 September 1999. Accompanying this request was a sample disclosure on the part of ASX as a listed entity.

5. RECENT CORPORATE LAW DECISIONS

(A) VALUATION REPORT IN THE CONTEXT OF A TAKEOVER AND DIRECTORS’ DUTIES

(By Larelle Law, Department of Commerce, Business School, The University of Queensland)

Duke Group Limited (in liq) v Pilmer & Ors, [1999] SASC 97 (20 May 1999), 17 ACLC 1, 329, 31 ACSR 213. Full Court of the Supreme Court of South Australia, Doyle CJ, Duggan and Bleby JJ

Although primarily a professional negligence action against accountants, the decision raises some interesting corporate law and partnership law aspects.

Briefly, the action involves the 1998 takeover of Western United Ltd (Western United) by the plaintiff, Kia Ora Gold Corp Ltd (Kia Ora subsequently changed its name to The Duke Group Ltd).

The defendants comprised three groups of people:

- the partners of Nelson Wheeler, Perth (NWP);

- several of the directors of Kia Ora at the time of the takeover;

- the partners of Nelson Wheeler nationally.

Kia Ora retained NWP to prepare a valuation report, required under the Listing Rules of the Australian Stock Exchange (by reason of the shareholdings and the common directorships of persons involved in both companies). The report as to "fair price" was to be provided by an "independent expert". The shareholders' meeting of Kia Ora took place at the end of October 1987, following the stock market crash. The directors at Kia Ora did not make any reference at the meeting as to whether the market downturn would affect the proposed acquisition of Western United, nor did NWP withdraw or modify their report. As a result of proceeding with the takeover, the plaintiff claimed economic loss and damages in excess of $90 million.

In holding that NWP breached their duty of care in contract and tort, the following issues were canvassed:

(1) To whom is the professional's duty of care owed?

NWP conceded that it owed a duty of care to Kia Ora's unassociated shareholders. The appeal court held NWP owed a duty of care to Kia Ora to exercise reasonable care and skill in providing advice on the fairness of the proposed price, for use in connection with the proposed acquisition of Western United. The court emphasised the practical difficulties with enforcing a duty owed exclusively to the shareholders. A duty owed to shareholders could lead to a multiplicity of actions and Kia Ora would never recover the whole loss it sustained. The balance of convenience favoured providing a remedy to the company rather than to individual shareholders. It was also relevant that a duty imposed in favour of Kia Ora protects creditors of Kia Ora.

That the recipient of the duty of care is the company and not the individual shareholders is a decision that reinforces the separate legal entity principle. It is more relevant to argue the direction of the loss, as there is a direct link between the purpose of the advice, the reliance on the advice, and the corporate decision to make the acquisition. To find the duty is owed to individual shareholders is inconsistent with the view of the general meeting as the exercise of corporate decision-making.

(2) The requirment to provide an opinion that the price is "fair and reasonable".

The court confirmed that the retainer between NWP and Kia Ora was to provide advice to Kia Ora for use in connection with a proposed acquisition of shares by Kia Ora. ASIC's Policy Note 75 analyses the role of the independent expert, and particularly, at paras 24-36, distinguishes between the meaning of "fair" and "reasonable". The court in Duke doubted the validity of the distinction (following Hayne J in Re Rancoo Ltd (1995) 17 ACSR 206 at 208) but did not elaborate.

(3) The relevance of the market crash and the "duty to correct".

NWP's valuation was unreliable as NWP acted upon an unsustainable estimate of future earnings. This is relevant to the question of whether there was any continuing duty to correct the valuation given the October 1987 market downturn. The court held that it must be an unusual circumstance to find a continuing duty, as advice is provided on the basis of circumstances at the time it is given. The court distinguished between NWP’s obligation to revise its valuation report (which the court held was not required) and its obligation to inform Kia Ora that the crash had undermined important elements upon which its report was based. This latter obligation existed, and was breached by NWP: "An expert who provides a report should inform the recipient of that report if the expert later learns of something that undermines a basis upon which the expert has expressed an opinion."

The court's distinction between the duty to revise vis-à-vis the duty to inform has analogies with provisions in the Corporations Law that impose a statutory duty to make disclosure, for example, whether the continuous disclosure regime requires the disclosure of amendments to forecast information disclosed in a prospectus or takeover document.

Kia Ora claimed as its loss the difference between the value of the consideration provided (in cash and shares) and the value of the shares acquired (and interest). The substantial issue of causation was whether the share market crash and the consequent decline in share values was the cause of the loss sustained by Kia Ora, bringing to an end any causative effect resulting from the breach of duty by NWP. The court analysed the market crash as just a market fluctuation, albeit a large one. The crash was an event of a type that was foreseeable and was foreseen. It merely increased the loss suffered by Kia Ora, and did not change the nature of that loss. The increase in the loss was not of such magnitude that it was unforseeable.

(4) Directors’ conflicts

This case again illustrates the vexed position of directors who are on the boards of both parties in a transaction when it comes to identifying and appropriately disclosing their conflict. Two directors of Kia Ora (Lee-Steere and Somes) who were also on the board of the target, Western United, appealed against the finding of breach of fiduciary duty. They knew of the over-valuation of Western United and that the acquisition was not in the interests of Kia Ora, yet there was no evidence of any disclosure. Accordingly, their continued involvement in the takeover proposal, in the absence of any disclosure, amounted to breach of duty. The court followed Permanent Building Society v Wheeler (1994) 11 WAR 187.

The court commented upon the appropriate course of conduct by a director facing a conflict:

- If there had been no suggestion of Kia Ora entering into an improvident transaction, it would be enough for directors to declare their interest and take no further part in the implementation of the takeover.

- If the directors knew that the transaction was contrary to Kia Ora’s interests, then they could not remain silent. However the court declined to comment on the further requirements on directors had they decided to take no part in the takeover.

The court did not agree with counsel’s assertions that the category of executive/non-executive director affects the scope of the fiduciary duty owed. The presence of independent directors on the board, and the existence of the independent expert’s valuation did not absolve directors from their fiduciary duty.

The undisclosed conflict of interest also led to a finding of a contravention of the statutory duties, namely honesty, diligence, and improper use of position. As the case involved the former (Companies Code) s 229(1), there was some discussion by the court as to the fraud distinction between s 229(1)(a) and (b), but the court decided that in civil litigation it was unnecessary to make the finding of fraud under (b).

Accordingly, Somes and Lee-Steere were in breach of their statutory and fiduciary duties and were liable to Kia Ora in damages for the loss sustained as a result of the takeover.

(5) Contributory negligence

Following Daniels v Anderson (1995) 37 NSWLR 438, the court found contributory negligence by Kia Ora, via the actions of its directors. In balancing the company’s right to rely on the valuation report of an expert, the court held that the obtaining of that report did not absolve Kia Ora’s directors of the responsibility to consider the fairness of the price. Further, the directors of Kia Ora had a continuing duty to monitor any professional advice tendered. Kia Ora’s damages in tort were reduced by 35 per cent; however, the court, restrained by the High Court decision in Astley v Austrust Limited [1999] HCA 6, was precluded from reducing the damages assessed for breach of contract on account of Kia Ora’s contributory negligence.

As far as attributing the actions of the directors to the company, the court upheld the principle of vicarious liability, even if that conduct was fraudulent and even if they were acting entirely for their own benefit.

(6) The national partnership

A controversial aspect of Mullighan J’s decision at first instance was the finding that NWP was in fact part of a national partnership. In applying the law to the facts, Mullighan J reached this conclusion based on the following factors:

- the referral of work from one office to another;

- the promotion of the national firm with the intention of acquiring clients;

- the fostering of uniform standards and procedures;

- the relationship of mutual agency ("in common") existed due to the undertaking of tasks associated with Nelson Wheeler National and the incurring of expenses in so doing were authorised by the participating partners;

- although the bulk of profits were not shared in a direct sense, sharing of fees occurred when work was done for companies which required services performed in more than one State.

The Appeal Court reversed this finding. The court emphasised the need to apply the relevant Partnership Act definition to the relationship, disregarding what the participants chose to call themselves. Hence, the description "Nelson Wheeler National" was not conclusive.

Significant indicia noted by the court were:

- The absence of mutual agency: the court held the original deed setting up the "association" specifically did not constitute the various members of Nelson Wheeler as agents for each other.

- The absence of a "national" tax return.

- The identifiable business carried on was the business of providing promotion and advertising services, common audit and tax manuals, training, coordination, etc. However, there was never at any stage any suggestion that the business carried on by the members of the scheme was the provision of accountancy services.

- The individual firms were agents for each other in the sense of performing work on behalf of another firm. They were agents in the sense of being the local agent for the performance of work on behalf of the instructing firm in that particular location. However, they were not agents in the sense of entering into contractual arrangements with third parties on behalf of their principals.

- It is not any financial benefit that will satisfy the term "profit" as used in the Partnership Act. However, there was never any sense in which the profits of a particular NWP firm were to be shared with members of another firm.

Kia Ora also raised the "holding out" provisions of the Partnership Act, pursuant to which, if any person holds themselves out to be a partner of a particular firm, then they are liable as if they are partners to anyone who gives credit to the firm, relying on the representation. The facts of this case supply an illustration of the application of the three elements of that section.

(i) The representation: the section requires the person to whom the representation is made to not only rely on the fact that there is a partnership, but that a particular person or persons is or are apparently a member or members of it. If the third party knows that there is a partnership but has no idea of the identity or standing of the partners, they cannot place any reliance on the identity of the partners.

Therefore, the court required a direct relationship between the source of the representation and the recipient of the representation. It was not enough for the plaintiff to rely on the general promotional material circulated by Nelson Wheeler describing itself as a national firm. The only source of the representation in the present case was the valuation report itself, that the court described as "equivocal". Although the report referred to an international firm and listed cities with other offices, there was no identification of who the partners were, or how many there were.

(ii) The giving of credit: "the mere reliance on the accuracy and integrity of a report or professional advice, once commissioned and received, would not constitute the giving of credit".

(iii) On the faith of the representation: the court ultimately decided that, given a finding here was unnecessary, there was insufficient evidence of reliance by either the directors or the shareholders of Kia Ora.

7. Other matters

Other matters discussed by the Appeal Court, not directly related to corporate law, included assessment of damages and interest, the effect of capital gains tax on a damages award, and the basis for establishing a fiduciary relationship between professional adviser and client.

(B) REMEDY FOR OPPRESSIVE CONDUCT IN A HOME UNIT COMPANY

(By Dr Elizabeth Boros, Centre for Corporate Law and Securities Regulation)

Fedorovitch v St Aubins Pty Ltd (No 2) [1999] NSWSC 776, No 5152 of 1997, Supreme Court of New South Wales, Young J, 21 July 1999

The original decision of Young J handed down on 14 May 1999 was noted in issue 22 of the Corporate Law Bulletin. His Honour held that the affairs of a home unit company had been conducted oppressively under section 246AA of the Corporations Law and that relief should be given. He stood the matter over for the purpose of considering what order needed to be made and directed the parties to exchange valuations.

In determining the appropriate relief, Young J was guided by the following considerations:

- the prime thrust of section 246AA is either to make the venture work so that the capital is property employed or to allow the capital to be removed;

- the ordinary order is that the majority buy out the minority, although exceptionally there have been orders that the majority sell their shares to the minority;

- ordinarily the court will not order oppressed plaintiffs to sell their shares against their will. It may be that the court will allow plaintiffs to elect to continue to live under the defendants’ regime or to sell their shares to the majority at valuation.

Here, none of the parties wanted to sell. However, his Honour held that the circumstances of this case were not sufficiently exceptional to justify departure from the general approach outlined above. Accordingly, the proper order was that at his option (to be exercised within a limited period) the second defendant or his nominee purchase the plaintiff’s shares at a value to be fixed by the court.

After fixing the value of the shares on the basis of expert evidence regarding comparable sales (at $310,000), the question arose whether the valuation should include an allowance for capital gains tax or the legal costs of selling the existing unit and the legal costs and stamp duty of buying a replacement unit.

Young J held that although the court could adjust the purchase price to take into account that the majority’s conduct had lessened the value of the shares or, alternatively, that the oppressed had been forced to sell at the bottom of the market, the court could not or should not give compensation under the guise of an enhanced purchase price. Accordingly, no factor for capital gains tax should be added to the value of the shares. However, his Honour stated, obiter, that had he allowed capital gains tax, he would have reduced the amount by two-thirds to allow for the fact that capital gains tax would ultimately be payable if the Fedorovitchs were to sell the unit and that there may have to be tax payable when the property is realised in the estate. His Honour also held that no allowance should be made for the costs of replacing the investment. These were matters for compensation rather than for adding on to the value of the shares and this was not a compensation case.

The form of Young J’s order is interesting. It requires that the plaintiffs place their shareholding in the capital of the company for sale by public auction with a reserve of $310,000 or, alternatively, sell by private treaty at not less than that figure, with contracts to be exchanged no later than 21 October 1999. If the property is not sold by that date, the second defendant must purchase the shares for the sum of $310,000, completion to take place no later than 21 November 1999.

(C) MINISTER’S CONSENT TO PROSECUTION NOT REQUIRED

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

Attorney-General v Oates [1999] HCA 35, No P47/1998, High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, 23 June 1999

On 12 January 1995, complaints were laid against the respondent for offences against ss 229(1) and (4) and 570 of the Companies (Western Australia) Code ("WA Code") allegedly committed between 26 August 1988 and 29 May 1989. The Minister for Justice of the Commonwealth had, prior to 12 January 1995, consented to the institution of the proceedings pursuant to s 1316 of the Corporations Law, which states:

"Despite anything in any other law, proceedings for an offence against this Law may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister’s consent, at any later time."

The respondent applied to the Federal Court on the grounds that the Minister had failed to give him a hearing prior to giving his consent under s 1316. The Full Court declared the Minister’s consent void holding that the opening words of s 1316 referred to "any law, whether common law or statute, that is inconsistent with the requirement that a prosecution must be commenced within five years".

The appellants appealed to the High Court arguing that s 1316 was facultative and not restrictive and did not impose any special time-limit upon the commencement of proceedings (whether summary or on indictment) nor was the consent of the Minister always necessary if the five year period elapsed.

On the construction of s 1316, the appellants submitted that the opening words of s 1316 authorised commencement of proceedings which would otherwise be barred because of a limitation statute. It was also argued that, if the Minister’s consent was required to commence any proceeding more than five years after the offence was committed (whether or not a limitation statute existed) the opening words of s 1316 would not be required. Further, the use of "shall" rather than "may" would have been more appropriate if the legislature had intended to prohibit the institution of prosecutions after five years without the Minister’s consent.

The High Court concluded that, under the laws of Western Australia, the offences allegedly committed were punishable on indictment. Had it not been for s 1316 (and its Western Australian predecessor), a perceived mischief would arise due to the operation of the Justices Act 1902 (WA) which would have rendered numerous offences under the WA Code punishable summarily requiring prosecution to be commenced within 12 months (no limitation applied to indictable offences).

The court drew support from the legislative history identifying provisions seeking to extend the limitation periods relating to offences punishable summarily and, accepting the appellants’ submision, concluded that s 1316 was facultative and not restrictive relating to time.

Accordingly, the court agreed that s 1316 did not require the Minister’s consent to the bringing of prosecutions for offences under ss 229 and 570 of the WA Code and so found it unnecessary to consider whether, if consent was necessary, an obligation to accord procedural fairness arose and was not satisfied.

(D) ENFORCEABLE UNDERTAKING ENFORCED WITH INDEMNITY COSTS

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

Australian Securities and Investments Commission v Robyn A C Cochrane & Or [1999] NSWSC 814, 2980/99, New South Wales Supreme Court, Santow J, 9 August 1999

On 16 October 1998, the first defendant ("RC") gave an enforceable undertaking to ASIC not to provide investment advice without a licence in contravention of ss 780 and 781 of the Corporations Law and to so inform certain persons to whom she had previously given investment advice within 14 days thereof. Two affidavits were put before the Court from two investment advisory clients as was a record of interview between ASIC and RC in which RC had admitted to signing cheques totalling $163,666.17 by replicating one client’s (S’s) signature without his authority.

Santow J found that RC had breached the enforceable undertaking and the Corporations Law and, without authority, misappropriated the above sum by replicating S’s signature on seven cheques. Accordingly, a compensatory order pursuant to s 93AA(4)(c) of the ASIC Act and s 1324(10) of the Corporations Law was made to pay the above sum for the loss or damage suffered by S on account of RC’s breaches of the Corporations Law and RC’s undertaking in respect of S. In this respect, Santow J noted that "[t]he standard of proof is the civil standard, but in the rigour of its application, rising to the level called for by the gravity of the matters in question: Briginshaw v Briginshaw (1938) 60 CLR 336".

Further, RC was restrained, pursuant to s 93AA(4)(a) of the ASIC Act and s 1324(1)(a) of the Corporations Law, from providing investment advice to any person in contravention of ss 780 and 781 of the Corporations Law.

As RC did not attend court, having had the opportunity to do so, nor had RC put any matter in opposition, Santow J considered RC to be in the same position so far as indemnity costs were concerned as if RC had attended court and put no matter to the court or only such matters as did not amount to any plausible or arguable case. Accordingly, indemnity costs were awarded against RC.

(E) INTERLOCUTORY INJUNCTION FOR BREACH OF ENFORCEABLE UNDERTAKING

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

Australian Securities and Investments Commission v Grubb & Anor [1999] WASC 103, 173 of 1999, Supreme Court of Western Australia In Chambers, White J, 27 July 1999.

The respondents were directors of a company (R Pty Ltd) which was a finance broker licensed under the Finance Brokers Control Act 1975 (WA) ("FBC Act") and whose business included managing mortgage investments for clients and operating a trust account for the money of those clients. After complaints, R Pty Ltd was put into provisional liquidation with a large trust account deficiency. In May 1999, the respondents gave an enforceable undertaking to ASIC pursuant to which the respondents, inter alia, undertook not to carry on or manage any further business as a finance broker or mortgage manager. This included a further undertaking not to arrange any new loans and to advise each lender that R Pty Ltd was ceasing its business of finance broking and was winding down its business of managing mortgages. The first respondent was a licensed finance broker but did not hold a current business certificate as required by s 26 (1) of the FBC Act.

On 7 May 1999, the first respondent sent a circular letter to R Pty Ltd’s clients stating he was not going to quit, nor was the office to be closed and that he would continue working in the business on a full-time basis. In further circular letters, the first respondent stated his intention to continue the partnership established with investor/mortgagee clients and sought instructions from clients to appoint himself and A (who held only a conditional finance broker’s licence) to manage their mortgages.

White J held that the first respondent had breached the enforceable undertaking by carrying on or threatening to carry on the business of finance broker. The first respondent had acquired premises, new computer software to manage mortgages and solicited instructions from clients to appoint himself and A to manage their mortgages (even though neither held required qualifications). He had also attempted to have trust funds paid to his employee at his postal address.

Accordingly, White J held that an interlocutory injunction be granted as there was a serious question whether the first respondent intended to breach his enforceable undertaking. As to the balance of convenience in granting the injunction, the affairs of clients of R Pty Ltd were in some doubt as neither the first respondent nor A had the requisite qualifications.

(F) INVALID REMOVAL OF DIRECTOR BY DIRECTOR ACTING IN TWO CAPACITIES

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

Mancini v Mancini [1999] NSWSC 799, 2955/99, New South Wales Supreme Court, Bryson J, 6 August 1999

The marriage of Mr and Mrs M had been dissolved. They were the only directors and shareholders of three companies in the W Group. Family Court Consent Orders provided for a Default Notice to be served stating the nature of any default and that where a defaulting party had not rectified certain defaults within seven days, the non-defaulting party could rectify the default by executing documents, making payments and dealing with any matter in the ordinary course of business as Attorney for the defaulting party.

Mrs M, on the grounds of various alleged defaults by Mr M (including the alleged failure to make certain payments to W Group companies), purported to convene meetings of directors of the three companies where it was resolved to appoint an employee, A, as a director and remove Mr M as a director. Mrs M appeared in the minutes as present in her own name and also as attorney for Mr M. When the meetings began, the only director present was Mrs M.

Bryson J held that the resolutions appointing A and removing Mr M were invalid on the following grounds:

(1) On the facts, there had been no service on Mr M of the Default Notice required by the Consent Orders before the Power of Attorney could arise.

(2) No notice of the directors’ meetings had been given to Mr M and Mrs M did nothing which even in form constituted receiving such notice as Mr M’s attorney.

(3) Tobin v Broadbent (1947) 75 CLR 378 required a strict approach to be taken in the construction of powers of attorney. The acts of dismissing M, voting, attending the meeting and receiving or waiving notice were not authorised as they did not constitute rectification of any defaults nor did they fall within the acts referred to in the Consent Orders.

(4) The office of director, being a personal responsibility and not a property right, could only be discharged by the person who holds the office unless the company’s constitution authorised acting by an alternate or other substitute or delegate. No procedures under the Articles for appointing an alternate director had been followed.

(5) Following the dictum of Windeyer J in Equity Nominees Ltd v Tucker (1967) 116 CLR 518, a quorum requirement of two directors could not be satisfied by one person who is the delegate of two different directors, or who is a director and the delegate of another director.

(6) The purported exercise by Mrs M of the power conferred by the Consent Orders was not in good faith and was in fraud of that power.

(7) The Articles of the companies conferred the power of removal of directors only on the company and the power could not be exercised by resolution of directors.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

D Kingsford-Smith, ‘Interpreting the Corporations Law – Purpose, Practical Reasoning and the Public Interest’ (1999) 21 Sydney Law Review 161

M Whincop, ‘Promoters, Prospectuses and Pragmatism: Updating Fiduciary Duties in a Time of Economic Reform’ (1998) 24 Monash University Law Review 454

The Company Lawyer, Volume 20, No 6, June 1999. Special Issue on the UK Law Commission’s Consultation Paper on Company Directors’ Duties: Regulating Conflicts of Interest and Formulating a Statement of Duties. Articles include:

- Is Company Law Founded on Contract or Public Regulation? The Law Commission’s Paper on Company Directors

- Section 317 and Efficient Self-Dealing: What should an Interested Director be Required to Disclose?

- Fiduciary Duties as Default Rules, European Influences and the Need for Caution in the Use of Economic Analysis

- The Law Commission’s Questionable Approach to the Duty of Care and Skill

- Back to the Future? Adolf Berle, The Law Commission and Directors’ Duties

- Economic Considerations in Part 3 of the Law Commission’s Paper on Company Directors

- Economics and Company Law Reform: A Fruitful Partnership?

Corporate Governance: An International Review, Volume 7, No 3, July 1999. Articles include:

- The Governance of Transnational Firms: Some Preliminary Hypotheses

- Financial Institutions and Their Relations with Corporate Boards

- The Board of Directors as Leaders of the Organisation

- Governance Mechanisms for Effective Leadership: The Case of Spain

- Empirical Evidence of Long-termism and Shareholder Activism in UK Unit Trusts

J Doe and T Tsai, ‘Positioning Hong Kong’s Securities and Futures Market for the Next Millenium’ (1999) 10 International Company and Commercial Law Review 153

Z Xin, ‘Legal Planning for Venture Capital Investment in China’ (1999) 10 International Company and Commercial Law Review 158

C Bebel, ‘A Detailed Analysis of United States v O’Hagan: Onward Through the Evolution of the Federal Securities Laws’ (1998) 59 Louisiana Law Review 1

D Greenwood, ‘Essential Speech: Why Corporate Speech is not Free’ (1998) 83 Iowa Law Review 995

M Krieger, ‘The Bankruptcy Court as a Court of Equity’ (1999) 50 South Carolina Law Review 275

S Hii, ‘Directors’ Duties to Prevent Insolvent Trading’ (1999) 27 Australian Business Law Review 224

A Palmiter, ‘Toward Disclosure Choice in Securities Offerings’ [1999] Columbia Business Law Review 1

Note, ‘Taming the Frontier? An Evaluation of the SEC’s Regulation of Internet Securities Trading Systems’ [1999] Columbia Business Law Review 165

L Griggs, ‘Golden Parachutes, Crown Jewels and the Arrival of the White Knight – Strategies to Defeat a Takeover. What Use in an Era of Rigorous Enforcement of Directors’ Duties?’ (1998) 5 Canberra Law Review 203

J Hendon, ‘Combating Legal Theft: Arguments for Shareholder/Employees Terminated from Close Corporations’ (1998) 77 Oregon Law Review 735

C Wade, ‘Four-Profit Corporations that Perform Public Functions: Politics, Profit and Poverty’ (1999) 51 Rutgers Law Review 323

C Johnson, ‘At the Intersection of Bank Finance and Derivatives: Who Has the Right of Way?’ (1998) 66 Tennessee Law Review 1

M Blair and L Stout, ‘A Team Production Theory of Corporate Law’ (1999) 85 Virginia Law Review 247

P Osode, ‘The Regulation of Insider Trading in Canada: A Critical Appraisal’ (1999) 28 Anglo-American Law Review 166

R Baird, ‘Liability of Directors and Managers for Corporate Environmental Offences – Recent Prosecutions’ (1999) 16 Environmental and Planning Law Journal 192

D Bayne, ‘Insider Trading - The Misappropriation Theory Ignored: United v O’Hagan’ (1998) 53 University of Miami Law Review

M Dailey, ‘Preemption of State Court Class Action Claims for Securities Fraud: Should Federal Law Trump?’ (1999) 67 University of Cincinnati Law Review 587

L Marino, ‘Executive Compensation and the Misplaced Emphasis on Increasing Shareholder Access to the Proxy’ (1999) 147 University of Pennsylvania Law Review 1205

A Guzman, ‘Capital Market Regulation in Developing Countries: A Proposal’ (1999) 39 Virginia Journal of International Law 607

P Cohen, ‘Securities Trading Via the Internet’ (1999) 4 Stanford Journal of Law, Business and Finance 1

R Walsh, ‘Pacific Rim Collateral Security Laws: What Happens When the Project Goes Wrong?’ (1999) 4 Stanford Journal of Law, Business and Finance 115

P G Watts, ‘Company Law Review’ [1999] New Zealand Law Review 23. Topics dealt with are:

- Caretaker Directors

- Quasi-Partnerships, Fiduciary Duties and Oppression

- Reckless and Fraudulent Trading

- Voidable Preferences

M Burke, ‘China’s Stock Markets and the World Trade Organisation’ (1999) 30 Law and Policy in International Business 321

R Gilson and M Roe, ‘Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance’ (1999) 99 Columbia Law Review 508

Bond Law Review, Vol 10, No 2, December 1998. Special issue on Corporate Governance. Articles include:

- Farrar, ‘Frankenstein Incorporated or Fools’ Parliament? Revisiting the Concept of Corporation in Corporate Governance’

- Fridman, ‘An Analysis of the Proper Purpose Rule’

- Hobson, ‘The Law of Shadow Directorships’

- Corfield, ‘The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis’

- Murphy, ‘Holding Company Liability for Debts of its Subsidiaries: Corporate Governance Implications’

- McDonough, ‘Corporate Governance and Government Owned Corporations in Queensland’

- Twaits, ‘The Duties of Officers and Employees in Non-Profit Organisations’

- Fox and Walker, ‘Boards of Directors and Board Committees in New Zealand: International Comparisons’

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7. CENTRE FOR CORPORATE LAW SEMINAR

(A) CLERP 6 AND SECURITIES

Speakers: Ms Pamela Hanrahan, Senior Lecturer in Law, The University of Melbourne; Ms Alison Lansley, Partner, Mallesons Stephen Jaques; Mr Alan Shaw, National Manager – Market Integrity, Australian Stock Exchange

Date: Thursday 9 September 1999

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

Venue: Mallesons Stephen Jaques, Level 28, Rialto Building, 525 Collins Street, Melbourne

Admission: $60

Seminar Topic:

CLERP 6 – Financial Markets and Investment Products, released in 1997, was followed up by a Discussion Paper in March 1999 which outlines the Government’s preferred position on implementing these extensive reforms to regulation of the Australian financial sector. CLERP 6 proposes a new legislative framework covering:

(i) Licensing of financial product markets

(ii) Licensing of financial services providers

(iii) Conduct of and disclosure by financial services providers

(iv) Financial product disclosure

that seeks to integrate regulation across a range of financial products and services including securities, superannuation, investment linked life insurance, futures and derivatives, and banking products. Among other things the CLERP 6 proposals will replace much of the existing regulation contained in the Corporations Law.

This important seminar looks at the potential impact of the CLERP 6 proposals on securities issuers, intermediaries and markets.

Speaker Details:

Pamela Hanrahan:is Senior Lecturer in Law at The University of Melbourne and a member of the Centre for Corporate Law and Securities Regulation. She is also Special Counsel with Arthur Robinson & Hedderwicks, where she practises in the area of managed funds. She is the author of a number of leading works on corporations law and securities law, including the recent "Managed Investments Law" and the forthcoming sixth edition of "Securities Industry Law".

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

Alan Shaw: is National Manager, Market Integrity at Australian Stock Exchange Limited. In that role he has been responsible for many of the ASX’s submissions on CLERP, including "CLERP 6" and "Implementing CLERP 6".He has been with ASX since July 1991 in a variety of roles including: Manager, Policy Development, Supervision; Manager of the Listing Rules Simplification Project; Manager, Companies for Melbourne and Hobart; and National Companies Counsel. He is co-author of a chapter titled "The Role of the Australian Stock Exchange" in "Securities Regulation in Australia and New Zealand", and the author of articles on a principles-based model for the Corporations Law.

REGISTRATION DETAILS

Send registration form and payment details by Tuesday 7 September for the CLERP 6 and Securities Seminar to: Mary Wildemast, Faculty of Law, The University of Melbourne, Parkville Vic 3052, fax: 9344 9983, tel: 9344 6194**,** email: "m.wildemast@law.unimelb.edu.au".

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8. CONFERENCE ON SME FINANCING

FINANCING THE FUTURE:

Small medium enterprise finance, corporate governance & the legal system

A one-day conference presented by the Key Centre for Ethics, Law, Justice & Governance at the Sheraton on the Park, Sydney, 13 December 1999.

Since the economic dislocation of the 1970s and 1980s, there has been increasing worldwide recognition of the need to foster innovation and dynamism within economies by a strong small medium enterprise sector. Many jurisdictions have openly envied the success of the United States, and sought to replicate the depth of its market for venture capital.

This conference inquires into the future of financing in Australia, by exploring some of the principal institutions -- legal, ethical, and economic -- necessary for the development of efficient markets for small firm finance. The conference speakers will address a range of themes that bear on the confluence of these issues. Particular focuses of the conference will be on Australia/US comparisons; the interaction between the legal system, business ethics, and market dynamics; and relationships between theory and practice in capital markets.

The conference will be organised into the following sessions and topics: Session 1: The Economic Framework of Private Capital Markets

Principal speakers are Professors Zoltan Acs (Merrick Business School, University of Baltimore & Chief Economic Advisor to the Office of Advocacy, US Small Business Administration) and Michael Klausner (Stanford Law School). Topics will concentrate on the nature of the market for business angel finance and informal venture capital, and the financial contracting process in the venture capital industry.

Session 2: Panel Session -- Practice in Private Capital Markets

Contributions from participants in private capital market, including venture capitalists, lending officers from trading banks, investment bankers, lawyers, and accountants.

Session 3: Ethics and Governance in the Small Firm

Principal speakers are Professors Larry Mitchell (George Washington University School of Law) and Charles Sampford (Director, KCELJAG) and Dr Michael Whincop (Griffith Law School). Topics will address the importance of trust in small firms, the relationship between governance and ethics, and the institutionalisation of ethics in small firms.

Session 4: The Legal System and the Small Firm

Principal speakers include Associate Professor Megan Richardson, Ms Ann O'Connell and Dr Geof Stapledon (all University of Melbourne Law School). Topics will include the Review of Business Taxation and its implications for small businesses; prospectus regulation and the role of ASIC; and intellectual property and trade secrecy.

A conference brochure will be released in the next fortnight. Please email: therese.wilson@mailbox.gu.edu.au with your contact details if you would like to receive a copy.

9. NEW CENTRE FOR CORPORATE LAW PUBLICATION

(A) DO INDEPENDENT DIRECTORS ADD VALUE?

Authors: Mr Jeffrey Lawrence and Dr Geof Stapledon
This Research Report contains the results of two groups of studies involving the Top 100 companies listed on the Australian Stock Exchange.

The first group of studies analyse whether board composition affects corporate performance. The second group of studies focus on whether independent directors have a positive influence in the area of Chief Executive Officer remuneration.

The results suggest that, on average, independent directors do not add value – or destroy value – in either of these areas.

The Report also:

- examines the rationale for corporate governance guidelines that promote independent directors;

- summarises the results of US and UK research into the effectiveness of independent directors;

- suggests a range of reasons why the studies’ results show no statistically significant connection between board composition and corporate performance or CEO remuneration; and

- examines the regulatory implications of the studies’ results.

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

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