**CORPORATE LAW ELECTRONIC BULLETIN**   
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Faculty of Law, The University of Melbourne

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Editors' Message: The Editors of the Corporate Law Bulletin welcome those new subscribers who have recently joined through the Institute of Company Secretaries. We hope you find the Bulletin to be a useful resource for keeping up to date on corporate and securities law developments. Previous editions of the Bulletin may be accessed from the archive site address above.

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) UK LAW COMMISSION CONSULTATION PAPER ON DIRECTORS' DUTIES

On 10 September 1998, the UK Law Commission published its Consultation Paper No 153, 'Company Directors: Regulating Conflicts of Interests and Formulating A Statement of Duties'.

The paper forms part of the UK Department of Trade and Industry's review of UK company law. The paper falls into two parts. The first part is a review of Part X of the Companies Act 1985 (UK). This part regulates self-dealing by directors and contains provisions as to what information concerning transactions in which directors are interested should be disclosed, and to whom, what the role of shareholders should be, and when such transactions are prohibited.

There are many transactions entered into by a company in which directors (or persons connected with them) have an interest. The provisions in Part X are diverse and complex, and they lack overall coherence and consistency. Moreover, since they were enacted, there have been important developments in corporate governance. What this consultation paper aims to do is to obtain a wide range of views on the ways in which these complex and important statutory rules can be modernised and rationalised.

The second half of the paper considers the case for having a statutory statement of the duties of directors to their company. This would include fiduciary duties and the duty of care. This issue has been considered before but the Law Commission considers it is time to look at it again. There have been many calls to make the law in this area more accessible and transparent. This consultation paper puts forward a range of possibilities for making directors' duties under the general law more widely understood.

An Appendix to the paper contains a draft statement of the duties of directors under the general law. It also contains a draft clause setting out a possible new statutory duty of care in line with recent developments in the general law.

The consultation period ends on 24 November 1998.

The paper may be downloaded at:

http://www.open.gov.uk/lawcomm/library/lib-comp.htm#libcp153

(B) SUPERANNUATION SURVEY - JUNE 1998

On October 7 1998, the Australian Prudential Regulation Authority released the findings of its June 1998 survey of superannuation. Superannuation survey highlights - June 1998

(a) Main features

(i) Total superannuation assets had reached $359.4 billion by the end of June 1998, representing growth of 3.4% during the quarter, or 13.1% during 1997-98.

(ii) The number of member accounts rose 2% during the quarter and now stands at around 18.1 million.

(iii) Contributions during 1997-98 were up 17.8% compared to the previous 12 months, increasing from $28.0 billion to $33.0 billion.

(iv) Discounting the rapidly growing (self-managed) excluded fund sector, contribution growth for large funds rose to 19.1% per annum.

(v) The strongest growth continues to come from member contributions, increasing by 31% over the previous year to $12.9 billion. Employer contributions increased by 11% to $20.1 billion.

(vi) Weaker capital markets overall during the June quarter caused net earnings to be the lesser component of growth, accounting for 46% of net growth. Net deposits accounted for 54% of the growth during the quarter.

(b) Industry structure

The assets managed by small self-managed funds (ie, excluded funds with less than 5 members) grew fastest during 1997-98, increasing by 23% ($7.8 billion). This was closely followed by industry funds which grew by 22% ($4.4 billion) during the last year.

Corporate fund assets grew by 9%, or $5.2 billion during the year. Public sector assets grew by 13% ($8.9 billion) and retail assets grew by 21% ($15.6 billion).

Retail funds currently hold around 25% ($90.6 billion) of total superannuation assets, public sector funds hold 22% ($79.9 billion), corporate funds 18% ($66.4 billion), excluded funds 12% ($42.3 billion), and industry funds 7% ($24.2 billion).

The excluded fund, industry fund and retail market segments all increased their market shares slightly during 1997-98, while that of the corporate funds and public sector declined marginally.

The proportion of the superannuation industry represented by the 'balance of statutory fund' assets (which represents annuity products, fund reserves and unallocated profits of life office statutory funds) was 16% at June 1998.

The assets managed through Retirement Savings Accounts (including existing capital guaranteed superannuation funds deemed to be RSA look-a-likes) reached $551 million at June 1998. This is a growth of 69% ($225 million) since September 1997, however it has been mainly due to the reclassification of existing assets as belonging to an RSA product. The share of superannuation assets in RSAs remains at around 1%.

(c) Contributions and benefits

During the June quarter, employers contributed $5.8 billion into superannuation, up 13.8% on the 1997 June quarter. In contrast, the $3.7 billion which employees contributed into superannuation during the same period was up 26.8% on the previous June quarter. Overall, June 1998 quarter contributions were up 18.5% on the June 1997 quarter.

As the contributions into small self-managed funds were estimated to be only 9.7% higher in 1997-98 than the previous year, overall contribution growth is apparently being mostly driven by the membership of the large superannuation funds.

Nonetheless growth in net contributions into small funds was 5.1% higher than in the previous 12 months, being largely fuelled by the growth in their number, eg the number of excluded funds increased to 181,774 during the June quarter, (up 6%).

Inward transfers remained at their usual levels, accounting for 37% of all money deposited into superannuation funds during the June quarter.

Lump sums, excluding outward transfers, accounted for 76% ($4.1 billion) of the benefits paid during the June quarter. The remaining 24% ($1.3 billion) of benefits were paid as pensions. Outward transfers accounted for 46% of all fund withdrawals during the June quarter, similar in relative importance to inward transfers.

Benefit payments, excluding transfers, during 1997-98 were up by 18.6% compared to the previous 12 months (pushed up by a 20% increase in the level of pension payments). Despite the higher growth rate of benefit payments as compared to contributions, net contributions (ie, contributions less benefits) rose dramatically (16.3%) for 1997-98 compared to the previous year. During 1997-98 $11.8 billion in net contributions flowed into superannuation (compared to $10.1 billion in the previous year).

(d) Manner of investment

Assets directly invested by trustees showed the strongest growth during the quarter, increasing by 4.8%. Assets placed with an investment manager and assets invested through the statutory funds of life offices both grew by 2.9%.

Investment managers had 38.8% ($139.4 billion) of total superannuation assets at the end of June 1998, fractionally down from 38.9% at June 1997. The share of directly invested superannuation assets increased 1.9% to 26.6% ($95.4 billion), with the statutory funds of life offices continuing to steadily lose share, reaching 34.7% ($124.5 billion) of total assets.

(e) Asset allocation

The share of superannuation assets invested overseas rose slightly to 16.5% ($59.2 billion) at the end of June 1998, up $3.5 billion. However, the Australian dollar depreciated against both the TWI and the US dollar (involving around half of overseas investment) during the quarter (by 2.9% and 7.5% respectively) acting to automatically increase the Australian dollar value of overseas investments. This suggests that there was most likely little net outflow of assets overseas during the quarter.

Superannuation investment held in equities and units in trusts increased by 0.7% ($0.9 billion) during the June quarter. Measured against the 2% decrease in the ASX accumulation index in the June quarter, this indicates a likely net increase in assets invested in equities markets by superannuation funds. However, superannuation equity and trust holdings overall decreased to 36.8% of total superannuation assets (from 37.7%).

Reflecting an increase in short term bond yields during the June quarter (but despite a decrease in long term bond yields), holdings of interest bearing securities increased by 2.9% ($2.4 billion). The proportion of superannuation assets held as interest bearing securities declined 0.1% to 23.8%.

Holdings of cash, deposits and placements increased by 14.8% ($3.6 billion) in the June 1998 quarter (the vast majority of the increase being in cash and deposits). They now represent 11.8% of the total value of superannuation assets.

These movements would appear to indicate that while superannuation funds were net buyers of Australian equities and interest bearing securities during the June quarter, there was a larger increase in the funds held in cash or deposits.

This result suggests a somewhat more conservative investment strategy by superannuation funds whereby allocations to cash and deposits were increased, primarily reducing the proportion of funds in equities. This may indicate that trustees are positioning themselves to take advantage of potential opportunities in the volatile equity market.

The value of assets held in direct property fell slightly in the June quarter to 7.3% of total superannuation assets at the end of the quarter, from 7.5% in March 1998. Other investments account for around 4% of total superannuation savings.

(C) ACCC ESTABLISHES TRUST FUND

On 8 October 1998, the Australian Competition and Consumer Commission (ACCC) established The Stevedoring Industry Reform Small Business Compensation Fund to compensate businesses which suffered losses during the waterfront dispute.

ACCC Chair Professor Alan Fels said: 'On 3 September 1998, the ACCC reached a settlement in relation to its litigation concerning the waterfront. The settlement provided for a damages fund of up to $7.5 million, funded by Patrick Stevedore Holdings Pty Ltd, to be available for small businesses damaged by the boycotts during the dispute.

'Small businesses which do not have an alternative claim for compensation, such as insurance, will be given priority over other claimants on the fund. An initial limit will be set on payments.

'The Trust Fund is to be administered by the Official Receiver of New South Wales. In general terms the Trust provides for priority to be given to individuals and businesses with an annual sales turnover of less than $100 million per year. Initially claims will be limited to $200,000 per claimant. There is also provision for larger business to claim on the Trust Fund once small businesses have recovered their damages.

'It is intended that small businesses will be able to make claims on the fund over the next few weeks. The Trustee will be preparing a claim form for use by prospective claimants. Once the claims are received, the Trustee will assess the claims and start making payments.

'Since the case was settled the ACCC has received calls from approximately 40 small businesses in relation to possible claims on the Trust Fund. The ACCC will be forwarding the contact details for these small businesses to the Trustee.

'The establishment of the Trust Fund is an excellent result for those small businesses which suffered loss during the recent waterfront dispute. Throughout the waterfront dispute the ACCC was determined to protect the interests of these small businesses without taking sides in the broader dispute.'

The Trustee's contact details are:

Mr George Caddy / Mr Maurice Sullivan   
Insolvency and Trustee Service Australia   
10th Floor   
255 Elizabeth Street   
Sydney NSW 2000

Tel: (02) 9581 7822

(D) AUSTRALIAN FINANCIAL INSTITUTIONS' COMMISSION STATISTICS

The September issue of the Australian Financial Institutions' Commission bulletin contains statistical information for 1997-1998 on the 21 Australian building societies. During 1997-98 asset growth was 11.8% so that the industry had $11.8 billion in assets in June 1998. Loan assets grew by 13.3% over the year and were $9.9 billion at June 1998. The industry's lending focus remains housing with loans secured by mortgage comprising 76% of the total loans and 64% of the total assets of the industry. The average risk-weighted capital adequacy ratio was 12.8% at June 1998 (above the prudential requirement of 8%) with balance sheet liquidity being at 14.1%. Delinquent loans were 1.5%, a reduction from the 2.7% at June 1997.

(E) 1998 AUSTRALIAN FINANCIAL MARKETS REPORT

The Australian Financial Markets Association (AFMA) has released its 1998 Financial Markets Report. Australia's financial markets recorded a record annual net turnover of $A35 trillion (trillion = billion x 1000) in 1997/98, an increase of 13% over the previous year. For the first time in the surveys history the cash market was surveyed and recorded a turnover estimated at $A2.5 trillion. Including cash, total market turnover was in excess of $A37 trillion.

The Chief Executive of the AFMA, Mr Ken Farrow, said, 'This is an extremely positive result for the financial markets and clearly demonstrates Australia's continued strength in a difficult period in the Asian region'.

'Most markets recorded increases in the volume of transactions dealt with both domestic and offshore counterparties', Mr Farrow said. 'The report also illustrates the increasing use of risk management products by fund managers and corporates', he said.

These and many other highlights have emerged from AFMA's 1998 Australian Financial Markets Report, which surveys the year to 30 June 1998 and makes comparisons with the four previous years. The report was released on 23 September 1998.

Australia's financial markets embrace over-the-counter (OTC) wholesale financial markets for both physical and derivative transactions (1998 turnover $24.7 trillion), together with the exchange traded markets operated by Sydney Futures Exchange (1998 turnover $9.7 trillion) and Australian Stock Exchange (1998 turnover $245 billion). The increases in total market turnover for individual markets from 1996-97 were OTC 14%, Futures 11% and Equities 15%.

(a) OTC Markets

- The non-government debt securities market recorded a 28% increase in volume, primarily driven by dramatic growth in bank (125%) and mortgage backed (78%) securities.

- An 86% increase in the turnover of corporate paper was the main contributor to the 20% increase recorded by the negotiable and transferable instrument market.

- The inaugural survey of the cash market confirmed expectations in showing that whilst 80% of transactions by number (not including rollovers) occurred in 11am cash, term cash represented 58% of market outstandings.

- Turnover in the foreign exchange market increased by 14% in a year characterised by extreme exchange rate volatility in the wake of the Asian currency crisis.

- Turnover in the currency options market increased by 70% and was driven by increased volumes with the other banks (139%) and fund managers and corporates (98%).

- Turnover in the forward rate agreement (FRA) market continued the decline (4%) which began in 1994-95.

- Despite a significant increase in turnover in cap and floor transactions, total turnover in interest rate options fell by 23%.

(b) Exchange-Traded Markets

- The three year bond contract, which is the most heavily traded contract in the Futures market by volume, accounted for 36% of the volume of all futures contracts and was the most liquid medium term bond futures contract in the region.

- The increase in the level of turnover in the Equities market coincided with increases in market capitalisation (10%) and record levels of new capital raisings ($A28.8 billion).

The report is available in full at AFMA's web site at: "http://www.afma.com.au".

(F) AUSTRALIAN NATIONAL AUDIT OFFICE PERFORMANCE AUDIT OF THE SALE OF ONE-THIRD OF TELSTRA

On 19 October 1998 the Australian National Audit Office released its performance audit of the sale of one-third of Telstra Corporation Ltd. The November 1997 Telstra public share offer involved the sale, in two instalments, of one-third of the company's issued share capital, with concurrent listings on the Australian, New York and New Zealand Stock Exchanges. The Commonwealth Government currently remains Telstra's majority shareholder.

The Government's objectives for the sale were to: achieve an optimum financial return from the sale; establish a broadly-based and orderly market for Telstra shares; secure a timely sale process conducted to high standards of probity and accountability; promote an internationally competitive, low cost and innovative telecommunications industry; and build investor support for the Government's asset sales program.

Total proceeds from the sale were approximately $14.24 billion. The Government's direct costs were $260 million with selling costs totalling $124.1 million and a $35.6 million project management fee paid to the Global Coordinators. Investor support for the Telstra sale was strong. Telstra has the largest share register in Australia with more than 1.8 million shareholders. At the issue price of $3.40 per share, the offer of one-third of Telstra's shares was more than four times subscribed.

The National Audit Office's objectives in auditing the Telstra sale were to assess the extent to which the Government's sale objectives were achieved; assess the effectiveness of the management of the share offer; assess whether sale arrangements adequately protected the Government's interests; and facilitate improved administrative arrangements for future share offers.

The National Audit Office makes a number of conclusions and recommendations in its performance audit:

(a) The issue was not fully priced. At the close of the first day trading, Telstra instalment receipts stood at a premium of 34 per cent, the largest initial premium of any Commonwealth Government public share offering. On a fully paid basis, over the eleven months since listing, the trading price of Telstra instalment receipts has risen more than 160 times the increase in the Australian Stock Exchange All Ordinaries Index and more than 20 times the increase in the Australian Stock Exchange All Industrials Index.

(b) Overall value for money in future sales could be improved by giving greater emphasis to financial issues when tendering for advisers; encouraging more competitive pressure on selling commissions and fees; paying fees only for services actually provided; and instituting a more effective and commercial approach to administering payment for shares.

(c) The offer was completed in accordance with the sale timetable, during a period of significant equity market volatility which represents a significant achievement given the unprecedented scale of the offer.

(G) IOSCO ANNUAL CONFERENCE

The 23rd Annual Conference of the International Organisation of Securities Commissions (IOSCO) was held in Nairobi, Kenya from 12 - 18 September 1998.

Highlights of the Conference included:

(a) adoption by IOSCO of the 'Objectives and Principles of Securities Regulation'

This Core Principles document sets out 30 principles of securities regulation, which are based upon three objectives of securities regulation:

- the protection of investors;

- ensuring that markets are fair, efficient and transparent; and

- the reduction of systemic risk.

(b) adoption by IOSCO of 'Disclosure Standards to Facilitate Cross-Border Offerings and Listings by Multinational Issuers'

These Standards represent an important step forward in reducing the costs of cross-border capital raising without sacrificing investor protection. Issuers will benefit directly from being able to prepare a single non-financial statement disclosure document for capital raising and listing in more than one jurisdiction at a time; investors will benefit from the comprehensive nature of required disclosures and the enhanced comparability of information.

In practical terms, the Disclosure Standards will become effective upon implementation by member jurisdictions. IOSCO is recommending that members take all appropriate steps in their respective home jurisdictions to accept a disclosure document containing the information set forth in the Standards. Disclosure documents prepared in compliance with the Standards will remain subject to host country review or approval processes.

(c) publication of a report on 'Securities Activity on the Internet'

This report was prepared by the IOSCO Technical Committee's Internet Task Force to provide guidance on the impact of the Internet on securities regulation. The report addresses the regulatory and enforcement issues posed by securities activities conducted over the Internet. The report sets out five key principles which should guide regulatory approaches to the Internet and that should be considered when formulating policies regarding specific activities on the Internet:

(i) the fundamental principles of securities regulation apply equally to securities activity on the Internet as to securities activity using more traditional communication methods. Hence, the use of the Internet for securities transactions should be subject to regulation that promotes the fundamental objectives of the protection of investors, market fairness, efficiency and transparency, and the reduction of systemic risk;

(ii) consistent with the fundamental principles of securities regulation, regulators should not necessarily impede the legitimate use of the Internet by market participants and markets. They should resist imposing any more restrictions on the use of the Internet than are necessary to promote the fundamental objectives of securities regulation in their countries;

(iii) regulators should strive for transparency and consistency regarding how their regulations apply in an Internet environment;

(iv) regulators should co-operate and share information in order to monitor and police securities activity on the Internet effectively; and

(v) regulators should recognise that electronic media and the use of such media is likely to evolve.

The report contains 24 key recommendations which securities regulators should consider when developing their Internet regulatory policy.

A full summary of the Conference's proceedings is available at:

http://www.iosco.org/press/presscomm980918-eng.html

(H) SEC TECHNOLOGY ROUNDTABLE

In October 1998, US Securities and Exchange Commission (SEC) released its report on its Technology Roundtable, convened in April of this year, to explore the impact of changing technology on the securities markets and on the regulatory environment of the future. The roundtable brought a variety of participants together to consider how the traditional functions of the securities industry, such as communicating information about securities, analysing and providing advice, finding and bringing together buyers and sellers, and raising capital, will be influenced by advances in technology. Most important, the roundtable permitted the participants to discuss how technological changes would affect investors.

During the roundtable, several themes evolved from the discussion:

(a) the nature and speed of technological change in the securities industry

The participants agreed that technology would greatly affect the way that business is done, though they expressed differing views about how quickly change would come and what would be the extent of the change. Several participants further emphasised that because we are at an early stage in the process of technological change, we cannot hope to accurately predict the ways in which technological change will manifest itself. Participants also discussed how the significance of technological change would be directly tied to the way that technology meets investors' needs. Several participants focused on the interaction between technology and the concept of trust - exploring how the impact of technology is linked to individuals' need to trust in their modes of communications and in their relationships.

(b) technology's role in levelling the playing field for investors

Some of the participants noted that emerging technologies such as the Internet have permitted smaller investors to gain access to information and analytic processes that previously were the province of large investors. One participant emphasised that the SEC has an opportunity to take active steps to permit technology to level the playing field further.

(c) technology's new challenges for investor protection

Several participants noted that technologies such as the Internet can present new threats to investors. The Internet allows individuals to easily and broadly disseminate information to the investing public. While this offers many benefits, it also enables miscreants to spread false information or hyperbole. That threat highlights the importance of investor education in regard to new technologies, as well as the need for improved regulatory vigilance.

(d) effect of technology on global regulatory issues

Several participants emphasised that regulators around the world need to develop global regulatory mechanisms because technology is tearing down national borders. The alternative could be to force market participants to try to use technological firewalls to isolate themselves from certain markets and players so as to avoid the risk of inconsistent regulation.

(e) technology's impact on executional skills and advisory skills

Some participants expressed the view that although technology would have a great impact on the execution of transactions, its effect would be to reduce the importance of the execution provider. The result would be that advisory skills would become relatively more important, particularly given the overwhelming amount of information now available to investors.

(f) SEC's response to technological change

The participants had several ideas about how the SEC should respond to technological changes, and the problems the SEC will face.

Several participants noted that because it is impossible to anticipate where technology will take us even in the next few years, it is important for the SEC to be flexible in its regulation. One participant suggested that the SEC increasingly use pilot programmes to develop regulatory structures. Another participant argued that because investors now face an overload of information, rather than a lack of information, the SEC needs to rethink the goals that underlie the regulatory structure.

Participants also suggested several particular steps the SEC should take to address technological change, such as helping to ensure that the Internet levels the playing field for investors , doing more to permit the electronic delivery of documents, and clarifying the rules regarding when the electronic delivery of information would constitute a recommendation. Finally, several participants noted that the SEC must continue its role in providing investor education and protection.

2. RECENT ASIC DEVELOPMENTS

(A) ASX FINALISES REGULATORY LINK WITH ASIC

On 23 September 1998, ASIC and ASX signed a Memorandum of Understanding (MoU) on the regulation of a listed ASX. On 14 October 1998, the ASX became a listed company.

The MoU creates a framework under which ASIC supervises compliance by ASX with the listing rules as a listed entity. The MoU also ensures the integrity of trading in ASX shares and covers some of the activities of ASX Settlement and Transfer Corporations Pty Ltd (ASTC).

Where ASX normally monitors share trading of listed companies and companies' compliance with listing rules, ASIC now has these responsibilities for ASX as a listed company.

As well as stating that ASX, ASTC and ASIC will co-operate and assist each other to achieve the objectives of the MoU, the agreement sets out procedures for the listing of ASX and the ongoing supervision of ASX as a listed company.

The MoU also covers procedures regarding company announcements about ASX securities, ASX applications for waivers of listing rules, surveillance of ASX securities trading and the operations of ASTC as the securities clearing house in respect of ASX securities.

The Corporations Law authorises ASIC to supervise ASX as a listed entity and to enter into arrangements to do so. The MoU is one component of those arrangements.

(B) SECOND COMPLAINTS RESOLUTION SCHEME

On 30 September 1998, ASIC approved the second complaints resolution scheme under its interim policy dealing with the Good Advice regulations for financial advisers.

The Life Insurance Complaints Service Ltd (LICS) has been approved for the purposes of considering complaints about licensees who provide retail investment advice.

The approval granted to LICS is valid until 1 October 1999, and is conditional on LICS ensuring that all applicants agree to be bound by the scheme's Terms of Reference.

The Good Advice Regulations required licensees who provide retail investment advice to join an approved external complaints resolution scheme by 1 October 1998. Because of the timing of the approval granted to LICS, ASIC will allow affected licensees a reasonable time to finalise their membership applications. Licensees are however required to finalise their membership of an approved scheme as soon as possible, and are expected to consider any complaints which arise from 1 October 1998.

(C) DAVIDS LTD PREVENTED FROM USING SHORT FORM PROSPECTUS

On 2 October 1998, ASIC announced it had taken action to prevent Davids Ltd from using the transaction specific prospectus (short form prospectus) provisions of the Corporations Law for one year.

ASIC has taken this step because it believes that Davids has, on three occasions in the past 12 months, not complied with the provisions requiring timely continuous disclosure of material information to ASX.

ASIC believes that in June 1998 Davids did not update its profit forecast for the market in a timely manner, and that in May 1998 Davids did not announce that legal proceedings claiming $11.4m had been commenced until two weeks after service of the summons.

ASIC also believes that in July 1998 Davids did not comply with its continuous disclosure obligations in relation to the proposal to sell its retail supermarket chain.

Short form prospectuses are permitted under the Corporations Law where there is a regime of continuous disclosure of material information to the market. This allows the market to have formed a view about the securities to be issued under the prospectus. In a short form prospectus, the only new information which investors receive is information about the rights attaching to the securities being offered, information about the effect of the offer on the issuer, and any update to information not previously disclosed to the market.

(D) INTERIM POLICY ON SERVICED STRATA SCHEMES

On 6 October 1998, ASIC issued an Interim Policy Statement giving guidance on the application of the Corporations Law to the promotion and operation of serviced strata arrangements. The main focus of the interim policy is on arrangements where owners of strata title units or community title interests make their units or interests available to a manager for use as part of a serviced apartment, hotel or resort complex.

ASIC does not regulate either the ordinary sale of strata title units or community title interests, or leasing them out.

ASIC believes it must provide interim guidance about the application of the Law to serviced strata arrangements to:

(a) help developers and promoters in the real estate industry understand their obligations under the Law (ie: prospectus, licensing and scheme registration obligations);

(b) better focus the attention of investors on relevant risks of investment, through improved disclosure in marketing documentation; and

(c) act as the first step in a review of the financial advice activities of real estate agents (as requested by the Government in accordance with recommendation 16 of the Financial System Inquiry Final Report 1997 (the Wallis Report)). ASIC will provide further information about this related project soon.

The interim guidance states that a serviced strata arrangement is likely to be a managed investment scheme, where an investor has an understanding that their return will depend, in whole or in part, on any one or more of the following:

(a) an interdependency between the use of the strata unit and the use of other investors' strata units (eg: investors' returns depend on an allocation of rent as between participating investors);

(b) pooling of income relating to the use of their strata unit and the use of other investors' strata units (eg: investors' returns depend on pooling the income from other strata units); or

(c) the use of the strata unit as part of a serviced apartment, hotel or resort complex (eg: some kinds of fixed or indexed return arrangements where the strata unit is not suitable for residential purposes).   
|   
ASIC Chairman Alan Cameron said the Commission was aware that there has been uncertainty for some time as to the application of the Law in relation to the promotion and operation of serviced strata arrangements.

'But we consider that the Law does apply in the cases described in our interim guidance, and that the prospectus and new managed investment provisions of the Law are sufficiently flexible to be complied with, and must ordinarily be complied with in connection with the promotion and operation of such schemes,' he said.

'However, because of the earlier uncertainty, unless there is misleading conduct or impropriety, ASIC will not enforce the Law immediately in relation to serviced strata schemes which are closed (ie: no more primary sales of interests in the serviced strata arrangement).

'Further, if there is no misleading conduct or impropriety, on an interim basis, ASIC will consider providing case by case relief from immediate compliance with the Law to serviced strata schemes which are well advanced in their development and promotion.'

The effect of the relief being provided by ASIC is that the dealers and investment advice licensing provisions of the Law will not apply, in general, in relation to people (including real estate agents) connected with the promotion and sale of interests in a serviced strata scheme which is well advanced in its development and promotion,

However. ASIC reminds anyone giving advice about a serviced strata scheme which has the benefit of an exemption from the Law granted by ASIC, that they must disclose any recommendation and have a reasonable basis for the recommendation.

Promoters and others should not rely on the ASIC Media Release alone, but should look at the interim policy statement and obtain appropriate professional advice.

ASIC invites comment on the interpretative and policy positions contained in the interim policy statement as part of a wider consultative process in finalising its policy (including focus group meetings with a cross-section of industry participants).

Comments are due by Friday 6 November 1998 and should be forwarded to Mark Adams, Real Estate Scheme Project, Australian Securities & Investments Commission, GPO Box 4866, Sydney, NSW, 1042 or emailed to: "regpol.syd@asic.gov.au".

Copies of the interim policy statement are available from the ASIC Infoline on 1300 300 630 and from the media release section of its Internet home page on "http://www.asic.gov.au".

For more information contact:

Mark Adams   
Principal Lawyer   
ASIC Regulatory Policy Branch

Tel: (02) 99112622

(E) ASIC/APRA SIGN MoU

ASIC Chairman Alan Cameron and Australian Prudential Regulation Authority (APRA) Chief Executive Officer Graeme Thompson signed a Memorandum of Understanding (MoU) on 12 October 1998 setting out how the two bodies will cooperate in the regulation of the Australian financial system.

APRA is responsible for the prudential supervision of banks, life and general insurance companies and superannuation funds, ASIC is responsible for monitoring and promoting market integrity and consumer protection in relation to the Australian financial system, the provision of financial services and the payment system.

The MoU sets out the framework for the two agencies to work together to achieve enforcement and compliance outcomes.

Under the agreement APRA and ASIC will notify each other of any proposed changes in regulatory policy which affects the market or any regulatory decisions likely to impact on the other's area of responsibility.

In this MoU, APRA and ASIC recognise that co-operation is vital to promote confidence in the financial system as well as the confident and informed participation of all stakeholders in that system.

Because of this, the MoU establishes a four person Co-ordination Committee consisting of two senior members of ASIC and two from APRA. This Committee will ensure there is a continual exchange of information between the two bodies including assessments of the administration and health of the financial areas that each body supervises, any major developments in the financial sectors that each supervises relevant to the performance of their regulatory responsibilities and information on individual regulated areas which raise particular concerns.

Mr Cameron said the financial system expects the two major regulators to work closely together and this MoU is a public commitment that this will happen.

'The fact I am a member of both the Commission and the Authority guarantees that both organisations will liaise regularly and are abreast of any developments in enforcement and compliance initiatives.'

Mr Thompson said this MoU provides a more formal framework for cooperation between APRA and ASIC which has already been working very well.

'Such cooperation is absolutely essential to the effective implementation of the government's financial reforms,' Mr Thompson said.

The full text of the MoU and Charter of the Co-ordination Committee are reproduced below:

(a) MEMORANDUM OF UNDERSTANDING BETWEEN

THE AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (APRA)   
AND   
THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

1. Objective

1.1 This memorandum of understanding (MOU) sets out a framework for co-operation between APRA and ASIC (the agencies) in areas of common interest where co-operation is essential for the effective and efficient performance of their respective financial regulation functions.

1.2 The agencies agree that consistent with their separate roles they will co-operate where it is within their administrative powers to reduce duplication and compliance costs and achieve effective enforcement and compliance outcomes.

1.3 This MOU is not intended to create binding obligations on either agency and each agency has the right to vary its terms at any time by agreement following consultation with the other agency.

2. Responsibilities

2.1 APRA is responsible for the prudential supervision for banks, life and general insurance companies and superannuation funds. If the State and territory Governments agree, APRA will also be responsible for the prudential supervision of building societies, credit unions and friendly societies. In performing its functions to protect the interest of depositors, policyholders and fund members APRA is required to balance financial safety with efficiency, competition, contestability and competitive neutrality.

2.2 ASIC is responsible for the administration and enforcement of the national scheme laws, being laws of the Commonwealth and the States in relation to Australian companies, securities, managed investments and futures markets; and for monitoring and promoting market integrity and consumer protection in relation to the Australian financial system, the provision of financial services and the payment system.

3. Regulatory Policy Development

3.1 Changes in regulatory policy or regulatory decisions on particular matters by either agency may have implications for the other agency. Each agency therefore will notify the other of any proposed changes in regulatory policy or regulatory decisions likely to impact on the responsibilities of the other and provide the other with the opportunity to comment on any proposed changes.

3.2 Where implementation of regulatory policy or regulatory decisions by either agency has implications for the other agency, each agency will notify the other where such implementation is likely to impact on the responsibilities of the other.

3.3 The agencies agree that, where appropriate, it is desirable for them to consult with each other in relation to policy statements and media releases, which are being formulated and which may be of interest to or have an effect on each agency. Where appropriate, the agencies may consider whether to issue a policy statement or media release on a joint basis, having regard to the subject matter of the release, the policy objectives of each regulator, and the objectives of this agreement.

4. Mutual Assistance

4.1 The agencies recognise that it is important that they co-operate to promote confidence in the financial system and the confident and informed participation of all stakeholders in that system.

4.2 The agencies agree to provide each other with mutual assistance in relation to the exchange of information, appropriate referral of matters and cooperation in regulation, compliance, and enforcement within the framework of this agreement and which is consistent with all relevant laws.

5. Co-ordination Committee

5.1 A joint Co-ordination Committee will be established to facilitate close co-operation between APRA and ASIC. The Committee will operate according to a Charter and be responsible for ensuring the appropriate arrangements are in place for matters such as co-ordinating information sharing, joint inspections or task forces, referral of cases and enforcement action or major supervisory intervention. It will also co-ordinate operational matters such as administrative arrangements to avoid duplication, statistical collections, joint research work or training or industry consultation, and participation in international fora.

5.2 It is envisaged that liaison in respect of routine operational matters will occur on an 'as needed' basis between appropriate staff of the two agencies.

6. Information Sharing

6.1 Full and timely exchange of information is a crucial element in co-ordination between APRA and ASIC.

6.2 APRA gathers a wide range of information on the entities, which it prudentially supervises. ASIC gathers a wide range of information in its role in monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.

6.3 The agencies agree that, subject to legislative provisions, information available to one agency, which is relevant to the responsibilities of the other agency, will be shared as requested. Each agency will provide relevant information to the other on a best endeavours basis, with due regard to the urgency of doing so. This will be subject to any relevant legal and operational considerations and any conditions, which the provider of the information might place upon the use or disclosure of the information, such as claims of legal professional privilege.

6.4 When exchanging confidential information, APRA and ASIC acknowledge the confidentiality and secrecy requirements of the Acts under which each agency operates. The agency providing information has the right to specify the level of confidentiality attached to the information it provides to the other, in order to protect that information from unauthorised use, or disclosure. The agency receiving the information will take all reasonable steps to ensure such information is only used or disclosed for the purpose for which it was obtained.

6.5 Each agency agrees not to disclose any confidential information obtained pursuant to this agreement to a third party unless it has obtained the prior consent of the agency which has provided the confidential information.

6.6 Subject to appropriate cost sharing, each agency may arrange for information relevant to its responsibilities to be collected from financial entities by the other agency.

7. Unsolicited Assistance

7.1 Each agency recognises that in the course of carrying out its functions and exercising its powers, it will come into possession of information which would, if provided to the other agency, be likely to assist that other agency in administering or enforcing the particular laws for which it is responsible.

7.2 Each agency agrees, subject to legal restrictions, to use its best endeavours to notify the other agency with due regard to the urgency of doing so of the existence of any information of a kind referred to above, notwithstanding that it may not have received a request from the other agency for such information.

8. Cost of Provision of Information

8.1 In general, the agency which receives the request for information shall bear the cost incurred by it in locating and providing the information to the agency who requests the information.

8.2 If it appears to the agency that receives the request that it will incur substantial costs in responding to the request it may make representations to that effect to the requesting agency and the parties may negotiate a cost sharing arrangement in relation to the provision of that information.

9. International Representation

9.1 The agencies will co-operate to ensure that Australia has appropriate representation in regional and international regulatory fora and training initiatives. In some circumstances there will be joint representation but where only one agency is represented it will consult with the other agency as needed before and after the particular gathering.

(b) Charter - APRA/ASIC Co-ordination Committee

The memorandum of understanding (MOU) between the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) has established a Co-ordination Committee (the Committee) to facilitate close co-operation between the two agencies in the pursuit of their respective responsibilities.

The Committee will operate according to this Charter.

The specific objectives of the Committee are to:

- ensure that both agencies exchange relevant information, including assessments of the overall administration and health of the financial sectors each agency supervises; major developments in the financial sectors each agency supervises relevant to the performance of their regulatory responsibilities; and information on individual regulated entities that raise particular concerns;

- discuss general developments in the financial sector and proposed changes to financial regulation policies relevant to the performance of each agencies regulatory functions;

- establish any procedures necessary to ensure that information sharing occurs in accordance with the principles of the MOU;

- co-ordinate on-site inspections of regulated entities and establish arrangements for joint on-site inspections, cross delegations of power, referral of matters and joint task forces where these are considered desirable for effective and efficient conduct of investigation and enforcement activities;

- co-ordinate administrative arrangements and systems development to avoid duplication and to reduce the regulatory burden on industry;

- discuss statistical and other data collection strategies and rationalisation of each agencies collections;

- foster and co-ordinate joint research, training, industry consultation and policy development work by both agencies;

- co-ordinate Australia's representation at international fora of regulators and participation in international regulatory training initiatives; and

- resolve any conflicts which may arise on any matter relating to issues covered by the MOU.

The committee has at least four members, comprising at least two representatives from each agency. Generally APRA's senior representative will be an Executive General Manager and ASIC's senior representative will be a National Director.

The committee will meet generally on a monthly basis, or more frequently as required, with chairing and secretarial duties shared between both agencies.

(F) POLICY PROPOSAL ON MORTGAGE INVESTMENT SCHEMES

ASIC is seeking industry and investor comment on which regulatory framework would be most appropriate for mortgage investment schemes. On 13 October 1998, ASIC released it policy proposal paper, the result of its review of the mortgage investment industry.

The review responded to problems in the industry, especially in light of exemptions under the old provisions of the Corporations Law for some solicitors and finance brokers, and the recent enactment of the Managed Investments Act 1998.

The paper proposes that mortgage investments should be regulated in the same manner as managed investments under the new legislation, but suggests some modification of the regime might be needed to accommodate special features of mortgage investment schemes.

The policy proposal will be used as the basis for a public consultation period during which ASIC will talk to the mortgage investment industry and investor associations.

Copies of the paper are available from the ASIC Infoline 1300 300 630, or from ASIC's web site at: "http://www.asic.gov.au".

Comments are due by Friday 13 November 1998, and should be directed to:

Vesna Zuro   
ASIC Regulatory Policy Branch   
GPO Box 4866   
Sydney NSW 1042

(G) FINANCIAL ADVICE SURVEY RESULTS

A Financial Advisers Survey conducted by ASIC and the Australian Consumers' Association (ACA) has found that the standard of financial advice has improved in Australia during the last three years, but there are still notable weaknesses in the industry.

The survey results are published in the October edition of CHOICE magazine and in a separate Financial Advisers Survey Report available from ASIC.

The joint project involved ordinary consumers from both metropolitan and regional areas who wanted advice on how to invest their own money; they were ordinary investors in every sense except that ASIC and ACA paid the consultation costs of the advisers.

The results of the survey suggest that standards of advice in the financial advisory industry have improved since this survey was first conducted by CHOICE in 1995, but that key problem areas still need to be addressed.

Of the 100 financial plans assessed, six plans achieved a 'very good' assessment, while 28 were assessed as 'good'. 48 plans were rated as 'acceptable'.

ASIC Chairman Mr Alan Cameron said this showed that the majority of financial planners were meeting their key legal obligations and were generally providing appropriate advice on investments. Several people in the study were in fact so satisfied with the advice they received that they returned to one of the advisers to actually invest their money.

The main areas of failure, according to ASIC, which need to be addressed are:

- the provision of Advisory Services Guides;

- the explanation of risk to consumers;

- the disclosure of fees, charges and commissions; and

- the need to explain to consumers any limitations in the scope of financial advice for which they are paying.

(H) SECTION 698 OF THE CORPORATIONS LAW: URGENT CALL FOR SUBMISSIONS

On 15 October 1998, ASIC announced it was seeking urgent submissions to assist it with developing a policy on its discretion to exempt or modify s 698 of the Corporations Law. This section deals with collateral benefits in takeovers.

The urgent need for policy development arises from the recent Federal Court decision in Aberfoyle v Western Metals (1998) 28 ACSR 187 which has caused uncertainty in two areas.

The Court held that a placement by a bidder to institutional shareholders of the target contravened s 698 as it constituted an inducement for those institutional shareholders to accept the bid.

ASIC has been informed that this decision has restricted the ability of bidders to fund their bids.

Due to the small size of the Australian market, it is extremely difficult for a placement of shares to institutions to succeed without offering shares to existing institutional shareholders of the target.

Subsequent to the Aberfoyle decision, ASIC granted a modification to Western Metals to allow it to offer shares to institutional investors. The relief was given on the basis that Western Metals did not offer shares to an institution which held more than 1% of the shares in Aberfoyle and that the aggregate percentage holdings in Aberfoyle of all the institutional investors which took up shares did not exceed 20%.

Market participants have informed ASIC that the 1% condition in particular is unworkable in many situations given the small size of the Australian market.

In Aberfoyle, the Court also held a crossings on market, where there is some pre-arrangement between buyers and sellers, is not in the ordinary course of business. This means the bidder cannot rely in that case on the defence in s 698(5).

ASIC has been informed that this ruling has restricted a bidder's ability to obtain a pre-bid stake. Anecdotal evidence suggests that a bidder's broker, in buying above the market price to obtain a bid stake, will be detected by the market. Once the buying is detected, market participants can arbitrage on that information to the detriment of the bidder.

ASIC wants to hear from market participants concerning the exercise of its discretion under s 698, balancing the Eggleston principles applying to takeovers with promoting market efficiency. However, market participants should note that ASIC will continue to monitor current takeovers to ensure compliance with the letter and the spirit of the law.

Submissions, due by 20 November 1998, should be addressed to:

Allan Bulman   
Regulatory Policy Branch   
ASIC   
GPO Box 5179AA   
Melbourne 3001

fax: 03 9280 3339

(I) ST GEORGE BANK RESTRUCTURING COSTS

On 15 October 1998, ASIC welcomed the decision of St George Bank Ltd to write down the goodwill recognised in its acquisition of Advance Bank.

A $120 million liability for expected restructuring costs of St George Bank had been included in the calculation of the goodwill in St George Bank's financial statements and consolidated financial statements for the year ended 30 September 1998.

An amount of $114 million after prior year amortisation will now be charged as an abnormal expense in the year ended 30 September 1998 ($78 million net of tax effect).

The adjustment made by St George Bank is consistent with Urgent Issues Group Abstract 8 'Accounting for Acquisitions - Recognition of Restructuring Costs as Liabilities'.

This Abstract allows a liability for the restructuring costs of an 'acquired entity' to be recognised as part of the purchase consideration in the calculation of goodwill but not a liability for the restructuring costs of the 'acquiring entity'.

ASIC believes that there is only one correct accounting treatment under Urgent Issues Group Abstract 8 and accounting standard AASB 1015, 'Accounting for the Acquisition of Assets'.

ASIC supports the view adopted by Urgent Issues Group Abstract 8 that the costs of restructuring the activities to be incurred by an acquiring entity are not in the nature of costs 'incidental' to an acquisition and also do not form part of the purchase consideration as defined under AASB 1015 as they are not liabilities undertaken by the acquirer in exchange for the net assets acquired.

ASIC Chief Accountant Jan McCahey said that there has been some diversity of accounting treatment by entities in relation to the liability for restructuring costs of an acquiring entity.

'ASIC will continue to review financial reports prepared by entities through its Financial Reports Surveillance Programme to ensure the reliability and comparability of financial reports.'

(J) POLICY PROPOSAL ON INDIRECT SELF-ACQUISITION BY INVESTMENT FUNDS

On 19 October 1998, ASIC released its Policy Proposal paper on Indirect Self Acquisition by Investment Funds. The Corporations Law does not allow the issue or transfer of a company's shares to an entity which that company controls. ASIC can give an exemption from the Law and impose conditions on that exemption.

If an institution's shares constitute a significant percentage of an index, such as the All Ordinaries Index, its controlled entities may be disadvantaged by not being able to invest in the institution's shares. Therefore, the institution's indexed funds would not be able to exactly mirror the index, and returns to investors may be limited by their inability to invest in the institution's shares.

ASIC proposes to grant relief and allow self acquisition under the following conditions, which aim to reduce the risks which are present in allowing indirect self acquisition:

(a) to reduce the risk of improper exercise of control, ASIC proposes prohibiting voting the shares held by controlled entities and limiting the number of the company's shares which the controlled entities can hold to 5% of the total number of shares on issue;

(b) to reduce the risk of preferential treatment to a controlled entity, ASIC proposes a condition limiting issues of shares to controlled entities to circumstances where either the other shareholders agree or where the other shareholders participate in the issue;

(c) to reduce the risk of preferential treatment between shareholders generally, ASIC proposes a condition limiting purchases of shares by controlled entities to on-market transactions and transactions between controlled entities;

(d) to reduce the risk of insider trading and disclosure, ASIC proposes that a company disclose its controlled entities' percentage holdings in its shares every 14 days, disclose within one business day any 1% or greater percentage change in its controlled entities' holdings and retain records of trading for inspection by ASIC and the relevant securities and futures exchange for a period of one year after the trading occurred.

ASIC also proposes unrestricted comfort relief to financial institutions where one of its controlled entities invests in an independently managed investment scheme which in turn invests in the company's shares.

ASIC has granted interim relief to Macquarie Bank Ltd to allow its life insurance subsidiaries to invest in their own shares. This relief was given to Macquarie Bank Ltd, in relation to its statutory funds, on conditions identical to those found in the policy proposal paper.

ASIC invites submissions based on the Policy Proposal Paper by 19 December 1998. Copies of the Policy Proposal Paper are available from ASIC Infoline (1 300 300 630) or the ASIC home page at: "http://www.asic.gov.au".

3. RECENT ASX DEVELOPMENTS

(A) DEMUTUALISATION OF AUSTRALIAN STOCK EXCHANGE

On 13 October 1998 ASX changed its type to a public company limited by shares and was included in its own official list. On 14 October 1998 shares in ASX were admitted to official quotation.

On the change of type a new constitution and amendments to the business rules of ASX took effect in accordance with section 766D(2)(d). The new constitution is in a normal commercial form appropriate for a company limited by shares. The new constitution expressly acknowledges the regulatory role of ASX.

The primary focus of amendments to the Business Rules was to:

- remove certain provisions of the former constitution concerning the admission of 'Members' (both natural person Members and Member Corporations) and the supervision of 'Member Organisations' as participants in the market conducted by ASX and insert similar provisions in the Business Rules;

- revise the Business Rules to ensure that they were consistent with the new membership structure, that is, the severance of the company law concept of membership from the concept of accreditation by ASX and access to its market facilities; and

- include transitional provisions.

This was achieved by significant amendments to the Definitions Section and Section 5 and by the addition of Sections 5A, 13 and 14. In accordance with the mandate Members gave to the Board of ASX in respect of demutualisation, the redrafting exercise adopted the same approach concerning:

- the activities and conduct of Participating Organisations (formerly Member Organisations) and the criteria and procedures for admission of Participating Organisations; and

- the admission requirements (based on experience and education and required type of connection with a Member Organisation) for Affiliates (formerly natural Person Members), as was adopted in the constitution and Rules prior to demutualisation.

The following is a brief summary of the changes:

(a) New Definitions Section

This is a revised version of the section which previously appeared at the beginning of the Business Rules. It includes some definitions and principles of interpretation previously located in the Articles.

(b) New Section 5A

This section deals with the recognition of Affiliates and Participating Organisations.

The concept of 'Member' which previously appeared in the constitution and Business Rules has been replaced with either Participating Organisation or Affiliate. The section contemplates that natural persons will be recognised as Affiliates and that corporations and partnerships will be recognised as Participating Organisations.

The admission procedure for an Affiliate is modelled on the admission requirements for a 'Member' which applied prior to demutualisation. The previous requirement that applicants be 'not less than 21 years of age' has been removed. A provision for a register of Affiliates has been added.

Provisions for Participating Organisations and Affiliates to be notified of applications to become a Participating Organisation or an Affiliate have been removed.

Requirements for a partnership conducting business have been incorporated into the requirements for ASX to recognise a partnership as a Participating Organisation (for example, the number of partners who must be Affiliates). The drafting also endeavours to ensure that the requirements for partnerships appropriately mirror those for corporations (for example, provision has been added requiring the constituent documents of a partnership to contain provisions which require continued compliance by the partnership with the requirements of the Business Rules. Provision has been added to require notification of the appointment of a new partner who is not an Affiliate).

The provision allowing a person to carry on business as a sole trader in limited circumstances on dissolution of partnership has been retained.

(c) New Section 5

New section 5 includes those provisions of the previous Business Rules, and to a lesser extent the constitution, which are concerned with the day to day running of a Participating Organisation's business.

(d) New Section 13

This section sets out the powers of supervision of ASX in relation to the business and activities of an Affiliate or a Participating Organisation. Sections 13.1 and 13.2 are primarily directed at Participating Organisations rather than Affiliates. In the case of Participating Organisations who are partnerships, in some senses the business of the Participating Organisation is really the business of the partners, some of whom will be Affiliates. A provision has been included in the definitions section, interpretation rule 4, to provide that provisions of the Rules which impose duties and liabilities on partnerships are to be read as imposing duties and liabilities jointly and severally on each partner. That is similar to the previous provision made in Article 1(6).

Section 13 uses the concept of 'cancellation' of the status of Affiliates and Participating Organisations rather than the previous concept of 'expulsion'.

(e) New Section 14

This section contains provisions setting out the 'infrastructure' for supervision by ASX and its delegates.

The Business Rules now contemplate that ASX has an unfettered power to delegate its functions.

As the procedures for the National Adjudicatory Tribunal and the Appeal Tribunal were in many respects similar, these tribunals have been treated similarly and are described in Rule 14.2.

(f) Miscellaneous

The balance of the amendments made to the Business Rules were:

- to reflect terminology changes from 'Member Organisation', 'Member' and 'Member Corporation' to 'Participating Organisation' and 'Affiliate' or in some instances, to a person who has given an undertaking to be bound by the Rules of ASX, such as a company which is a partner of a Participating Organisation;

- to revise Rule numbers where required;

- to replace references to articles with references to appropriate rules;

- to replace references to 'Board' with, as appropriate in the particular circumstances, 'Exchange' or 'National Adjudicatory Tribunal'.

Essentially the process was one of translating the existing regulatory regime across to a demutualised environment adopting the same regulatory approach as reflected in the constitution and Business Rules prior to demutualisation.

(g) Listings

In relation to Listings, on demutualisation some changes in decision-making processes were implemented. National Listing Committee, which made decisions on admissions and heard appeals on certain decisions of Listings management ceased to exist.

Decisions on admissions are now made by Listings management. Appeals by an entity from certain decisions of management affecting it (refusal to admit, conditions of admission, refusal to grant a waiver, conditions of a waiver, the application of the listing rules to the entity (except in relation to a suspension) and the removal of the entity) will be heard by a newly constituted body, the Listings Appeals Committee. The guidance note on ASX Listings has been reissued (dated 19 October 1998) and explains the new decision-making processes.

(B) APPLICATION OF LISTING RULES 10.1 AND 11.2 TO PRO RATA ENTITLEMENTS

(Contributed by David Cullen And John Williamson-Noble - Gilbert & Tobin)

Quancorp Pty Ltd v MacDonald (1998) 28 ACSR 520; 16 ACLC 1562

A decision of the Supreme Court of Western Australia has confirmed that listing rules 10.1 and 11.2 do not apply to the in specie distribution of assets by way of dividend to all members of a company on a pro rata basis. The decision, however, has wider implications for the application of these listing rules, particularly listing rule 10.1.

Cudgen RZ Limited ('Cudgen'), a listed public company, had as its major asset a majority shareholding in Consolidated Rutile Limited ('CRL'). The two major shareholders of Cudgen held approximately 97% of Cudgen's issued share capital. In May 1997, Cudgen announced a proposal to distribute its shareholding in CRL to its shareholders on a pro rata basis by way of in specie dividend and to seek the approval of members to a solvent voluntary winding up of Cudgen.

Shortly after this announcement, the plaintiffs, who operated a corporate advisory service, announced an intention to make a Part A offer to Cudgen's shareholders. The major shareholders of Cudgen indicated that they would not accept the offer. Cudgen subsequently announced that its board had concluded that the plaintiffs' proposed offer was not in the best interests of its shareholders and that they had resolved to proceed with the in specie distribution and voluntary winding up proposal.

The plaintiffs brought proceedings seeking a declaration that, amongst other things, the dividend proposal contravened listing rules 10.1 and 11.2. Listing rule 10.1 prohibits a listed company from disposing of a substantial asset to a substantial shareholder without shareholder approval and listing rule 11.2 prohibits a listed company from disposing of its main undertaking without first obtaining the approval of its shareholders. Pending hearing of the declaration, the plaintiffs brought two applications for interlocutory injunctions to prevent payment of the dividend, both of which were refused for reasons which included that the listing rules had not been breached (see (1997) 24 ACSR 745; 15 ACLC 1415 and (1997) 25 ACSR 123; 15 ACLC 1639).

In delivering judgment following hearing of the application for the declaration, Anderson J concluded that listing rule 10.1 applies where it is proposed to dispose of a substantial asset to a substantial shareholder alone and is not intended to apply to the distribution of a dividend to shareholders pari passu. The rule is directed at transactions between the company and related parties/subsidiaries/substantial shareholders involving the company's assets, where the transaction may be unfair or unreasonable from the standpoint of shareholders generally. His Honour also held that listing rule 11.2 is not concerned with dividend distribution, whether in cash or in specie. Rather, listing rule 11.2 is concerned exclusively with transactions in which persons may obtain a benefit, otherwise than a benefit enjoyed pari passu with all shareholders. It is not concerned with transactions in which the benefits flow to all shareholders on an equal footing, in their capacity as shareholders.

The conclusions in respect of both listing rules 10.1 and 11.2 were based on the fact that, for resolutions of shareholders under each listing rule, a voting exclusion statement applied pursuant to which the company had to exclude votes cast by (in essence) the parties to the transaction obtaining the benefit from the transaction. In the case of an in specie distribution on a pari passu basis, this would mean that the votes cast by every shareholder would have to be excluded by the company.

Although the decision concerned an in specie distribution of shares by way of dividend, the comment by Anderson J that listing rule 10.1 applies where it is proposed to dispose of a substantial asset to a substantial shareholder alone (as opposed to pro rata entitlements) has wider implications. There have been many examples in the past where ASX has applied listing rule 10.1 (and its predecessor, Listing Rule 3J(3)) to transactions involving the offer of an entitlement to all shareholders on an equal footing. In other cases, ASX has confirmed that the listing rule applied but granted a waiver.

Examples of other transactions which would appear to fall within the comments made in Quancorp v MacDonald include mergers by scheme of arrangement, 'spin-offs' of subsidiaries by scheme of arrangement and, arguably, equal access buy-back schemes. At least in the case of the first two of these, whereas previously application to ASX for a waiver from listing rule 10.1 may have been necessary, it appears that this may not now be required.

4. RECENT CORPORATE LAW DECISIONS

(A) Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation [1998] VSCA 76, Court of Appeal of Victoria, Brooking, Charles and Kenny JJA, 14 October 1998

The appellant, Sands & McDougall Wholesale Pty Ltd (SMW), was a wholesale and retail company. On 20 June 1994, it was placed under voluntary administration, and in September 1994 it was placed into liquidation. In the six months prior to 20 June 1994, SMW had traded and incurred sales tax liabilities. During that period, SMW made six payments totalling $878,000 to the Deputy Commission of Taxation (the Commissioner) in respect of those sales tax liabilities.

The appellant was the liquidator of SMW and he sought, inter alia, to have the six payments declared unfair preferences within the meaning of s 588FA(1) of the Corporations Law and voidable transactions within the meaning of sections 588FE and 588FF.

The appellant argued that the primary liability for payment of sales tax lay with the wholesaler and was not dependent on payment of any part of the tax by the purchaser, and that by s 69 of the Sales Tax Assessment Act 1992 (Cth), unpaid sales tax was a debt recoverable by the Commissioner from the wholesaler, the Commissioner having no recourse against the purchaser.

In deciding this issue, the Court first turned to the question of whether sales tax payable is properly called a debt, thus raising the issue of priority. The Court found that the liability of the company as wholesaler to pay sales tax was to be characterised as a debt, overturning the trial's judge's findings that sales tax liability was not a debt, that the company was merely a conduit for the Commissioner, that sales tax was the property of the Commissioners and that sales tax remittances could not be unfair preferences.

The next issue was whether the Commissioner could rely on s 588FA(2) of the Corporations Law such that the payments of sales tax were part of a continuing business relationship or running account, such that the payments were not unfair preferences. The Court held no such relationship or running account existed: 'What in fact occurred was that 21 days after the end of each month ... a debt for the amount of sales tax arose and should have been discharged.' The fact that the company earmarked payments of sales tax to the debt owing for a particular month, and that the Commissioner accepted this appropriation, was considered inconsistent with a running account.

The Commissioner was also unable, on the evidence, to establish that, in reliance on s 588FG(2), he had no reasonable grounds to suspect that the company was insolvent at the relevant time. Hence the Court ordered the Commissioner to repay each of the impugned payments under s 588FF(1) together with interest.

(B) Brian Millwood Smith v Kerrie Papamihail and ASIC, Federal Court of Australia, No WAG 95 of 1998, FED No 1310/98, Carr J, 16 October 1998

This was an application under ss 5 and 6 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) for review of a decision of ASIC requiring the applicant to give to the second respondent certain assistance in connection with an investigation being conducted by the second respondent. An annexure to the ASIC notice requiring the applicant to provide reasonable assistance in turn required the applicant to sign two authorities, addressed to an English bank and a Channel Islands trust company, authorising and consenting to the release to the second respondent certain specified information.

The applicant contended that the ASIC notice, issued pursuant to s 19 of the ASIC Law, was invalid because it only required the applicant to give reasonable assistance without requiring him to appear for examination. Section 19 provides that where ASIC has reasonable grounds for suspecting or believing that a person can give information relevant to a matter it is investigating, or is to investiagte, it may require that person to, inter alia, give all reasonable assistance in conenction with the investigation. The applicant argued that s 19 only applied when there was an examination on foot or about to be held. The applicant also queried whether there existed any relevant privilege against self-incrimination.

In dismissing the application, Carr J held that s 19(2)(a) did not require that the reasonable assistance result in obtaining information directly from the recipient of the relevant notice; nor did it require any information obtained as a result of the reasonable assistance be used in any examination of the recipient of the notice.

With respect to the issue of privilege, Carr J held that, subject to s 68, s 19(2) impliedly abrogated any privilege against self-incrimination. Section 68 prevents self-incrimination being used as a 'reasonable excuse' for refusing or failing to provide information or produce documents. Carr J viewed s 68 as recognising what is implicit in the case law, namely absence of privilege, and then providing a code for extending some protection to persons in specified circumstances.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Mark Wormell, 'Securitisation and Set-off' (1998) 9 Journal of Banking and Finance Law and Practice 181-190

Each year in Australia, more than $10,000m of financial assets (to date, primarily residential mortgages) are securitised. This article analyses the interaction of various forms of set-off, and related rights and defences, with this significant financial sector. The author concludes that, particularly when undertaken by banks and financial institutions which take deposits, set-off and the related rights and defences pose no threat to the parties to securitisations.

(B) Peter Knight, 'The 'Year 2000 Problem'' (1998) 9 Journal of Banking and Finance Law and Practice 191-197

The 'Year 2000 problem' may not have so serious an impact as some commentators suggest. For those who do not take adequate (and appropriate) corrective measures, legal remedies may be available, but they are not devoid of uncertainties, at least in the case of defective systems supplied some time ago which have enjoyed a reasonably useful life in production. It is therefore desirable to take certain steps to ensure that such appropriate steps are taken to meet any Year 2000 problem which may adversely affect critical business systems.

(C) James Routledge, 'Part 5.3A of the Corporations Law (Voluntary Administration): Creditors' Bargain or Creditors' Dilemma?' (1998) 6 Insolvency Law Journal 127-136

The creditors' bargain view of insolvency law argues that legislative regimes attempting to deal with the competing interests that arise in corporate insolvency should promote outcomes that reflect the bargain creditors would agree to from an ex-ante position. Examination of Pt 5.3A of the Corporations Law (Cth) from the creditors' bargain perspective is presented in this article. Generally, Pt 5.3A, both in construction and judicial interpretation, complies with the creditors' bargain. Some areas where divergence from the model occurs are identified; in these areas it is apparent that adherence to the creditors' bargain would have been desirable. Moreover, the article provides support for the creditors' bargain as a valid normative model on which to base the construction and application of insolvency law.

(D) R J Lee, 'Disclaimer in Liquidation' (1998) 6 Insolvency Law Journal 137-157

Relatively little legal discussion has occurred as to the meaning of the phrase 'unprofitable contract' in the context of the disclaimer provisions in the Corporations Law. This article canvasses the relevant cases to examine possible meanings. In contrast, the effect of a disclaimer on third parties, such as guarantors, has been canvassed in detail in recent cases, with some interesting differences emerging between the courts of today and the courts of almost 100 years ago.

(E) Professor Erik Werlauff, 'Common European Company Law: Status (1998) (1) Equal Treatment of Companies, Domicile under Company Law and Related Concepts' (1998) 9 European Business Law Review 169

This is the first of three articles in which the author discusses steps towards harmonisation of European company law. Specifically, this article examines the requirements of the EEC Treaty regarding equal treatment of domestic and foreign companies; issues in relation to a company's nationality and whether a company can transfer its domicile from one state to another; and international choice of law in other company law matters.

(F) Lyndon A Badham, 'Directors Versus Receivers: Control of Litigation on Behalf of Companies in Receivership' (1998) 16 Company and Securities Law Journal 508

Upon a chargor's default under a charge agreement and the appointment of receivers and managers, the receiver is given the power to litigate on behalf of the company, but the directors of the company in receivership are not necessarily stripped of their powers. This can lead to difficulties as the receivers and directors often disagree as to whether a cause of action should be litigated. This article looks at the problems created by receivers and directors having concurrent powers to litigate on a company's behalf and suggests an approach to address them.

(G) Roger J Bowden, 'In Search of a Normative Takeover Code: Theory and Jurisdiction' (1998) 16 Company and Securities Law Journal 516

The international diversity of takeover codes and their jurisdiction has led observers to speculate whether any code additional to general provisions of corporate law is necessary at all. This article argues that a special code is indeed necessary, and can be regarded as a second-best response to some intrinsic difficulties with the operations of corporate law, namely that damage can occur very suddenly and that plays of the implied game are not repeated. Takeover codes and litigation can usefully be informed by the equal margin value principle, which means that the marginal value of shares to all holders should be the same and is measured by their quoted market value. A contingent compensation regime is suggested that, unlike the mandatory bid rule, allows a market for corporate control.

(H) Rosemary Langford, 'The New Statutory Business Judgment Rule: Should It Apply to the Duty to Prevent Insolvent Trading?' (1998) 16 Company and Securities Law Journal 533

The Corporate Law Economic Reform Act 1998 (Cth), which the Federal Government has been aiming to enact this year, will, if passed, introduce into the Corporations Law a new statutory business judgment rule. This rule will provide directors with a certain amount of protection from liability in relation to the duty of care and diligence imposed on them both under the Corporations Law and under general law. However, despite lobbying from various groups, the proposed new statutory business judgment will not apply in relation to the duty of directors to prevent insolvent trading (the 'insolvent trading duty'). Based on an examination of a number of issues concerning the proposed statutory business judgment rule and each of the duty of care and diligence and insolvent trading duty, this article concludes that the decision not to extend the application of the new statutory business judgment rule to the insolvent trading duty is appropriate. It is hoped that this article will provide practitioners and students with useful information on the history, development and interpretation of the insolvent trading duty, as well as indicating some major themes which underlie, and areas of overlap between, each of the statutory business judgment rule, the insolvent trading duty and the duty of care and diligence.

(I) Mary L Riley, 'Directors' Liability' [1998] 3 Asian Commercial Law Review 115

This article examines directors' liability under the Company Law of the People's Republic of China.

(J) Sally Wheeler, 'Inclusive Communities and Dialogical Stakeholders: a Methodology for an Authentic Corporate Citizenship' (1998) 9 Australian Journal of Corporate Law 1

(K) Jennifer Hill, 'Public Beginnings, Private Ends - Should Corporate Law Privilege the Interests of Shareholders' (1998) 9 Australian Journal of Corporate Law 21

(L) Neil Andrews, 'Bad Company? The Corporate Form in an Uncertain Law' (1998) 9 Australian Journal of Corporate Law 39

(M) Christopher Symes, 'The Dawn of Green Corporate Insolvency Law: Environmental Accountability Creeping Over the Horizon' (1998) 9 Australian Journal of Corporate Law 64

(N) Sonny Ballengarra, 'Women and the Public Company Director of Corporate Law' (1998) 9 Australian Journal of Corporate Law 81

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6. CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION LATEST PUBLICATIONS

(A) Prospectus Liability Under The Corporations Law

Author: Donna Croker

In 1997 over $25 billion in capital was raised by companies listed on the Australian Stock Exchange. Recent court judgments such as the Full Federal Court judgment in Fraser v NRMA Holdings Ltd and the increased emphasis given to the need for due diligence under the Corporations Law, have focused attention upon the liability that can apply to those engaged in capital raising for companies.

Those potentially liable include the company, its directors, auditors, bankers, solicitors, underwriters, stockbrokers and those who authorised or caused the issue of the prospectus. This book analyses the liability provisions of the Corporations Law as they apply to those involved in capital raising. It also analyses the defences to liability.

The Federal Government has recently proposed amendments to the prospectus provisions of the Corporations Law as part of its Corporate Law Economic Reform Program. The book reviews these proposed changes and considers how they will affect those involved in capital raising.

The book is of particular relevance to those who are involved in capital raising, including company directors and their advisers.

(B) Institutional Investors' Views On Corporate Governance

Authors: Professor Ian Ramsay, Dr Geof Stapledon and Mr Kenneth Fong

Institutional investors hold approximately 50% of the shares of companies listed on the Australian Stock Exchange. Institutional investors are now key players in corporate governance. As highlighted in the media, institutions have intervened to shake up boards of underperforming companies. They have also promoted best practice guidelines covering the structure and composition of boards of directors, executive remuneration and other matters.

This Research Report outlines the results of a study of the views of institutional investors on corporate governance issues. These issues include voting by institutional investors (including circumstances when institutions vote against management and their views on confidential voting and compulsory voting); monitoring of corporate governance practices by companies in which the institutions invest; liaison with other institutions over corporate governance matters; views on the structure and composition of boards of directors (including independent directors and separating the roles of chairperson and CEO); use of board committees; director and executive remuneration; and barriers to institutional investor activism (including legal barriers such as the takeover provisions of the Corporations Law and economic barriers).

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

(C) Corporate Governance And The Duties Of Company Directors

Editor: Professor Ian Ramsay

With the publication in late 1997 of the Federal Government's Corporate Law Economic Reform Program paper titled Directors' Duties and Corporate Governance and the many recent court cases and legislative changes dealing with directors, the role of directors' duties has never been more important. This book provides detailed legal analysis of directors' duties and also addresses important issues in the corporate governance debate.

The duties examined include the duty of care, skill and diligence; the duty to act in good faith and for proper purposes; the duty to act honestly; and the duty to refrain from making improper use of information and position. Other specific legal issues reviewed include the liabilities of nominee directors and 'shadow' director and other third party liability for corporate activity.

A feature of the book is that the authors include leading judges who have been involved in major cases relating to directors' duties, well known practitioners, regulators and academics.

The book is of relevance to those in the business sector and their advisers (legal, financial, management and accounting) as well as to regulators and others interested in the corporate governance debate.

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