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Centre for Corporate Law and Securities Regulation
Faculty of Law, The University of Melbourne

with the support of

The Australian Securities Commission
and the leading national law firms:

Allens Arthur Robinson Group
Blake Dawson Waldron
Clayton Utz
Corrs Chambers Westgarth
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We welcome subscribers to the first bulletin of the Corporate Law Electronic Network, brought to you by the Centre for Corporate Law and Securities Regulation with the support of the ASC, the Allens Arthur Robinson Group, Blake Dawson Waldron, Clayton Utz, Corrs Chambers Westgarth and Mallesons Stephen Jaques. The Network should be of particular interest to corporate law practitioners and others with an interest in corporate law developments.

On a regular basis, the following items will be posted on the Network:

1.    summaries of significant corporate law developments (both statutory amendments and recent court decisions) which have been prepared by leading law firms;

2.    significant announcements made by the ASC (for example, announcements of new ASC Policy Statements and Practice Notes);

3.    abstracts of articles from international and Australian corporate law journals, including the most recent issue of the Company and Securities Law Journal;

4.    announcements of corporate law conferences and seminars.

Subscribers to the Network are able to participate in discussion of recent corporate law developments; the Network will enable discussion among subscribers of particular cases or statutory amendments of relevance to practitioners and others.

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) SHAREHOLDER AND CREDITOR RIGHTS GIVEN A BOOST

A recent decision of the Federal Court of Australia (Airpeak Pty Ltd & Ors v Jetstream Aircraft Ltd & Anor (1997) 23 ACSR 715) has once again liberated the operation of the ‘injunction’ provision of the Corporations Law. Section 1324 was previously constrained by the narrow interpretation of Young J in the New South Wales Supreme Court (Mesenberg v Cord Industrial Recruiters Pty Ltd (1996) 39 NSWLR 128). He had ruled that it was only the ASC that could bring an action for an injunction because the section concerned a possible breach of the law which carried with it a civil penalty. Now, Einfeld J in the Federal Court has taken a view which is supported by most practitioners, namely that the section does permit the court to grant an injunction or such other relief to the whole range of persons including creditors.

Airpeak Pty Ltd (Airpeak) commenced an action against Jetstream Aircraft Ltd (Jetstream) for breach of contract relating to the supply of aircraft and associated products and services. Jetstream cross claimed against Airpeak’s directors, Mr and Mrs McGowan, that they had acted in contravention of their duties. It applied for orders under section 1324 of the Corporations Law for the return of moneys which had been received by the McGowans as a result of their alleged breaches of duty. The McGowans applied to the Federal Court to have that part of the claim which related to breaches of duty struck out, relying on the decision in Mesenberg. Einfeld J ruled that the Mesenberg decision was wrong, and held that he could grant relief to Jetstream on the basis of section 1324, conferring on both shareholders and creditors appropriate rights under the section. (Arthur Robinson Hedderwicks)

Editorial Note: Since Airpeak, Wheeler J of the Supreme Court of Western Australia has cast doubt on Mesenberg: Emlen Pty Ltd v St Barbara Mines Ltd (1997) 24 ACSR 303 at 306.

(B) COMPULSORY ACQUISITION OF SHARES ISSUED AFTER CLOSE OF TAKE-OVER BID

Southcorp Limited ran into this problem when it bought Yarra Valley winemaker, Coldstream, last year. Coldstream had numerous long dated options and Southcorp was faced with trying to "mop up" new Coldstream shares as long dated options were exercised. The ASC modified section 701 of the Corporations Law to allow the shares to be compulsorily acquired upon their issue on the exercise of options. Similar relief was granted to Mobil Exploration in its bid for Ampolex Limited. Both decisions have been challenged in the Administrative Appeals Tribunal.

 Notwithstanding the AAT proceedings, the ASC has formalised its policy in this area. It has released Policy Statement 126 setting out the terms upon which it will allow a bidder to compulsorily acquire shares issued after a successful takeover scheme or announcement. The policy only covers shares in the same class as the bid class that are issued on the exercise or conversion of convertible securities after the takeover offer closes. The relief will be available if the offeror gets a 90% entitlement on a diluted basis (including the convertible securities). For shares issued within three months of the bid closing, the offer must be on the same terms as at the close of the bid (which means that the consideration need not necessarily be cash). If shares are issued more than three months after the close of the bid, a cash price must be offered and this must be supported by an independent expert’s report. (Blake Dawson Waldron)

(C) CORPORATE LAW ECONOMIC REFORM PROGRAM

The Federal Treasurer has released a discussion paper, the first from the Corporate Law Economic Reform Program, which suggests a change to accounting standards to make them more consistent with overseas standards. The paper is available at: http://www.treasury.gov.au/Publications/CLERP. Comments are invited by 17 October 1997.

2. RECENT ASC DEVELOPMENTS

(A) WHOLESALE INVESTMENTS

The ASC has issued a warning to investors on the dangers of wholesale investments. Several wholesale investment companies have gone into liquidation, causing superannuants to lose substantial amounts of money. Unlike retail investments, wholesale investments are not required to lodge a prospectus or comply with certain other safeguards. (ASC Press Release)

(B) YANNON AFFAIR

Investigations by the ASC into the Yannon affair have not yielded a formal brief to the Commonwealth DPP. The DPP, Brian Martin QC, has compared the investigative period favourably with the period for investigating matters with respect to Alan Bond. The ASC has said one difficulty of investigations into possible corporate illegalities is the wide range of penalties possible. (The Australian 5/9/97)

(C) ASC ENCOURAGES BETTER FINANCIAL FORECASTS

The ASC has taken steps to ensure that investors will, in future, be better placed to assess financial forecasts and other financial projections in prospectuses.

The ASC has published a practice note [PN67] on ‘Financial Forecasts in Prospectuses’ which has been compiled following consultation and public comment and is intended to act as a guide to prospectus issuers on the use of forecasts. To obtain a copy of the practice note, please contact the ASC at infoline@asc.gov.au.

(D) ASC MAKES SAVING EASIER

The ASC has announced that people can top-up their money in their existing managed investments without filling in more forms. This new streamlined process will also apply when an investor chooses to switch between managed funds offered by the same manager. Managers are still required to keep investors informed about where their money is, what is happening to it and any changes that may affect their managed investment. This will ensure investors have adequate information to make their decisions, as well as making it more convenient to increase their savings by not requiring the filling in of additional forms each time.

This policy will also mean that Australian managers will experience significant savings because they will no longer have to repeatedly issue the same paperwork for ‘top-up’ investments by existing customers. New investors must still receive a full prospectus before investing. Copies of the policy, entitled ‘Additional Investments in Managed Investment Schemes’ [PS 127] are available from the ASC at infoline@asc.gov.au.

(E) GREENSHOEING FOR TELSTRA FLOAT

The ASC has granted a special exemption to the Telstra float, allowing a process that will even out any major fluctuations in its share price after the November listing. The exemption allows brokers to the float to intervene in the market for up to a month after the listing, using a process known in the USA as ‘greenshoeing’.

Greenshoeing allows brokers to short-sell, i.e. to allocate more shares than have been issued. If the price falls when the shares are listed, brokers will buy shares in the market to cover their positions. This buying supports the share price. Conversely, if the price rises, brokers will go to the issuer and seek another allocation at the original issue price.

Funds managers have said that the adoption of greenshoeing could lead to the Government selling more than the originally proposed one third of Telstra, possibly up to 15% more.

Greenshoeing has never been permitted in Australia before, but is being introduced in this instance because a significant proportion of the float is expected to be offered in the US and British markets, where it is a common practice. (AFR 12/9/97)

(F) DISCLOSURE OF UNDERWRITING AGREEMENTS IN PROSPECTUSES

The ASC has warned that some prospectuses continue to fail to make adequate disclosure in relation to agreements between the issuer and the underwriter of capital raising schemes. The ASC believes that issuers should make the following disclosure about underwriting agreements:

(i) where there is a general introductory statement in a prospectus about an issue being underwritten or the expression ‘underwritten’ is on the front page, the issuer should use the expression ‘partially underwritten’ if that is the case; and

(ii) where there is a statement on the front cover of a prospectus about an issue being underwritten, it should be similarly qualified. (ASC Press Release)

3. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Kanaga Dharmananda, 'Ultra Vires Goes Ultra Violet' (1997) 71 ALJ 622:

The Corporations Law contains provisions purporting to abolish the doctrine of ultra vires as it applies to companies. Issues arise as to the scope of the ultra vires doctrine and the extent to which the doctrine has, in fact, been limited by the Corporations Law. This article examines these issues and considers what a person, dealing with a corporation, must do because of the doctrine of ultra vires.

(B) The Honourable Justice Ipp, ‘The Diligent Director’ (1997) 18 Company Lawyer 162:

Justice Ipp of the Supreme Court of Western Australia discusses the director’s duty of care, skill and diligence, and explores the differences in emphasis between the Australian and English approaches.

(C) Jennifer Payne, ‘Financial Assistance for the Acquisition of Shares’ (1997) 18 Company Lawyer 186:

The author examines the provisions in the Companies Act 1985 (UK) which govern the issue of financial assistance, and the reforms proposed by the DTI in its paper, ‘Company Law Reform: Financial Assistance by a Company for the Acquisition of its Own Shares’.

(D) Greg Golding, ‘Prospectus Misstatement Liability in the 1990s: Where Does the Director Really Stand? - Part II’ (1997) 7 Australian Journal of Corporate Law 299:

This article analyses a director’s liability for prospectus misstatement, assessing the implications of the recent NRMA and AWA cases.

(E) Peter Edmundson, ‘Indirect Self-Acquisition: The Search for Appropriate Concepts of Control’ (1997) 15 C&SLJ 264:

The concept of control is fundamental to the definition of relationships between companies. One context in which the concept arises is indirect self-acquisition. Sections 185 and 205 prohibit a company holding or acquiring shares in its holding company. These provisions rely on there being a ‘subsidiary’ relationship. The ‘subsidiary’ test has its limitations for this purpose and reforms were proposed in the Second Corporate Law Simplification Bill 1996 (Cth). The proposed changes included a ‘controlled entity’ test similar to that currently used elsewhere in the Corporations Law. With broad reforms foreshadowed, this article examines issues involved in finding a formulation of control which is appropriate in this context.

(F) Fraser Todd, ‘Stepping Into the Australian Securities Commission’s Shoes: Not as Easy as it Sounds - The ASC and Procedural Fairness in Company Takeovers’ (1997) 15 C&SLJ 278:

The author examines the law and policy as it relates to procedural fairness and the discretions vested in the ASC, particularly in relation to contested takeovers.

(G) G P Stapledon & Jeffrey Lawrence, ‘Board Composition, Structure and Independence in Australia’s Largest Listed Companies’ (1997) 21 Melbourne University Law Review 150:

This article examines the rationale for the corporate governance recommendations made by the Australian Investment Managers’ Association and others. It also presents the results of a study of board composition and structure in Australia’s 100 largest listed companies. The study found that less than half of the sample conformed with two key AIMA recommendations.

(H) Andrew Hicks, ‘Corporate Form: Questioning the Unsung Hero’ (1997) July Issue, Journal of Business Law 306:

The author asks whether limited liability is appropriate for all of the million small limited companies that now claim it, or whether a new unlimited ‘business corporation’ for small business should be introduced.

(I) Daniel R Fischel & Robert S Stillman, ‘The Law and Economics of Vanishing Premium Life Insurance’ (1997) 22 Delaware Journal of Corporate Law 1:

In the mid-1980s, life insurance companies sold life insurance based on illustrations of future performance which showed premiums ending or ‘vanishing’ after 5 - 10 years. Today, numerous policy holders are being told that they will have to pay premiums for a period longer than initially illustrated in order to keep their policies in force. Many class action suits have resulted. Part I of this article explains the economic origins of vanishing premium policies and shows how, fundamentally, the problems that resulted have been due to economy wide changes in interest rates. Part II surveys some of the formidable legal barriers which plaintiffs, particularly those in class action suits, face in vanishing premium cases. Even if plaintiffs overcome these barriers, they must still prove damages. Part III demonstrates that when damages are calculated properly, the actual exposure faced by the insurance industry from these suits is far less than the relief typically sought.

(J) Jay W Eisenhofer & John L Reed, ‘Valuation Litigation’ (1997) 22 Delaware Journal of Corporate Law 37:

This article provides an overview of valuation issues. It discusses shareholder appraisal actions, breach of fiduciary duty actions against corporations and their officers and directors, actions for fraud and breach of contract arising principally out of acquisitions, reorganisations under the Bankruptcy Code, and tax proceedings. Part I discusses how valuation disputes arise in each context, the legal standards applicable to each claim, and the different legal and financial standards which are applied to the actual valuation calculation in the different proceedings. Part II provides an overview of some selected valuation methodologies. Part III discusses the adjustments that may have to be made to the valuation of a shareholder’s interest, such as a downward adjustment to account for a minority interest and lack of control or an upward adjustment to account for voting control, otherwise known as a control premium.

(K) Claire A Hill, ‘Why Financial Appearances Might Matter: An Explanation for "Dirty Polling" and Some Other Types of Financial Cosmetics’ (1997) 22 Delaware Journal of Corporate Law 141

Companies select a particular accounting method, or even engage in a particular business transaction or practice, to improve their financial appearance to increase or smooth their reported earnings or reduce their reported debt. Pooling - an accounting method for mergers which keeps post-merger accounting earnings higher than alternative methods - is the most notorious example; hence it has been referred to as ‘dirty pooling’. This article discusses generally accepted accounting principles, financial statements, and corporate beautification generally. The author also examines the results of empirical studies of various visible financial statement beautification techniques, and sets out her theory of how highly visible financial statement beautification techniques could persist. The author then discusses how her theory fits into the efficient capital markets hypothesis.

(L) Christine Cuccia, ‘Informational Asymmetry and OTC Transactions: Understanding the Need to Regulate Derivatives’ (1997) 22 Delaware Journal of Corporate Law 197:

This article highlights the differences between exchange traded derivatives and over the counter (OTC) derivatives, and concludes that the relationship between the two types of financial instruments presents a need to regulate both. The author discusses the relationships involved in OTC transactions, and the ways in which the interests of each of the parties come into conflict. The author examines the viability of legislation, regulation, and the development of a firm’s own internal controls, and concludes there is a need for regulation. Finally, the author offers some proposed regulations.

4. CORPORATE LAW CONFERENCES AND SEMINARS

The Centre for Corporate Law and Securities Regulation, in association with the Australian Institute of Company Directors, will be holding an evening seminar, ‘Do Independent Directors Matter?’ at the Melbourne office of Blake Dawson Waldron on November 20 1997 from 5.15 pm - 6.45 pm. The seminar speaker is Professor Bernard Black of the Columbia University Law School, with commentary from Henry Bosch AO, former Chairman of the NCSC and a leading commentator on matters of corporate governance, Jeffrey Lawrence of J P Morgan, and Geof Stapledon of the Centre for Corporate Law and Securities Regulation. The session will be chaired by Catherine Walter. The registration fee is $65. Further details and registration forms are available from:

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The Australian National University’s Centre for Law and Economics, in association with the Centre for Corporate and Securities Regulation, will be holding a one day conference at the ANU in Canberra on November 21 1997. The topic is ‘The Corporate Law Economic Reform Program’. Speakers will be:

Jim Murphy, Head of the Corporate Law Economic Reform Program within the Department of The Treasury;

Claire Grose, Chairperson of the Corporations Law Committee, Business Law Section, Law Council of Australia and Partner of Freehill Hollingdale & Page;

Professor Robert Baxt, Chairman of the Corporations Law Committee of the Australian Institute of Company Directors;

David Goddard, Partner of New Zealand law firm Chapman Tripp Sheffield Young;

Professor Bernard Black, Columbia University Law School, New York;

Senator the Hon Ian Campbell, Parliamentary Secretary to the Treasurer.

The registration fee is $200, or $150 for full time academics. Further details and registration forms are available from:

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If you have a conference or seminar you would like to publicise through the Corporate Law Electronic Network, please forward details by fax: 03 9344 5285 or e-mail: "corplaw@unimelb.edu.au".

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