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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) IFSA WELCOMES GREATER CORPORATE GOVERNANCE DISCLOSURE BY PUBLIC COMPANIES

The disclosure by the top 100 listed public companies of their corporate governance practices improved during 1998 according to a recent study commissioned by the Investment and Financial Services Association (IFSA). The study found that there was an overall improvement in the level and quality of disclosure since 1997. In a Media Release dated 3 September 1998 IFSA's Chief Executive Officer, Lynn Ralph states, 'Whilst it is pleasing to note the attention many companies have paid to this area, there is still plenty of room for improvementŠToo many companies are still treating disclosure as a compliance task rather than an opportunity to communicate with shareholders in a meaningful way'. The study made the following conclusions:

(a) There was considerable improvement in the overall level of disclosure. A total of 60 companies included a corporate governance statement in their 1997 Annual Report that was significantly different from the previous year. The other 40 companies surveyed, however, made no significant change.

(b) There was an overall improvement in the quality of disclosure. A total of 30 companies published statements that were individually tailored to the company and reflected a clear understanding of the underlying issues, compared with only 10 companies last year.

(c) Corporate strategy was addressed comprehensively by 51 companies, compared with 20 last year.

(d) The delineation of responsibility between board and management was more clearly defined, being addressed by 64 companies, compared with 36 last year. Only 4 companies satisfied the new Guideline on Remuneration Disclosure contained in the second edition of 'Corporate Governance: A Guide for Investment Managers and Corporations'.

(e) A formal review of directors' performance was conducted by 33 companies, compared with 27 last year. The content and outcome of that review, however, was not disclosed although it would be a matter of extreme interest to investors in their assessment of those seeking re-election.

(f) Age and term limits for directors, an important element in board refreshment and renewal were generally not disclosed. The maximum age for appointment as a director was specified in only 4 cases, compared with 7 last year. Retirement age was stated by 28 companies, compared with 23 last year, and the institution of a maximum term by 12 companies, compared with 11 last year.

EDITORS' NOTE: Professor Ian Ramsay and Mr Richard Hoad of the Centre for Corporate Law and Securities Regulation have conducted a detailed study of the first year of operation of the disclosure of corporate governance practices by almost 300 Australian listed companies. The study has been published in (1997) 15 Company and Securities Law Journal 454-470.

(B) 1998 CORPORATE LAW WORKSHOP

The 1998 Corporate Law Workshop (hosted by the Business Law Section of the Law Council of Australia) was held on 12-13 September 1998 in Melbourne. The Workshop is one of the leading forums for discussion of corporate law issues in Australia. Those who attended the Workshop including senior representatives of the Australian Securities and Investments Commission, the Australian Stock Exchange, the Futures Exchange, the Business Law Division of the Treasury, practitioners and academics in the corporate law area.

The following papers were presented at the Workshop:

- The proposed statutory derivative action which is contained in the Corporate Law Economic Reform Bill 1998;

- Takeover reforms contained in the Corporate Law Economic Reform Bill 1998 (with a focus on the proposed mandatory bid rule whereby a bidder will be able to exceed the 20 per cent takeover threshold before being required to make a general takeover offer);

- Reform of the financial markets and investment products;

- The new regulatory regime for managed investments (with a particular focus upon the duties applying to directors of those who manage such investment schemes);

- An evaluation of the reforms contained in the Company Law Review Act 1998 regarding the signing and execution of documents on behalf of companies.

The papers presented at the Workshop will be edited and made available for purchase from the Business Law Section of the Law Council of Australia. A future issue of the Bulletin will contain details of how the papers can be purchased.

(C) CORPORATE LAW REFORMS TO ABOLISH ANNUAL RETURNS

On 17 September 1998, the Treasurer announced that the Government will abolish the need for 650,000 proprietary companies to lodge their annual returns from 1999-2000, with that relief extended to a further 1 million proprietary companies in 2000-2001. The Government will also review Corporations Fees.

The reforms form part of Phase Two of the Corporate Law Economic Reform Program (CLERP). Key proposals for reform include:

(a) the establishment of a Business Advisory Board to provide strategic advice on the direction and initiatives of the ASIC Information Division.

(b) initiatives to assist ASIC in making optimal use of new communications technology. This will include legislative changes to allow information to be lodged electronically and over the Internet, and the introduction of alternative and easier payment methods such as credit cards and EFTPOS for the payment of fees.

(c) a 'no change - no lodge' policy which will provide that from year 1999-2000, proprietary companies will not have to lodge an annual return when there have been no changes to the information held by ASIC.

(d) from the year 2000-2001 proprietary companies will not receive an annual return and will not need to lodge one. However companies will be required by law to notify ASIC immediately of any changes to the matters which were previously included in the annual return.

(e) a review of fees set under the Corporations Law with the objectives of reducing fees to be paid by small business and reducing the complexity of fee arrangements.

The proposals will be released in a Proposal Paper in the next Parliamentary term. They will be developed in full consultation with the Business Regulation Advisory Group (established to assist with the CLERP process), ASIC, the wider business and investor community and its professional advisers.

The proposed reforms were welcomed by the Australian Chamber of Commerce and Industry (ACCI). ACCI Chief Executive, Mark Paterson, said the reforms will reduce the regulatory burden on Australian business.

A survey conducted by ACCI setting out business priorities for the next Parliament identified complexity of government regulations and cost of compliance with government regulations as being amongst the five most important areas needing change. Mr Paterson said the removal of the red tape burden from business must be regarded as an ongoing objective for Government, as should the move towards more cost effective and efficient methods of transmitting information and collating it.

Australia's two leading accounting bodies, the Institute of Chartered Accountants in Australia (ICAA) and the Australian Society of CPAs (CPA), both also welcomed the Treasurer's proposed reforms. In a joint statement, the two accounting bodies said the planned changes were logical and would benefit 65% of Australia's small businesses which would no longer need to lodge annual returns. ICAA Technical Director Keith Reilly said, 'The proposal to abolish the need for most small proprietary companies to lodge annual returns will mean significant cost savings for the companies themselves and for the regulator. The accounting bodies have long supported this measure.'

CPA Director, Accounting and Audit, Colin Parker, said the bodies also welcomed the review of corporations fees: 'At present the fee structure for a small company is quite unrelated to the services that are provided by ASIC. If ASIC's processing costs are cut with the abolition of annual returns, these savings should be passed on to companies, and ultimately to the consumer.'

2. RECENT CORPORATE LAW DECISIONS

(A) Television and Media Services Ltd v Australian Securities and Investments Commission

Administrative Appeals Tribunal, AAT No 13213, B J McMahon (Deputy President), 26 August 1998

This case involved a review by the AAT of a decision by the Australian Securities and Investments Commission (ASIC) to exempt a company from the requirements of s 1029 of the Corporations Law. The company seeking the review was Television & Media Service Ltd (TMS). Much of its business involved the selling of advertising time on cinema screens. The companies involved in this industry secured from the owners of cinemas the right to sell advertising time. On 30 June 1997, a competitor of TMS, MEG, entered into a screen advertising agreement with Village Roadshow Limited whereby MEG secured access to a range of screens owned by Village. The agreement between MEG and Village detailed the prices payable by MEG for access to the Village cinema screens. Evidence accepted by the AAT was that if this information was made available to any of MEG's competitors, its position would be likely to be adversely affected in that its competitors would have the benefit of knowing the prices which MEG had paid to Village. The AAT also noted that the agreement contained confidential and commercially sensitive information concerning the Village cinema screens subject to the agreement.

After MEG entered into the agreement, it required further capital to fund an expansion of its activities. It prepared and issued a prospectus and section 11.2 of the prospectus detailed the company's material contracts. Included among these was the agreement with Village and, although a summary of the document was set out in the prospectus, none of the confidential information was included.

Section 1029 of the Corporations Law requires a corporation in respect of whose securities a prospectus has been lodged, to deposit a verified copy of every material contract referred to in the prospectus at the registered office of the corporation. The company is then obliged to 'keep each such copy for a period of at least 12 months after the lodgment of the prospectus for inspection by any person without charge'. TMS made several attempts to inspect the agreement between MEG and Village at the office of MEG. MEG refused to allow inspection of the agreement. In late 1997, MEG made an application to ASIC seeking an exemption from compliance with s 1029 of the Corporations Law. This application was granted by ASIC. TMS then sought a review before the AAT of the decision of ASIC to grant the exemption.

An important point was that ASIC had issued a policy statement as well as a class order allowing exemptions from s 1029 where compliance would cause adverse commercial consequences. However, compliance with the class order must be done prior to the issue of the prospectus so that the exemption can be referred to in the prospectus. The AAT accepted the evidence of MEG that its failure to take advantage of the class order was an oversight and it would have been entitled to the benefit of the class order.

TMS argued that because MEG had not complied with the requirements of the class order it was not appropriate for ASIC to issue a later exemption 'because it was tantamount to encouraging an erosion of the standards of care and diligence which should be applied to the preparation of prospectuses and compliance with the Corporations Law'.

The AAT noted that although TMS sought to gain a commercial advantage in gaining access to the contract with Village, there is clear authority that the purpose or motive of the person seeking to inspect such a material contract under s 1029 is irrelevant: Rossington Holdings Pty Ltd v Lion Nathan Ltd (1992) 7 ACSR 509. In Rossington, McLelland J rejected any comparison between s 1029 and other statutory provisions such as s 319 where inspection of the books of a company pursuant to a court order is made conditional on good faith and a proper purpose being shown. His Honour observed that such conditions are conspicuously absent from s 1029.

The AAT observed that if TMS had brought court proceedings at any time between the first refusal of access to the agreement by MEG and the relief granted by ASIC, TMS would have had good prospects of success even though it sought to gain a commercial advantage. Such an application could have been brought pursuant to s 1324 of the Corporations Law which provides that where a person is engaging in conduct that contravenes the Law, the court may grant an injunction.

However, TMS chose instead to seek review of the exemption granted by ASIC. This meant that different considerations applied. The AAT noted that if court proceedings had been brought by TMS prior to the ASIC exemption being granted, the court would have been concerned to ensure there was compliance with the Corporations Law. However, in determining whether to grant an exemption, ASIC is entitled to take into account all the surrounding circumstances in deciding whether or not an exemption should be given. The AAT concluded that, in granting the exemption, ASIC had acted properly and in accordance with its own policy. Failure to give the relief would have resulted in substantial detriment to MEG with no demonstrated benefit to any third party. The AAT therefore affirmed the decision of ASIC.

(B) Australian Securities Commission v John Phillip Donovan And Julia Gwendolin Donovan

Federal Court of Australia, Fed No 986/98, Cooper J, 20 August 1998

This judgment involved the duty of care and diligence contained in s 232(4) of the Corporations Law and a determination of the appropriate penalty for breach of that statutory provision.

The Australian Securities Commission (ASC) filed an application asserting a breach of s 232(4) of the Corporations Law by the respondents. This section provides that in the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances. The respondents were directors of a company called Good Life Company and Friends Pty Ltd. It sold growerships and quotas for the production of a fermented milk product known as Kefir.

The evidence showed that the company continued to sell growerships and quotas between November 1995 and October 1996 contrary to evidence from both employees and outside experts that the company might be insolvent and that it lacked any market in which to sell the Kefir products. The court held that no person in the position of the respondents should have, acting reasonably and exercising appropriate care and diligence, continued after November 1995 to sell growerships and quotas to potential growers of Kefir. There was not at that time any reasonable basis to reject the professional advice which was given to the company. Consequently, each of the respondents had breached s 232(4) of the Corporations Law.

The court then turned to consider the appropriate penalty to be imposed. Section 232(4) is a civil penalty provision. The ASC submitted that the first respondent should be prohibited from being involved in the management of a corporation for life and that the second respondent should be prohibited from being involved in the management of a corporation for 10 years. The court noted that the relevant civil penalty provision which allows for a management banning order by the court is a protective provision designed to protect the public and to prevent a corporate structure being used by individuals in a manner which is contrary to proper commercial standards. The court found that the first respondent did not accept any responsibility for what had occurred to his company. It was therefore appropriate to impose an order banning him from management. However, the court expressed some doubt as to whether under s 1317EA(3) it could ban a person for life. In particular, the section refers to the court making a banning order 'for such period as is specified in the order'. The court stated that an order banning a person from managing a corporation for life is properly characterised as an order prohibiting a person permanently, in contra-distinction to a specified period, from managing a corporation. The court noted that other statutory provisions of the Corporations Law do refer specifically to the power to prohibit a person permanently from managing a corporation.

The court did not express a final view on the interpretation of s 1317EA(3) as it reached the conclusion that a permanent banning order was not warranted on the facts. It imposed a banning order of 10 years on the first respondent noting that his conduct was serious and although the respondent did not have a history of corporate misconduct and although he had not gained financially, the creditors and growers had suffered substantial loss and the first respondent refused to accept that what he had done was wrong and unlawful. In the case of the second respondent (who was the former spouse of the first respondent), the court stated that her conduct arose from a lack of understanding of the proper role of a company director and the duty of care and diligence owed by a director to the company. The court prohibited her from managing a corporation for a period of 3 years.

In addition to the management banning orders, the court imposed a pecuniary penalty of $40,000 on the first respondent and $4,000 on the second respondent.

(C) Deputy Commissioner Of Taxation v Leslie Raymond Austin

Federal Court of Australia, Fed No 1034-98, Madgwick J, 27 August 1998

Issue: Definition of De Facto Director

In 1996 the company Talljade Pty Ltd was wound up. In the same year, the company's liquidator obtained an order against the Deputy Commissioner of Taxation (DCT) for recovery of payments of group tax and penalties made by Talljade to the DCT. This was on the basis that those payments were unfair preferences within the meaning of s 588FA of the Corporations Law.

In this case, the DCT sought to be indemnified by Mr Austin as an alleged de facto director of Talljade for the group tax and penalties under s 588FGA of the Corporations Law. This section provides that, when there is a preference payment made and the court makes an order against the DCT, then the directors of the company are, subject to exceptions which were not material in the case, liable to indemnify the DCT. The issue in the case was whether Mr Austin could be regarded as a de facto director of Talljade.

Section 60 of the Corporations Law defines directors to include de facto directors; ie, 'any person occupying or acting in the position of director of a corporation, by whatever named called and whether or not validly appointed to occupy or duly authorise to act in the position'. Mr Austin had resigned as a director of Talljade on 30 October 1995. However, he then continued to play an active role in the company including negotiating agreements with the DCT on behalf of Talljade and negotiating time to pay with some of the company's creditors. The court stated that given the great variety of commercial and corporate life, defining what it means to be 'acting as a director' by reference to general principles may be unprofitable. Rather, whether a person acts as a director 'will often be a question of degree, and requires a consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned'. Factors considered relevant by the court included:

(a) the size of the company - in a large and diversified company, great discretion to deal with significant matters may be given to employees;

(b) the internal practices or structure of the company in that certain work given to an individual may be of such a type that it is more appropriate to classify that work as being undertaken by the individual in the capacity as an expert employee or consultant rather than as a director; and

(c) how the person who it is claimed has acted as a director was

reasonably perceived by outsiders who deal with the company.

The court stated that a necessary condition of acting as a director, whether properly appointed or not, is that one exercises what might be called 'top level management functions'. On the facts of this case, Mr Austin exercised such functions and, according to the court, had the 'practical direction of the company'. In these circumstances, the court held Mr Austin to be a de facto director and therefore liable to indemnify the DCT.

(D) Norman Stewart Taylor v Santos Ltd

Full Court Of The Supreme Court Of South Australia, Doyle CJ, Pryor And Olsson JJ, Judgment Delivered 11 September 1998

Issue: Discovery of documents held by a third party where the third party is wholly-owned by another company which is wholly-owned by the defendant. Are the documents 'in the power' of the defendant for the purpose of discovery?

The plaintiff had sued Santos Limited ('Santos') for damages in relation to the termination of his employment by Santos. The plaintiff applied for discovery of certain documents in the possession of Santos Europe Limited ('SEL'). At the time of judgment, SEL was a wholly-owned subsidiary of Santos International Holdings Pty Limited ('SIHL'). SIHL was a wholly-owned subsidiary of Santos.

A Master of the Supreme Court had ordered Santos make discovery of the documents on the basis that they were within the control of Santos. The Master held that Santos had a presently enforceable legal right to require SEL to produce the documents and, in the alternative, that Santos had 'de facto control' over the documents held by SEL.

The Full Court overturned the decision of the Master. Doyle CJ noted that the obligation of Santos was to make discovery of documents that were in its 'possession, custody or power'. As the documents were not in the possession or custody of Santos, the issue was whether they were in the power of Santos. The court applied the judgment of Lord Diplock in Lonrho Limited v Shell Petroleum Co Limited [1980] 1 WLR 627 where Lord Diplock stated that in the context of the phrase 'possession, custody or power' the expression 'power' must mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Doyle CJ stated that a person does not have a 'presently enforceable legal right' to obtain a document if the person is able to inspect the document only if the third person who has control of the document agrees to permit inspection or agrees to refrain from so exercising that person's control as to prevent inspection. Doyle CJ considered the judgment of Hedigan J in Linfa Pty Ltd v Citibank Ltd [1995] 1 VR 643. He expressed some reservations about what was said by Hedigan J and stated that documents of a subsidiary company are, prima facie, not in the power of the controlling company. Nor he stated 'will it usually be appropriate for a court, in the context of discovery, to engage in the lifting of the corporate veil. Proper recognition must be given to the distinct obligations of the directors of a subsidiary company'. However, Doyle CJ stated that the decision in Linfa was consistent with the approach that he adopted because in that case Citibank had the actual immediate ability to inspect, and if necessary produce, the relevant documents because the company in possession of the documents was staffed by Citibank staff, and the company was operated by Citibank staff for Citibank purposes as if it were a part of Citibank.

Doyle CJ held that Santos did not have a presently enforceable legal right to inspect the documents held by SEL. He stated that although Santos was able to determine an overall commercial strategy that would be followed by each of SIHL and SEL and although it had the ultimate ability if it wanted to exercise its powers to replace directors and staff in those companies, it was important to recognise the fact that SEL and SIHL were distinct legal entities. The directors of SEL owed duties to their own company. There was nothing to suggest that the directors of SEL generally acted at the direction of Santos or that SEL did not have to make use of its own decision-making structures and staff. 'The fact that SEL complied with an overall group strategy does not, in my opinion, lead to the conclusion that Santos was in a position to determine or dictate the decision on every matter that fell to be decided by SEL'.

Doyle CJ then considered the alternative conclusion of the Master that Santos had de facto control over the documents in the possession of SEL. Doyle CJ disagreed with this conclusion and stated that it did not distinguish between the ability to influence or dictate the broad policy and strategy to be followed by a subsidiary and the ability to insist upon compliance by the subsidiary with a specific demand for access to a particular document. In particular, there was no evidence to support a conclusion that Santos made decisions that fell to be made by the directors of SEL or its staff. The daily operations of SEL were not controlled and conducted by Santos. Doyle CJ noted that it may seem paradoxical that Santos had the ability to control SEL in relation to matters of broad strategy but yet documents in the possession of SEL were not in the power of Santos. According to Doyle CJ, the control that Santos had over SEL did not extend to an actual ability to require the documents to be produced for inspection because SEL would do so only if the directors of SEL considered it appropriate and in the interests of SEL that they should do so, not because they had no practical choice.

Another submission put by counsel for the plaintiff was that Santos could cause SIHL to alter its constitution, then in turn cause SIHL as shareholder of SEL to resolve in general meeting the documents be produced to SIHL. In other words, Santos could obtain possession of the documents after a series of resolutions by the shareholders and directors of SIHL and SEL. Doyle CJ stated that although Santos may well be able to put itself in a position in which it could obtain inspection, in his opinion, an ability to obtain inspection after following certain postulated steps does not constitute a present power over the documents.

(E) John Spinks and Others v Maxwell William Prentice

Federal Court of Australia, No 3100 of 1998, FED No 1120/98, Beaumont, Burchett and Lehane JJ, 10 September 1998

The appellants were officers of a corporation which was being wound up under the Corporations Law of the ACT (ACT Law). The respondent was the liquidator who had sought orders from the Federal Court summoning the appellants for examination and for the production of documents. The appellants sought an order to permanently stay their examinations and the production of the documents.

The appellants contended that:

(a) jurisdiction had not being validly conferred upon the Federal Court with respect to civil matters arising under the ACT Law; and

(b) the Federal Court did not have power under the ACT Law to make orders to summons persons for examination (s 596B) or to produce documents (s 597(9)) as the Court could only exercise functions which were exclusively judicial or incidental to judicial functions.

The appellants argued that s 51(1) of the Corporations Act 1989, which purported to confer original jurisdiction upon the Federal Court, was ultra vires on the basis that conferral of jurisdiction under the Commonwealth's territories power, s 122 of the Constitution, was a non-federal matter and hence outside the scope of Chapter III of the Constitution. Specifically, they submitted that s 51(1) was outside the scope of s 76(ii) of the Constitution which grants the Commonwealth legislative power to confer original jurisdiction on the High Court in any matter arising under any law of the Commonwealth, and s 77(i) which grants the Commonwealth legislative power to define the jurisdiction of any federal court other than the High Court.

The Full Federal Court rejected this argument, finding that s 5 the Corporations Act 1989, which applied the Corporations Law to the ACT, was a valid exercise of the Commonwealth's territories power; it was a law made by the Parliament within the meaning of s 76(ii) and s 51(i) was a valid exercise of the power under s 77(i).

In relation to the Federal Court's power to summons persons for examination and require production of documents, the appellants argued that this was invalid as it could be exercised in a non-judicial context, such as summoning for examination an officer of a corporation not being wound up, and relied on Gaudron J's judgment in Gould v Brown where Her Honour had stated that the co-operative legislative scheme was intended to operate 'seamlessly', and was not capable of being severed. The appellants referred to the doubt over the constitutionality of s 447A of the Corporations Law, on the basis of impermissible legislative delegation, expressed by Gaudron J in Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 72 ALJR 873 at 906. That section empowers the court to make 'such order as it thinks appropriate about how [Part 5.3A of the Corporation Law] is to operate in relation to a particular company'.

The Full Federal Court rejected this submission, holding that Chapter 5, Part 5.9, in which the examination power is found, was valid in all respects and that even if s 447A were beyond power, the balance of Part 5.9 could stand whether s 447A was severed or not.

Thus the Full Federal Court confirmed the constitutional validity of the Federal Court's jurisdiction to hear civil matters arising under the ACT Law made under the Commonwealth's territories power, and also confirmed the Federal Court's power to summons a person in connection with the examinable affairs of a corporation and to require the production of books at an examination.

3. RECENT ASIC DEVELOPMENTS

(A) ASIC BOOK LAUNCH

On 31 August 1998, ASIC launched its first book, 'Scams and Swindlers', containing case studies on financial swindlers and their victims.

The book was written using real ASIC cases which in some examples involved a team of investigators, lawyers and accountants working for many months. By profiling these cases, ASIC hopes it will allow potential investors to learn from other people's mistakes.

The book was written by ASIC's Regional Commissioner for the Northern Territory, Bruce Brown, who estimates about 10,000 Australians lose money through fraudulent and illegal investment schemes each year.

(B) TIME EXTENSION FOR COMPETENCY STANDARDS CONSULTATION

On 2 September, ASIC extended the timetable for advisory services industry participants to comment on their preferred framework for the development of personal competency standards.

In February ASIC released a consultative paper which proposed the Australian National Training Authority (ANTA) framework be used to develop and implement personal competency standards.

In light of the range of views received by ASIC and because of the importance of the matter, ASIC intends to give industry participants more time to review the ANTA framework and to possibly submit alternative or complementary models.

Personal competencies will be developed to apply to all those who advise on retail financial products, including securities, and life and general insurance.

ASIC envisages the framework having at least three components:

(a) a competency standard to be met by the principal or principals of the advisory service business (ie licence applicants);

(b) a competency standard to be met by those who provide financial advice services as representatives; and

(c) a mechanism or mechanisms for assessing licence applicants and representatives against the standards.

The time period in which participants must comply with the competency standards will depend on the implementation of the single licensing regime proposed under the Government's Corporate Law Economic Reform Program (CLERP). Appropriate transition periods for participants will be provided.

In the recent consultation process, a number of industry participants supported the adoption of the ANTA framework proposal, agreeing with the benefits of the proposal, such as building on ANTA's previous experience in the financial sector and the portability of nationally recognised qualifications.

Other industry participants requested more time to consider the use of the ANTA framework. There were also others who, while endorsing the goal of setting credible competency standards, believed that they could develop a more appropriate model.

While ASIC considers that the ANTA framework is a viable option, it will retain an open mind when reviewing alternative or complementary models.

Persons wanting to suggest an alternative model should develop their proposal within certain parameters to ensure it is consistent with ASIC objectives. Therefore the proposal needs to:

(a) be consistent with the proposed single licensing regime for intermediaries (in particular, the common set of requirements in relation to conduct of business recommended in CLERP Paper No 6);

(b) consider the requirements set out in the section entitled 'What are the processes that should be followed when accrediting a course/program' contained in ASC/ISC Draft 5 'Consistent Regulation of Investment Advice', June 1996; and

(c) address the costs and benefits and other issues required under the Commonwealth Office of Regulation Review's publication, 'A Guide to Regulation'.

Copies of the Consultative Paper are available from the ASIC Infoline on 1 300 300 630 or from the ASIC website: "http://www.asic.gov.au".

Submissions should be forwarded by 30 September 1998 to:

Jan Horwood   
Regulatory Policy Branch   
ASIC   
GPO Box 5179AA   
Melbourne 3001

(C) CONCISE REPORTS FOR SHAREHOLDERS

ASIC announced on 6 September that it would consider applications for accounting relief by companies that wish to send a concise report to shareholders instead of a full annual report.

Recent amendments to the Corporations Law allow companies the choice of sending a concise report or full annual report to shareholders once the Australian Accounting Standards Board (AASB) has finalised an accounting standard specifying the contents of concise financial reports. An accounting standard dealing with concise financial reports is expected to be in operation for financial years ending on or after 31 December 1998.

ASIC Deputy Chairman Peter Day, said ASIC had been encouraged by the AASB to allow the current exposure draft of a proposed AASB accounting standard dealing with concise financial reports (ED 94 'Concise Financial Reports') to be the basis for concise reporting to shareholders.

'Given these circumstances together with the clear intention of parliament for operation of the new law as soon as possible after 1 July, ASIC believes companies should be given an opportunity to implement this initiative early, under controlled conditions,' Mr Day said.

ASIC relief would allow companies to send shareholders concise financial reports prepared in accordance with ED 94 provided the report also contains all information that directors consider an ordinary investor would require. Relief would also depend on meeting specific conditions relating to full report availability including a 1800 (free call) telephone request service, timely delivery of information and the full report being accessible via Internet access.

The Chairman of the AASB, Mr Ken Spencer, said that the adoption by companies of the exposure draft dealing with concise financial reports as a condition of any accounting relief granted by ASIC would provide valuable feedback to the AASB on the practical operation of the proposed accounting standard.

Applications for a specific accounting exemption should be made to the appropriate ASIC regional office.

(D) ASIC LOOKS FOR BETTER FEE DISCLOSURE

Radical improvement in disclosure of fees and expenses coupled with more transparent and tailored reporting on investment returns is needed by fund managers, ASIC Deputy Chairman Peter Day said while addressing IFSA's (Investment & Financial Services Association) 1998 Financial Services Conference in Canberra on 8 September 1998.

He outlined a number of current and 'live' examples of what he described as disappointing standards of disclosure to investors.

'In most of the cases I cited, fees and expenses related to the management of individual investment products were not shown on the face of the statements of account. These are literally hidden costs.

'Fees and expenses levied are typically disclosed, not individually but in aggregate, somewhere else in a separate report unrelated to an investor's individual statement of account.

'I am discouraged that there are so many examples of leading investment houses failing to show fees and expenses charged to their customers' accounts, often not clearly showing or explaining investment returns which relate to income earned or market value gains, and providing almost no analysis of charges or returns in dollars or on a percentage basis, on the face of the statements of account.

'I believe investors in many investment funds are treated poorly when it comes to their personal statement/report received quarterly, half yearly or yearly. It is surprising this situation exists when investors regularly and resoundingly say fees and returns are at the top of their concerns in choosing investment products.

'This is a unique, creative and important industry. We are at a critical time in its development. The CLERP proposals foreshadowed a framework for reform of disclosure regimes in which you could participate and shape. Your customers say they need you to be more transparent, and they must surely reward those who do so with loyalty and increased investment.

'ASIC has recently held constructive discussions with the industry and IFSA on short form investment prospectuses and how fee structures should be disclosed. Yet we acknowledged that much more needs to be done in that area.

'So while we are making some progress on these types of issues at the prospectus (or entry) level, ASIC wants to encourage, stimulate and support continued improvement in industry's periodic reporting standards.

'Individual investment managers in the industry itself need to address these customer issues at a face-to-face reporting level. This is basic customer service.'

(E) ASIC SURVEILLANCE AND INTERNET CAPABILITIES

Maintaining an efficient and regulated market in the global world of electronic commerce, has been signalled as a priority area for ASIC by its Deputy Chairman Peter Day.

Speaking to the Group of 100 National Congress in Sydney on 9 September 1998 about 'Managing Regulation in the Global Market Place', Mr Day said recent research suggests that as many as 40% of Australian investors will be doing some of their investing via the Internet by 2001.

'This emerging trend presents real opportunities for suppliers and customers of financial services, while giving ASIC another challenge to work on,' Mr Day said.

'ASIC must be capable of monitoring and acting on breaches of Australian securities and consumer law occurring via the Internet. ASIC is directing efforts to enhance its Internet surveillance and enforcement capabilities using advanced Internet software tools that can automate surveillance processes, using push technology and intelligent agents.'

ASIC also wants to develop its capability to be able to monitor and capture, on an automatic basis, details of a web site for investigatory or evidentiary purposes and retrieval of selected or filtered information (eg. addressing specific criteria).

'Planning is under way to experiment in automatically integrating information from our enforcement activity database, our company records database and information gathered by Internet robots,' Mr Day said.

'ASIC has a responsibility to promote confidence in financial markets and services whether those markets use traditional or emerging technologies. The potential exists for regulators to undertake virtual advertising, positioning their own brand warnings adjacent to web searches advertising investment opportunities believed to exhibit high-risk-high-return characteristics. Such warnings could be hot-linked to the regulator's own or other web sites, leading the potential investor into a product health warning page, perhaps based on case histories the regulator has compiled,' Mr Day said.

(F) POLICY PROPOSAL - ELECTRONIC COMMERCE

On 14 September 1998, ASIC released its policy proposal paper on offers, invitations and advertisements of securities which appear on the Internet.

This policy proposal has been developed as part of ASIC's commitment to recognising the benefits that electronic commerce can offer and removing unnecessary impediments.

One of ASIC's aims in this regard is to improve certainty for those who use the Internet for commercial transactions. This policy proposal also forms part of ASIC's co-operative international efforts. ASIC is working within international organisations to encourage regulators in other countries to issue guidelines about how the requirements of their laws affect transactions in, and communications about, financial products on the Internet. As regulators in more jurisdictions provide this information, there will be greater certainty and less regulatory risk for Australian issuers using the Internet to make available offers, invitations and advertisements of securities, and for Australian investors using the Internet to seek out investment opportunities.

Efforts to harmonise the requirements of different jurisdictions, which should reduce compliance costs, are also continuing. ASIC's approach is to minimise compliance costs as much as reasonably possible and so it has prepared this policy proposal with reference to the work that has been done in other jurisdictions on these issues.

The main features of this policy proposal are:

(a) ASIC will not seek to regulate offers, invitations and advertisements of securities that appear on the Internet if the offer, invitation or advertisement:

(i) is not targeted at persons in Australia;

(ii) contains meaningful jurisdictional disclaimers; and

(iii) there is no misconduct;

(b) issuers that ASIC regulates will be required to include a statement in their electronic prospectuses identifying the countries where their securities are available; and

(c) ASIC will continue its co-operative efforts with international regulators to:

(i) improve certainty for Australian issuers who make available offers, invitations or advertisements of securities on the Internet; and

(ii) promote the confident and informed participation of consumers in Internet transactions in financial products.

A copy of the policy proposal is available from the ASIC website at : http://www.asic.gov.au or the ASIC Infoline on 1 300 300 630.

Submissions are due by 9 October 1998 and should be directed to:

Donna Croker   
Regulatory Policy Branch   
ASIC   
GPO Box 5179AA   
Melbourne 3001

E-mail: regpol.melb@asic.gov.au

(G) COMPLAINTS RESOLUTION SCHEME APPROVED

On 16 September 1998, ASIC approved the first complaints resolution scheme under its interim policy statement dealing with the Good Advice Regulations for financial advisers.

The Financial Services Complaints Resolution Scheme (FSCRS), an initiative of the Financial Planning Association of Australia, has been approved for the purposes of considering complaints about licensees who provide investment advice to retail investors.

From 1 October 1998, licensees must becomes members of an external complaints resolution scheme approved by ASIC. The approval granted to the FSCRS is valid until 1 October 1999. The approval is conditional upon the scheme addressing key elements of the interim policy statement dealing with the adequacy of resourcing and independence from member organisations.

(H) SECURITIES AGREEMENT WITH ITALY

On 21 September 1998, ASIC entered into a Memorandum of Understanding with the Commission Nazionale Per Le Societa E La Borsa (CONSOB) of Italy during a meeting of the International Organisations of Securities Commissions (IOSCO) in Nairobi. The MoU will provide a framework for the exchange of information and investigative assistance between ASIC and Italy's CONSOB in securities and futures matters including securities fraud, insider trading, market manipulation, and disclosure requirements for securities acquisitions and prospectuses.

The MoU aims to enhance investor protection in Australia and Italy by ensuring that the investigation of breaches of securities laws are not frustrated by jurisdictional difficulties associated with cross border enforcement activities. In this regard the MoU will contribute to the integrity and efficiency of the securities markets in Australia and Italy. The MoU was signed by the Chairman of CONSOB, Professor Luigi Spaventa, and ASIC Chairman Alan Cameron.

Mr Cameron said it was significant that ASIC continued to expand its ties with Securities Commissions throughout the world.

'It is an example of regulators across the world showing their willingness to work together,' Mr Cameron said.

'With improvements in technology and growth in international information systems it is important for Australia to take a global outlook on regulation and the exchange of information between regulators.'

MoUs also exist between ASIC and securities and futures regulators in the United States, United Kingdom, France, New Zealand, Hong Kong, China, Canada, Thailand, Brazil, Indonesia, Germany and Malaysia.

4. RECENT ASX DEVELOPMENTS

(A) LEGAL ACTION

On 4 September 1998 the Chief Justice of the Supreme Court of South Australia rejected the application by Mr Mclachlan that challenged the inspection report, evidence and charges produced by ASX in connection with its disciplinary action against Mr Mclachlan. Costs were awarded to ASX. A suppression order was made for 14 days (time for lodgment of appeal) in respect of a number of exhibits relating to the ASX inspection report and notice of charges.

(B) ASX BUSINESS RULE AMENDMENTS

(a) Marketable Parcel

The definition of 'Marketable Parcel' in the ASX Business Rules has been amended effective 3 August 1998.

The amended definition is:

'Marketable Parcel' means in relation to:

(i) Equity Securities and redeemable preference shares with a fixed and certain date for redemption, but not rights to subscribe for Equity Securities, a parcel of securities of not less than $500 based on:

- the closing price on SEATS, if the Equity Securities are quoted; or

- the price paid on issue, if the Equity Securities are unquoted; and

(ii) rights to subscribe for Equity Securities, a parcel of rights which, if taken up in full, would result in a parcel of Equity Securities which would be not less than $500 based on:

- the closing price on SEATS of the Equity Securities at the time of purchase of the rights, if the Equity Securities are quoted; or

- the total application moneys payable in relation to the exercise of the rights, if the Equity Securities are unquoted.

(iii) Loan Securities other than redeemable preference shares with a fixed and certain date for redemption, 1 security with a face value of not less than $100.

The definition is only used for the purpose of defining the minimum economic holding in a company. Servicing a large number of small holders can be a considerable expense for a company.

The new definition overcomes the problems with the lack of consistency of the previous definition (which was calculated by reference to the number of securities, which in turn depended on the price of the securities). The previous thresholds in the definition functioned in an arbitrary manner, such that what constitutes a Marketable Parcel varied from $2.00 to $500 and over - depending on which price band a security fell into and where the price of the security lay within that band.

(b) Single Price Auction

The closing single price auction, which was introduced in February 1997 as a trial, has, as of 10 August 1998, become a permanent feature of the equities market. To give effect to this initiative, ASX Business Rule 2.6.3A has been deleted and new Business Rule 2.6.5A and a definition of 'Closing Single Price Auction' inserted.

(c) Section 2A

Section 2A of the ASX Business Rules was introduced on 11 August 1997. This section provided for the introduction of a matching facility trial (ASX Match) as an adjunct to SEATS, to operate a matching facility at one or more times during the day.

Section 2A had a sunset provision whereby Section 2A would cease to have effect on 10 August 1998. This sunset provision has been extended for a further 12 months.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Anne Wyatt and Rosalind Mason, 'Legal and Accounting Regulatory Framework for Corporate Groups: Implications for Insolvency in Group Operations' (1998) 16 Company and Securities Law Journal 424-450

This article takes a cross-disciplinary approach to examine how the current legal and accounting regulatory frameworks present problems for an equitable, orderly administration of the insolvent company within a corporate group. It is proposed that the Australian legal and accounting frameworks do not provide specific, systematic solutions for ongoing operation of corporate groups and also their administration in liquidation. Further, that corporate, legal and accounting regulation are closely intertwined but lack consonance. The discrepancies between legal and accounting regulation have an adverse impact on the relevance and usefulness of financial information, particularly when insolvency strikes. Suggested reforms include explicit recognition of corporate groups in the Corporations Law, joint development of common precepts within law and accounting regulation, and statutory provisions facilitating a group solution in the event of insolvency.

(B) John Goodwin, 'Financial Reporting and Auditing Obligations of Proprietary Companies with Foreign Company Shareholders' (1998) 16 Company and Securities Law Journal 451-463

In April 1997, the Australian Securities Commission issued four Class Orders dealing principally with the preparation, auditing and lodgment obligations of certain proprietary companies which have foreign company shareholders. Considered together with the Corporations Law, these Orders have provided some practitioners and other interested parties with difficulties understanding their application. This article examines these Orders and provides a practical guide to their understanding.

(C) Vivien R Goldwasser, 'Current Issues in the Internationalisation of Securities Markets' (1998) 16 Company and Securities Law Journal 464-485

This article discusses several of the forces which impact upon the regulation of world equity markets: internationalisation; harmonisation; and regulatory arbitrage. To be sure, increasing internationalisation of securities markets and harmonisation of laws are significant features of the changing financial landscape and cannot be ignored. However, progress made in this direction has been far from monolithic and should not be overstated. Furthermore, the model of international regulatory competition - which postulates that corporations will engage in regulatory arbitrage, moving from one exchange to another in search of the least costly, least regulatory, and most tolerant legal environment - is fine in theory but perhaps not in practice.

(D) Jonathan Farrer and Ian M Ramsay, 'Director Share Ownership and Corporate Performance - Evidence from Australia' (1998) 6 Corporate Governance: An International Review 233-248

An important and controversial corporate governance issue is the extent to which share ownership by directors increases corporate performance. Some commentators suggest that increasing directors' shareholdings in their companies provides directors with the incentive to improve corporate performance. Other commentators suggest that high levels of director share ownership may simply entrench directors. The authors examine whether there is a positive relationship between the level of director shareholdings and corporate performance for 180 listed Australian companies. They find that, in some circumstances, such a relationship does exist but the results differ according to a number of factors such as the performance measure used, whether director share ownership is measured by dollar value or percentage of the shares of the company outstanding, the size of the company and the industry in which the company operates.

(E) Chris Mallin and Kean Ow-Yong, 'Corporate Governance in Small Companies - the Alternative Investment Market' (1998) 6 Corporate Governance: An International Review 224-232

This paper examines corporate governance in small companies listed on the Alternative Investment Market (AIM) which was established in the UK in 1995. The London Stock Exchange rules stipulate that each company wishing to join AIM must have a nominated adviser and broker. The nominated adviser is seen as playing a key role in AIM companies, enjoying an ongoing advisory relationship as well as playing a monitoring role. The presence of the nominated adviser may, in some ways, mean that less emphasis is placed on formal corporate governance structures, as the nominated adviser does have a close relationship with the company it advises.

The formal aspects of corporate governance are analysed in terms of disclosures in the admission document put forward by AIM companies coming to market. Preliminary findings suggest AIM companies brought onto the market by a nominated adviser who also acts as the nominated broker pay more attention to the Cadbury Code on corporate governance. Also, the study suggests AIM companies raising no new capital on admission possess relatively weaker corporate governance structures.

The success of AIM, with over 240 companies having joined in the first 18 months of its existence, means that the findings have implications for policy-makers involved in corporate governance not only in the UK but also for those involved in the establishment of markets for small companies in a global context.

(F) John Holland, 'Influence and Intervention by Financial Institutions in their Investee Companies' (1998) 6 Corporate Governance: An International Review 249-264

This article describes the corporate governance role of financial institutions in their portfolio companies during typical co-operative circumstances and during periods of corporate need and difficulty. The breakdown of relationships and the use of the market for control is also explored. Confidential case studies were prepared from interviews with senior directors and fund managers in UK based financial institutions. The implicit influence process was constrained by FI unwillingness to interfere in good performing companies and by limited FI power in co-operative circumstances. However, the case FIs were able to use their quasi insider knowledge advantage to diagnose problem areas in strategy, management quality, and the effectiveness of the board. They kept this diagnosis in reserve until circumstances arose where they could exercise much stronger influence. The article ends by exploring this extensive private influence process within instititionalist theory and by discussing the implications of this behaviour for policy changes.

(G) T E Cooke and Etsuo Sawa, 'Corporate Governance Structure in Japan - Form and Reality' (1998) 6 Corporate Governance: An International Review 217-223

The last decade has witnessed a growing debate over corporate governance issues in a number of countries. The debate developed from Anglo-Saxon countries, such as the UK and US, where dispersed share ownership and thriving takeover markets are evident with financial systems referred to as market based. However, the debate now includes countries with credit-based financial systems, such as Germany and Japan, which are characterised by intercompany shareholdings, intercompany directorships and often substantial bank involvement. A question of considerable importance is whether the two systems of corporate governance will converge over time, particularly in the context of increasing globalisation of trade. To contribute to this debate, this article focuses on corporate governance in Japan, an issue that has been debated with great interest in Japan by businessmen, academia, critics, government, consumers and accountants.

(H) Grant Ledgerwood, 'New Corporate Governance Paradigms for Transnational Enterprises - Shell and Strategic Futures for Big Oil' (1998) 6 Corporate Governance: An International Review 269-277

This article comments on and positions within the issues of corporate governance the process by which Shell, one of the world's largest and most successful corporations, first committed important errors in its environmental, community and communications strategies and then responded. It forecasts some of the cultural and structural issues which need to be investigated in order to offset the future likelihood of Shell committing similar errors in future.

(I) John Cotton, 'Self-incrimination in Company Legislation' (1998) 19 Company Lawyer 182

The author examines the recommendations of the Kluver Report on Review of the Derivative Use Immunity Reforms of May 1997.

(J) Xian Chu Zhang, 'Chinese Law: Practical Demands to Update Company Law' (1998) 28 Hong Kong Law Journal 248

The article examines two recent cases in the People's Republic of China concerning derivative actions and the fiduciary duty of corporate management which illustrate the potential risks of investing in China.

(K) Elliott J Weiss, 'United States v O'Hagan: Pragmatism Returns to the Law of Insider Trading' (1998) 23 Journal of Corporation Law 395-438

(L) Lisa M Fairchild & Nan S Ellis, 'Municipal Bond Disclosure: Remaining Inadequacies of Mandatory Disclosure Under Rule 15c2-12' (1998) 23 Journal of Corporation Law 439-467

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6. LAW CONFERENCES AND SEMINARS

(A) The Use of the Courts by Lawyers for Personal Enrichment - Seminar and Dinner - 8 October 1998

The University of Melbourne Law School Foundation will present a seminar and dinner on Thursday 8 October 1998 at Le Meridien at Rialto in Melbourne. The seminar topic is 'The Use of the Courts by Lawyers for Personal Enrichment'.

Speakers include Mr Justice Bill Gillard, Victorian Supreme Court; Mr Peter Gordon, Slater and Gordon; and Mr Evan Whitton, author and journalist. The Chairman is Mr Geoff Masel, Victoria Legal Aid. Ms Susanna Lobez, presenter of Radio National's 'The Law Report', is the dinner speaker.

The cost is $135 for the seminar and dinner, $75 for the seminar only or $70 for the dinner only.

For further details contact the External Relations Office at the Faculty of Law, University of Melbourne, Parkville 3052, telephone (03) 9344 7483, facsimile (03) 9349 4287 or s.dexter@law.unimelb.edu.au.

7. ARCHIVES

The Corporate Law Electronic Network Bulletins are retained on an archive. You may review prior Bulletins by accessing the following Website:

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8. CONTRIBUTIONS

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