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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) REFORM OF PRUDENTIAL REGULATION OF SUPERANNUATION

On 28 October 2002 the Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan, announced a package of reforms designed to strengthen the prudential regulation of superannuation in Australia.

The reform proposals follow from the Government's 2 October 2001 Issues Paper, Options for Improving the Safety of Superannuation.

The Superannuation Working Group (SWG), chaired by Mr Don Mercer, and comprising representatives from the Australian Prudential Regulation Authority (APRA), Treasury and the Australian Securities and Investments Commission (ASIC), undertook industry consultation on the proposals and made recommendations for change.

The SWG found that the current prudential regime, which has remained largely intact since the Superannuation Industry (Supervision) Act 1993 was introduced almost a decade ago, is generally sound.

But the SWG recommended changes to modernise the regime and enable APRA to undertake preventative action rather than enforcement action after a breach has occurred.

In response to the SWG's report, the Government will introduce a number of reforms
including:

(1) Universal licensing

- a requirement for all trustees of APRA-regulated superannuation funds to obtain a superannuation trustee licence (STL), and for all superannuation funds to be registered with APRA prior to accepting contributions;

(2) Risk management

- a requirement for trustees to prepare and submit to APRA a risk management plan for each fund, outlining how relevant risks will be managed and monitored, including a fraud control plan;

(3) Enhanced disclosure

- enhanced disclosure of important fund information to fund members, APRA, and publicly through ASIC's electronic facilities; and

(4) Enhanced enforcement

- appropriate enforcement powers to underpin the new framework.

The Government has also released the final report of the Superannuation Working Group (SWG), which formed the basis for the reform package, as well as the Government's response to the SWG's report.

The Government's response to the SWG's report addresses not only the recommendations they raised, but also a number of recommendations of the Productivity Commission in its Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Superannuation Legislation.

The Minister noted that the Government decided not to implement the SWG's recommendation that APRA be provided with a power to make prudential standards.

The Government considers that the other reforms, including the implementation of a trustee licensing regime, and requirements for all funds to have a risk management plan, together with the existing operating standards-making power, will ensure that trustees continue to remain responsible for fund governance, and that the regulator has appropriate tools to act where necessary.

The Government has agreed that the costs incurred by APRA in the licensing process will be met by a licence fee.

The Superannuation Working Group report and the Government's response to the report are available on the Treasury website at <http://www.treasury.gov.au> under "What's New".

(B) REPORT ON THE REGULATIONS AND ASIC POLICY STATEMENTS MADE UNDER THE FINANCIAL SERVICES REFORM ACT 2001

In a media release dated 23 October 2002 Senator Grant Chapman, Chairman of the Joint Statutory Committee on Corporations and Financial Services announced the following:

"Our Inquiry into the Regulations and ASIC policy statements made under the Financial services Reform Act 2001 has uncovered some serious departures from the objectives of the Act. Although generally the regulations and policy statements meet the objectives of the Act, these departures from the objectives need urgent attention," he said.

Senator Chapman was commenting after tabling the Committee's Report in Parliament.

"The Committee is disturbed that problems caused by the regulation of basic deposit products have not been resolved despite recommendations made in the Committee's report on the Financial Services Reform Bill last year," Senator Chapman said.

"ASIC's training requirements for representatives advising on basic deposit products will involve substantial costs and threaten the delivery of basic banking services in remote and regional areas. As basic deposit products are simple, low risk and well understood by consumers, the Committee is unable to see the justification in their regulation under the Act. Rather than benefiting consumers, the regulation of basic deposit products causing likely further branch and agency closures will be detrimental to their interests," he said.

"The Committee has recommended amendments to the Corporations Act 2001 to exempt basic deposit products from regulation under the Act," he said.

"Another issue of considerable concern to the Committee is the uncertainty surrounding licensing requirements for accountants. This has caused enormous disruption within the industry. The Committee had expected that certain tax agents' exemptions in the Act would resolve licensing issues. However, this has not happened and regulation 7.1.29, which was intended to provide a further licensing exemption, simply does not work.

"The Committee has recommended that the Act or the regulations be amended to provide a licensing exemption for accountants in similar terms as the exemption provided to lawyers under the Act," Senator Chapman said.

Other recommendations made by the Committee cover the following areas:

- the amendment of the regulations where technical problems have been identified;
- disclosure of fees and charges in relation to superannuation products;
- disclosure of placement of insurance with unauthorised foreign insurers to wholesale clients;
- reporting of data to ASIC regarding placements with unauthorised foreign insurers;
- amendment of the regulation dealing with offshore service providers;
- ASIC's policy formulation for the regulation of cross-border financial services;
- the resolution of licensing uncertainties for corporate and industry superannuation funds;
- the jurisdiction of the Superannuation Complaints Tribunal;
- the definition of 'custodial and depository services';
- the need to set up mechanisms whereby a discretion can be exercised in certain cases regarding applications for financial services licences; and
- the removal of telephone monitoring provisions from the Act.

The report is available on the Parliamentary Committee's website at <http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm>

(C) BUSINESS DEMERGERS

In a media release dated 21 October 2002 Senator Helen Coonan, Minister for Revenue and Assistant Treasurer announced that Parliament had passed the Government's demerger legislation.

In essence, a demerger involves restructuring a corporate or trust group by splitting it into two or more entities or groups, with the underlying owners holding one or more of those entities or groups directly.

Senator Coonan said the key features of the model to provide tax relief for demergers include:

- providing demerger tax relief where underlying ownership is maintained and the demerging entity divests at least 80 per cent of its ownership interests in the demerged entity;
- applying the measure to widely held and non-widely held companies and trusts;
- allowing capital gains tax relief at both the shareholder and entity levels; and
- providing an exemption from the existing dividend rules, subject to integrity rules.

Providing tax relief for demergers was recommended by the Ralph report on business taxation reform.

(D) EVIDENCE ON THE VALUE OF DUAL LISTINGS

The Reserve Bank of Australia, in its October 2002 Bulletin, has provided evidence on the value of dual listed companies. The Reserve Bank notes that in 2001, two Australian companies (BHP and Brambles) each used a dual listed company structure to facilitate their international expansion. They joined CRA, which had entered into a similar arrangement with RTZ to form Rio Tinto in the mid-1990s.

Dual listed company structures are effectively mergers between two companies in which the companies agree to combine their operations and cash flows, but retain separate shareholder registries and identities. In this respect, a dual listing is quite different to a cross-listing. Whereas a dual listing involves the (quasi) merger of two separate entities, a cross-listing occurs when an individual company establishes a secondary listing on a foreign exchange.

Dual listed company structures have a relatively long history, with one involving Royal Dutch Petroleum and Shell dating back to 1903. This was followed by the formation of Unilever NV/Plc in 1930. After that, there does not appear to have been well-known examples of dual listed companies until the late 1980s and 1990s, when seven new dual listed companies (excluding Rio Tinto) were formed. However, six of these seven new dual listed companies have since been disbanded. Accordingly, there remain in existence only six well-known dual listed companies, of which Australian companies account for three.

The companies establishing dual listed company structures have generally cited similar reasons: the structure was seen as a way of merging the two enterprises in a tax effective manner, while maintaining the stock market listings on both home country markets and retaining the national identities of the firms.

The Reserve Bank undertook a study of the three Australian dual listed companies. What the Reserve Bank found was that two of three dual listed companies have persistently traded at a significant premium in the Australian market relative to the UK market. According to the Reserve Bank, this evidence tends to refute claims that Australian companies can increase shareholder value by shifting their listing to large overseas exchanges.

The study is available on the Reserve Bank website at <http://www.rba.gov.au>

(E) GOVERNMENT PLANS TO ADOPT INTERNATIONAL INSOLVENCY LAW

On 17 October 2002 the Parliamentary Secretary to the Treasurer, the Hon Senator Ian Campbell, announced that the Federal Government plans to adopt an international model law on cross-border insolvency to speed up dealings between Australian and foreign courts.

The model, developed by the United Nations Commission on International Trade Law, is designed to overcome differences in legal systems between members' countries and lead to faster and more efficient resolution of insolvencies.

Copies of the paper are available on the Treasury website at <http://www.treasury.gov.au>. Comments on the paper can be submitted until the end of the year and should be sent to the General Manager, Corporate Governance Division, Department of the Treasury, Langton Cresent, Parkes, ACT 2001.

(F) SEC PROPOSES ADDITIONAL DISCLOSURES, PROHIBITIONS TO IMPLEMENT SARBANES-OXLEY ACT

On 16 October 2002 the United States Securities and Exchange Commission voted to propose rules implementing provisions of the Sarbanes-Oxley Act (see Bulletin No 59, July 2002, for a summary of the Act). The proposed rules concerning Sections 404, 406 and 407 of the Act would require public companies to disclose information about internal control reports, company codes of ethics and audit committee financial experts. Proposed rule changes dealing with provisions of Section 303 would prohibit actions designed to improperly influence auditors.

(1) Sarbanes-Oxley disclosure requirements

The Commission decided to publish for comment proposed rules implementing Sections 404, 406 and 407 of the Sarbanes-Oxley Act. The proposed rules would require companies to include the following new disclosures in their Exchange Act filings.

(a) Pursuant to Section 407, a company would be required to disclose the number and names of the "financial experts" serving on the company's audit committee and that they are independent of management, as determined by the company's board of directors.

(b) Pursuant to Section 406, a company would be required to disclose whether the company has adopted a code of ethics for the company's principal executive officer and senior financial officers, or if it has not, why it has not; and to disclose on a current basis amendments to, and waivers from, the code of ethics relating to any of those officers.

(c) Pursuant to Section 404, a company would be required to file, in its annual report, an internal control report of management stating:

(i) management's responsibilities for establishing and maintaining adequate internal controls and procedures for financial reporting for the company;

(ii) management's conclusions about the effectiveness of the company's internal controls and procedures for financial reporting as of the end of the company's most recent fiscal year; and

(iii) that the company's registered public accountant has attested to, and reported on, management's evaluation of the company's internal controls and procedures for financial reporting.

The Commission also decided to propose similar rules with respect to registered investment companies under Sections 407 and 406, dealing with financial experts and codes of ethics. Under Section 405 of the Sarbanes-Oxley Act, the internal control report requirements of Section 404 do not apply to investment companies.

(2) Financial experts

The proposed rules regarding financial experts would define the term "financial expert" by requiring such a person to have all of the attributes listed in Section 407 of the Sarbanes-Oxley Act. They also would provide a list of factors that companies should consider when determining whether a member of the audit committee is a financial expert.

(3) Codes of ethics

In addition to the previously discussed disclosures, the proposed rules would define a code of ethics as a codification of standards that is reasonably necessary to deter wrongdoing and to promote:

(a) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(b) avoidance of conflicts of interest, including disclosure to an appropriate person or persons identified in the code of any material transaction or relationship that reasonably could be expected to give rise to such a conflict;

(c) full, fair, accurate, timely, and understandable disclosure in reports and documents that a company files with, or submits to, the Commission and in other public communications made by the company;

(d) compliance with applicable governmental laws, rules and regulations;

(e) the prompt internal reporting of code violations to an appropriate person or persons identified in the code; and

(f) accountability for adherence to the code.

A company would be required to disclose in its annual report whether it has a code of ethics. Companies, other than foreign private issuers and registered investment companies, would be required to disclose either on Form 8-K or on their Internet websites any changes to, or waivers of, such code of ethics. Foreign private issuers and registered investment companies would be required to disclose changes to, and waivers of, such codes of ethics in their periodic reports or on their Internet websites.

(4) Internal control reports

The proposed rules would require a company to file an annual internal control report as part of its annual report. This report would address management's responsibility to establish internal controls and procedures for financial reporting and require management to evaluate the effectiveness of those controls and procedures as of the last day of the company's fiscal year. Under Section 404(b) of the Sarbanes-Oxley Act, the company's auditor must attest to, and report on, management's assertions in the internal control report. The company must state this fact and file the auditor's attestation in its annual report.

In addition, recently adopted rules require companies to conduct a quarterly evaluation of their disclosure procedures and controls. The proposed rules would also require companies to conduct quarterly evaluations of their internal controls and procedures for financial reporting. They would also make conforming revisions to recently adopted certifications by a company's principal executive and financial officers regarding the company's quarterly and annual reports, and related rules.

Comments on the rule proposals should be received by the Commission within 30 days of their publication in the Federal Register.

(5) Sarbanes-Oxley prohibitions of improperly influencing auditors

The Commission voted to propose rule amendments to implement Section 303 of the Sarbanes-Oxley Act of 2002. Section 303(a) prohibits an issuer's officers, directors, and persons acting under the direction of an officer or director, from taking any action to fraudulently influence, coerce, manipulate or mislead the auditor of the issuer's financial statements for the purpose of rendering those financial statements materially misleading. Comments on the proposed amendments should be received by the Commission within 30 days of their publication in the Federal Register.

The full text of detailed releases concerning each of these items is available on the SEC website at <http://www.sec.gov>. Comments will be collected for 30 days following publication of the proposals in the Federal Register.

(G) CORPORATIONS AMENDMENT (REPAYMENT OF DIRECTORS' BONUSES) BILL 2002

On 16 October 2002 the Commonwealth Treasurer, the Hon Peter Costello MP introduced the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 into the Australian House of Representatives.

The Bill amends the Corporations Act 2001 to permit liquidators to reclaim unreasonable payments made to the directors of companies that are wound up. This will assist in the restoration of funds, assets and other property to companies in liquidation for the benefit of employees and other creditors.

To be caught, the transaction must have been unreasonable, and entered into during the four years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred. The reasonableness of a transaction will be determined with regard to a number of factors, including the respective costs and benefits of the transaction to the company.

Under the Bill, the reasonableness of a benefit to a director is determined as at the time the benefit is conferred on the director. This enables liquidators to recover payments where the true magnitude of the unreasonableness involved only becomes apparent when the company actually makes the payment, even if it appeared reasonable at the time the company agreed to make the payment.

The Bill is drafted so as to include transfers made to a close associate of a director, or transfers made to a third party for the benefit of a director or close associate.

To avoid constitutional doubt, the amendment will apply with prospective effect, from the commencement of the Bill.

The Bill was introduced with the approval of the Ministerial Council for Corporations, which comprises the Commonwealth, States and Territories.

(H) NYSE, NASD MOVE TO STRENGTHEN RULES CONCERNING ANALYSTS AND IPOs

On 3 October 2002 the New York Stock Exchange and NASD jointly announced efforts to strengthen rules concerning research analysts and initial public offerings. These initiatives are in support of a new joint regulatory initiative among the Securities and Exchange Commission, the New York State Attorney General, the NYSE and NASD to address these critical areas.

The NYSE and NASD unveiled new rule proposals covering the way member organizations, their research analysts and investment-banking departments manage and disclose conflicts of interest, and also announced a new committee they have formed at the SEC's behest to extensively review the initial public offering process and recommend ways to address recent problems and strengthen the underwriting process.

(1) Summary of proposed amendments

Research Analysts: Further separates an analyst's compensation from investment banking influence by requiring a compensation committee review and approval of research analysts' compensation; prohibits the compensation committee from considering a research analyst's contribution to the firm's overall investment banking business; requires the basis for compensation to be documented and certified by an annual attestation to the Exchange; prohibits research analysts from participating in solicitation or "pitch" meetings with prospective investment-banking clients; amends the definition of research analyst to include research directors and supervisory analysts or others who supervise, influence or control the preparation of research reports and establishment or change in ratings or price targets. Also implements new registration category and qualification exam for research analysts, as well as continuing education to address applicable rules and regulations, ethics, and professional responsibility.

Member Organizations: Prohibits issuance of research reports by the manager or co-manager of a securities offering for 15 days prior to and after expiration time of any "lock-up agreement"; requires notification to customers when a member or member organization terminates research coverage of a subject company.

Member Organizations and Research Analysts: Amends the definition of "public appearance" to apply restrictions to research analysts making a recommendation in a newspaper article or similar public medium; extends the 10-day and 40-day quiet periods for research reports of managers and co-managers of initial and secondary offerings to making public appearances.

(I) EUROPEAN COMMISSION PROPOSES FRAMEWORK FOR TAKEOVER BIDS

On 2 October 2002 the European Commission presented its new proposal for a Directive laying down common rules for takeover bids. The proposal sets out to offer European firms greater legal certainty for cross-border takeover bids in the interests of all concerned, including their employees, and to protect minority shareholders where control of a company changes hands. To provide a framework for such corporate restructuring, which involves the laws and the authorities of more than one Member State, action at Union level is the only way to enable progress. That is why, although the previous proposal was rejected by the European Parliament in July 2001, the Commission has remained convinced of the need for an EU Directive on takeover bids and has come forward as soon as possible with a new proposal that is likely to meet with the approval of the Council and Parliament.

The new proposal is intended to meet Parliament's concerns without compromising the basic principles approved unanimously in the Council's common position concerning the previous proposal. Those principles are:

- all holders of securities of the offeree company who are in identical situations must be given equal treatment ;
- the addressees of the bid must have sufficient time and information to be able to reach a properly informed decision on the bid ;
- the board of the offeree company must act in the interests of the company as a whole ;
- false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid; and
- an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

(1) Changes

The new proposal has the same scope and lays down the same basic principles as its predecessor. In particular, the rule that the board of the offeree company must obtain the shareholders' authorisation before launching defensive measures has been retained, as it is considered essential that the future of the company should be decided by the people who own it.

However, the new proposal has been supplemented in such a way as to meet the concerns voiced by Parliament. The proposal here follows the recommendations set out for the Commission in the Jaap Winter Group Report (see below and IP/02/24) as regards a common definition of the "equitable price" in a mandatory bid and the introduction of a squeeze-out right enabling a majority shareholder to require the remaining minority shareholders to sell him their securities. This is combined with a sell-out right enabling minority shareholders to require the majority shareholder to buy their securities following a takeover bid.

As regards more specifically the removal of barriers to takeover bids in Europe, the new proposal would require greater transparency concerning companies' capital structure and control and the defensive mechanisms they have put in place, and would introduce a rule whereby structural defensive measures were neutralised following a successful takeover bid. This rule would apply to restrictions on the transfer of securities and voting rights but would not encroach on anyone's acquired rights, so as not to raise legal or even constitutional problems that would be intractable in most Member States.

(2) Background

The previous proposal for a Directive on takeover bids was rejected by Parliament in July 2001, after 12 years of negotiation: a conciliation procedure between Parliament and the Council had produced a compromise text, but when this was put to the vote at a plenary sitting of Parliament there was no majority (273 MEPs voted for and 273 against) (see IP/01/943). Contributing factors to this vote were:

- concerns over the obligation on the board of the offeree company to obtain the approval of shareholders before taking any defensive action against the bid; and
- the misconception that this obligation on the board to remain impartial meant that the offeree company was unable to defend itself, and consequently fear that European companies would be left vulnerable to being taken over, by US companies in particular, or quite simply by firms in other Member States.

Following that vote, the Commission set up a Group of High-Level Company Law Experts under the chairmanship of Professor Jaap Winter with the task of presenting suggestions for resolving the issues raised by Parliament. In preparing the present proposal, the Commission has taken broad account of the recommendations made by the Group in its report on issues related to takeover bids, which was published in January 2002 (IP/02/24).

The text of the new proposal is available on the Europa website at <http://www.europa.eu.int/>

(J) CANADIAN CHIEF EXECUTIVES COMMIT TO LEADERSHIP IN IMPROVING CORPORATE GOVERNANCE

The Canadian Council of Chief Executives has announced that chief executive officers of leading Canadian enterprises have made a commitment to playing a lead role in improving corporate governance practices in Canada. In a 34-page statement from the Canadian Council of Chief Executives (CCCE) entitled Governance, Values and Competitiveness: A Commitment to Leadership, they offer detailed recommendations on a wide range of governance issues.

The initial recommendations deal with issues related to the role of chief executives, including accountability, compensation, insider trading and personal certification of corporate reports as well as leadership in ethical conduct and corporate citizenship. Subsequent recommendations address issues affecting boards of directors, such as the independence of the board and key committees, board leadership, the audit process, equity compensation, transparency and disclosure.

The Council's statement notes that the United States has responded to major corporate scandals with extensive new rules and regulations that affect many Canadian companies directly and put pressure on Canada to follow suit. It suggests, however, that Canada's approach should not start by assuming that the United States has all the answers.

Formerly known as the Business Council on National Issues, the CCCE is a non-profit, non-partisan organization composed of the chief executives of 150 leading Canadian enterprises. The members of the Council head companies that administer in excess of $2.1 trillion in assets, have annual revenues of more than $500 billion and account for a substantial majority of Canada's private sector investment, exports and research and development.

The statement on corporate governance is on the Council's website at <http://www.ceocouncil.ca>

(K) STUDY REVEALS AUSTRALIAN CORPORATES DO NOT MEET NYSE REQUIREMENTS ON BOARD INDEPENDENCE

Australian companies are failing to meet strict new corporate governance measures implemented by the New York Stock Exchange (NYSE), according to a new survey released by global professional services firm Ernst & Young.

The survey was of Australia's Top 200 companies. Of the Top 200 surveyed, 18 were registered with the US Securities and Exchanges Commission (SEC), with a number of SEC registrants having a dual listing on the Australian Stock Exchange (ASX) and the NYSE.

The survey indicates Australian companies would fall significantly short if called upon to meet the NYSE requirements for key board committees to be comprised of independent directors.

Also, according to the survey, many Australian non-executive directors would likely fail to meet the strict new 'independence' standards established by the revised NYSE regime, with many of the Top 200 companies facing the possibility of having their boards of directors considered unsuitable.

Over one quarter of Australian audit committees currently include executive directors. This means they do not meet the basic requirements for an independent audit committee in the US.

The Ernst & Young survey also identified that of the 200 companies surveyed, only two reported they had delegated the auditor appointment / removal function to the audit committee itself. The survey also revealed that 155 of the top 200 companies had adopted and disclosed their code of conduct, however, no company had yet disclosed the content of its key committee charters in the annual report.

The survey is available on the Ernst & Young website at <http://www.ey.com/global/content.nsf/Australia/Home>

(L) SEC PROPOSES DISCLOSURE OF PROXY VOTING BY MUTUAL FUNDS, INVESTMENT ADVISERS

The United States Securities and Exchange Commission has voted to propose requiring mutual funds and other registered management investment companies to disclose their proxy voting policies and procedures and their actual proxy votes cast. The proposal is designed to enable fund shareholders to monitor their funds' involvement in the governance activities of portfolio companies.

The Commission also proposes requiring investment advisers to adopt written policies and procedures governing their exercise of voting authority with respect to client securities. Advisers would also be required to inform clients about these policies and disclose how clients can obtain information from the adviser about actual proxy votes cast.

(1) Investment company proposals

The proposals affecting registered management investment companies would require the following:

(a) Investment company proxy voting policies and procedures

The proposals would require a fund to disclose in its registration statement the policies and procedures that it uses to determine how to vote proxies relating to portfolio securities. This disclosure would include the procedures that a fund uses when a vote presents a conflict between the interests of fund shareholders, on the one hand, and those of the fund's investment adviser, principal underwriter, or any affiliated person of the fund, its investment adviser, or principal underwriter, on the other.

(b) Investment company proxy voting record

The proposals would require a fund to file its complete proxy voting record with the Commission as part of its report on Form N-CSR, the form that was recently proposed by the Commission to be used by funds to file certified shareholder reports required by the Sarbanes-Oxley Act of 2002. The recommended proposals would require a fund to disclose the following information for each matter with respect to which a fund was entitled to vote: information identifying the matter voted on; whether the matter was proposed by the issuer or by a security holder; whether and how the fund cast its vote, and whether the fund cast its vote for or against management.

(c) Disclosure of proxy votes that are inconsistent with fund's policies and procedures

The proposals would require a fund to disclose in its reports to shareholders proxy votes that are inconsistent with the fund's proxy voting policies and procedures and the reasons for the inconsistent votes.

(d) Availability of proxy voting information to fund shareholders

The proposals would require a fund to disclose to its shareholders the availability of information about its proxy voting policies and procedures and its voting record. Specifically, a fund would be required to state in its registration statement and reports to shareholders that information about the fund's proxy voting is available without charge, upon request, by calling a specified toll-free (or collect) telephone number; on the fund's Web site, if applicable; and on the Commission's Web site. The recommended proposals also would require a fund, upon receipt of a request for proxy voting information, to send the requested information within three business days of receipt of the request.

(2) Investment adviser proposals

The proposals with respect to investment advisers would require the following:

(a) Investment adviser proxy voting policies and procedures

The proposals would require investment advisers to adopt written policies and procedures governing their exercise of voting authority with respect to client securities. An adviser's policies and procedures must be designed to ensure that the adviser votes proxies in the best interest of clients and addresses material conflicts of interest that may arise between the adviser's interests and those of its clients.

(b) Investment adviser disclosure of proxy voting policies and procedures

The proposals would require investment advisers to describe their proxy voting policies and procedures to clients and to furnish a copy of their policies and procedures upon client request.

(c) Obtaining information from investment advisers about proxy votes

The proposals would also require investment advisers to inform clients how they can obtain information from the adviser on how it voted their proxies.

(d) Investment adviser recordkeeping for proxy voting

In addition, the proposals would amend the investment adviser books and records rule to require advisers to maintain certain records about their proxy voting activities, including how they voted each client's proxies. The Commission will review these records as part of its investment adviser inspection program.

The full text of detailed releases concerning each of these items is available on the SEC website at <http://www.sec.gov>. Comments will be collected for 60 days following publication of the proposals in the Federal Register.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC ANNUAL REPORT 2001-2002

The Australian Securities and Investments Commission's 2001-02 annual report was tabled in Federal Parliament on 15 October 2002. The annual report provides an account of outcomes achieved by ASIC over the 2001-02 financial year.

Results from 2001-02 include that ASIC:

- successfully prosecuted 42 offenders, resulting in 19 custodial sentences;
- took 81 civil proceedings, resulting in orders against 140 people or companies, $65 million in recoveries and compensation orders and $45 million frozen;
- fined or banned 20 people, either through the courts or administratively, from directing companies;
- removed 35 people from the financial planning or investment advice industry, 17 of them permanently;
- licensed or registered 477 financial service advisers and product issuers;
- commenced implementing the most ambitious reforms to financial services regulation ever attempted;
- lifted the quality of fundraising documents seeking more than $291 millions in capital through 77 stop orders;
- published research and recommendations to combat international cold calling investment scams that cheated Australians of an estimated $400 million; and
- facilitated a record 6.1 milIion company searches through www.asic.gov.au.

The annual report is availabIe on the ASIC website at <http://www.asic.gov.au>

(B) ASIC ISSUES CLARIFYING FINANCIAL SERVICES REFORM CLASS ORDERS

On 11 October 2002 ASIC released six new Class Orders (CO) clarifying the intended application of some provisions of the Corporations Act 2001 (the Act). The Class Orders relate to the provisions introduced into the Act by the Financial Services Reform Act 2001 (FSRA).

(1) CO 02/1071 - Clarification of Corporations Regulation 10.2.74

This Class Order is intended to help remove any uncertainty arising in relation to the operation of regulation 10.2.74. This regulation identifies what is a 'class of financial products' for the purposes of the product disclosure transitional provisions.

Uncertainty has arisen as to whether or not the conditions in that regulation are sufficient to establish when financial products are in the same class, or whether the regulation sets out necessary conditions that are to be applied together with the common law.

In order to avoid any doubt, the Class Order has the effect of ensuring that the conditions set out in regulation 10.2.74 may be treated as sufficient.

This means for example, that a responsible entity which issued interests in a registered managed investment scheme under a prospectus before the FSRA commenced on 11 March 2002 may during the transition period, use prospectuses for interests in any new schemes for which they are the responsible entity, provided that the conditions in regulation 10.2.74(2) are satisfied.

(2) CO 02/1072 - Product Disclosure Statements - top-up relief for managed investment schemes

This Class Order provides relief from the requirement to provide a Product Disclosure Statement for the acquisition of further interests in the same class in the same managed investments scheme.

The relief applies where the investor has previously paid a total of at least $500,000 for the purchase of the same class of interests in the scheme. The relief applies to interests in registered and unregistered schemes.

(3) and (4) CO 02/1073 and CO 02/1074 - Financial Services Guide - dealing in underlying investments by superannuation trustees and responsible entities

These Class Orders provide relief to superannuation trustees and responsible entities of registered managed investment schemes from the requirement to provide a Financial Services Guide (FSG).

The entity will not have to provide an FSG merely because the entity deals in financial products which are the underlying investments of the fund or scheme concerned.

(5) CO 02/1075 - Travellers' cheques and confirmations of transactions

This Class Order disapplies the confirmation requirements in s1017F of the Act in relation to transactions involving travellers' cheques. This relief is provided on the basis that as a matter of standard practice, receipts are provided to customers when they purchase or dispose of travellers' cheques.

(6) CO 02/1084 - Australian Financial Services (AFS) licence numbers in prospectuses

In order to avoid any doubt, this Class Order gives transitional relief for the citing of the AFS licence number in prospectuses, as may be required under s912F of the Act.

AFS licensees will not be required to update prospectuses prepared before their AFS licence is granted to include the AFS licence number. The relief ceases to apply at the end of the two-year financial services reform transitional period.

A copy of these Class Orders can be obtained from the ASIC's Infoline on 1300 300 630 or from the ASIC website at <http://www.asic.gov.au>

For further information contact:

Mark Adams
Director, Regulatory Policy
ASIC
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Mobile: 0402 428 025

(C) ASIC REVIEWS PRACTICE NOTE 66

On 4 October 2002 ASIC announced that it intends to review aspects of Practice Note PN 66 in relation to Transaction Specific Prospectuses. The Practice Note, issued in August 1997, has not been revised since the introduction of amendments contained in the Corporations Law Economic Reform Program Act 1999.

Most of the Practice Note continues to provide useful guidance, even though the sections have changed slightly. However, paragraph 66.33, dealing with ASIC's power to exclude bodies from being able to use a Transaction Specific Prospectus, has been replaced. ASIC expects to use this power more widely than in the past.

Section 713(6) of the Corporations Act (the Act) enables ASIC, in certain circumstances, to make a written determination, the effect of which is to preclude a listed body from being able to use the reduced format fundraising document currently permitted by section 713 of the Act. This written determination will normally be done by instrument in the form of Pro Forma 162.

The new paragraph reads:

'[PN 66.33] When considering whether to make an instrument of exclusion, ASIC will generally offer the disclosing entity an opportunity to make submissions about whether the instrument should be made. ASIC will not usually regard it as a sufficient argument against making an instrument of exclusion that the breach of the relevant obligation has since been rectified in some way'.

Section 713 otherwise allows a body to use that reduced format if the prospectus is for an offer of continuously quoted securities of a body. The term 'Continuously Quoted' is defined in section 9 of the Act.

For further information contact:

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

(D) SUPERANNUATION: FINANCIAL TIPS AND SAFETY CHECKS ON SUPERANNUATION

On 2 October 2002 ASIC released its latest guide to superannuation, "Super decisions: understanding and making superannuation choices".

In plain language Super decisions presents an independent guide to the essential facts and choices about superannuation. It offers step-by-step financial tips and safety checks.

Super decisions explains

- how super works and how it is regulated;
- how to stop fees and charges from eating away your retirement savings;
- what superannuation investment choices really mean;
- how to judge your fund's performance;
- when and how to change funds;
- how to avoid becoming a lost member; and
- what organisations can help you.

The guide is free and copies are available through ASIC's consumer website at <http://www.fido.asic.gov.au> or in hard copy through ASIC's Infoline on 1300 300 630.

For further information contact:

Mr Peter Kell
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ASIC
Tel: (02) 9911 2092
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(E) ASIC ISSUES DISCUSSION PAPER ON THE USE OF PAST PERFORMANCE INFORMATION IN INVESTMENT ADS

On 30 September 2002 ASIC released a discussion paper on the use of information about the past performance of investments in advertisements and other promotional material.

'ASIC wishes to ensure that past performance information is used responsibly in advertising and is not misleading', said Peter Kell, ASIC's Executive Director of Consumer Protection.

'An undue emphasis on past returns can lead to consumers having unrealistic expectations and making poor investment decisions', Mr Kell said.

To address these issues, ASIC will issue a guide to assist industry on the use of past performance information in advertising. A draft guide has been released as part of the discussion paper.

Key provisions of draft guide include that:

- if an ad includes past performance figures, it should give a five year return figure in addition to figures for any other periods;
- 'hypothetical' or 'simulated' past performance figures should not be used in ads;
- past performance figures should be up to date;
- information about returns should be balanced with key information about risk;
- promoters are encouraged not to give undue prominence in ads to past performance information; and
- returns should be calculated after all on-going fees have been deducted.

Earlier research, which is summarised in the discussion paper, shows that:

- Past performance information is used in advertising for many products in the financial services industry including managed funds, super funds, financial advisers and investment newsletters.
- Most advertisements for managed funds contain past performance information (often prominently). Frequently, past performance figures only cover short, unrepresentative periods (eg one year).
- Promoters choose varying methods for displaying past performance information, resulting in poor comparability and omission of important information.
- Academic research commissioned by ASIC indicates past performance is a weak and unreliable predictor of future performance over the medium to long-term.
- Past performance information can be misleading if not balanced with other relevant factors such as risk.
- Many consumers appear to put undue weight on past performance when choosing individual investments.

ASIC will accept comments on its draft guide until 15 November 2002.

The discussion paper, draft guide and two related documents can be obtained from ASIC's website at <http://www.asic.gov.au> or by calling ASIC's Infoline on 1300 300 630.

The related documents are 'Managed Fund Advertising' by P Gerrans and S St Clair and 'A Review of Research on the Past Performance of Managed Funds' by the Funds Management Research Centre.

3. RECENT ASX DEVELOPMENTS

(A) ASX SUPERVISORY REVIEW RELEASES ANNUAL REPORT

On 30 September 2002 ASX Supervisory Review (ASXSR), the company established to enhance the accountability and transparency of ASX's supervisory activities, delivered its Annual Report to the ASX Board and the Australian Securities and Investments Commission.

The report covers the first full year of operation, the 2001/2002 financial year. A full copy of the report is available on ASXSR's website <http://www.asxsr.com.au>, and on <http://www.asx.com.au>

The ASXSR report concluded that during the twelve months to 30 June 2002, as a result of the various reviews undertaken by ASXSR during 2001/2002:

- appropriate standards were met by the ASX Group in the conduct of its supervisory activities;
- the level of funding and resourcing devoted by the ASX Group to its supervisory activities was adequate;
- subject to the fact that ASXSR has not yet had the opportunity to complete its review of the CHESS and Derivatives Market Control policies and procedures, the ASX policies and procedures of those areas in the ASX Group with supervisory functions was adequate to support the ASX Group in complying with its specific statutory obligations as an authorised market operator and clearing and settlement facilitator under the Corporations Act;
- ASX conducted its supervisory activities ethically and responsibly;
- ASX had in place and maintained appropriate controls and arrangements for dealing with potential and actual commercial and employee conflicts of interest;
- ASX companies department's handling of the supervision of listed entities having a special identified conflict was satisfactory.

The observations in relation to policies and procedures generally were:

- A number of the MOUs agreed between ASX and ASIC are now well out-of-date and work should commence on their review.
- There was an element of unevenness across ASX departments in relation to the policies and procedures. Although this was in part due to the different supervisory functions performed, it was also due to separate departmental development of these policies and procedures. As a result, some ASX departments should refine their procedures.
- Similarly, there was unevenness across ASX in terms of documenting compliance programs, although the system did work effectively. It would be helpful if ASX placed at the front of its group-wide compliance plan a strategic overview. Supervisory departments, particularly core supervisory departments, should document a similar concept for their own areas of responsibility.

4. RECENT TAKEOVERS PANEL MATTERS

(A) THIRD APPLICATION RESOLVED IN RELATION TO COLONIAL FIRST STATE PROPERTY FUNDS

On 11 October 2002 the Takeovers Panel advised that the circumstances surrounding the third application in relation to the four Colonial First State Property funds (Colonial Funds) have now been resolved. Consequently, the Panel has decided not to make any declaration of unacceptable circumstances in this matter, Colonial 3.

The application from the Responsible Entity for the Colonial Funds sought orders to restrain Mirvac Funds Ltd (Mirvac) from acquiring units in the Colonial Funds or processing acceptances under its takeover bid unless and until certain amendments were made to the Mirvac Property Trust constitution. The Colonial Responsible Entity asserted that, under the constitution of the Mirvac Property Trust, Mirvac was unable to issue the stapled securities, or the options, offered under its bid. The Colonial Responsible Entity made its application on Tuesday 24 September, 2002.

The following events have occurred since the application was made:

(a) on 30 September 2002, unitholders in the Colonial Funds, the Commonwealth Property Office Funds and Gandel Retail Trust voted in favour of a proposal to merge the Colonial Funds with the Commonwealth and Gandel funds;

(b) on 2 October 2002, responding to a referral of a question of law from the Panel, the Federal Court held that Mirvac's bid could not be accepted in its current form and that the Mirvac Property Trust constitution would need to be amended in order for Mirvac to be able to issue options offered as consideration under the bid and for the bid to proceed - see Item 5(A) of this Bulletin. (The Court said, on the basis of a particular set of facts put forward to it, that Mirvac had the power to make that amendment if it considered that it would not adversely affect the rights of the Mirvac Fund unitholders); and

(c) on 3 October Mirvac withdrew its bid, with the consent of ASIC, citing the events in paragraphs (a) and (b) above as the reason for the withdrawal.

As a result of the above events there are no longer any material issues in the proceedings that need to be resolved by the Panel, and accordingly the Panel has decided not to make any declaration of unacceptable circumstances in relation to this application.

(1) When unacceptable circumstances may occur

The Panel notes that it would constitute unacceptable circumstances for a bidder to proceed publicly with a bid when it did not have constitutional power to issue the consideration offered. In this matter, Mirvac's advice to the Panel was that it had received Senior Counsel's advice, before commencing its bid, that the Mirvac Property Trust constitution did support the issue of the consideration offered.

(2) Media release in relation to the Court's findings

The Panel is concerned at Mirvac's media release on 2 October which did not mention the defects in Mirvac's bid, in the form that the bid was made, that were clearly stated in the Court's findings. The Panel considers that the media release was misleading in that it did not advise that the Court had found that the offers as formulated were incapable of acceptance. This is the more so where Mirvac used those deficiencies in its application to ASIC for ASIC's consent for Mirvac to withdraw its takeover offers.

Release of misleading statements in relation to ongoing Panel matters is a continuing concern and the Panel is considering whether further guidance is required in this area, beyond the Panel's views set out in its Rules for Proceedings which are available on the Panel's website. The Panel is also concerned at the use by Mirvac (and others previously) of triumphalist terms such as "vindicated" in relation to continuing Panel matters. Parties are unlikely to assist the timely and cooperative resolution of matters before the Panel by using inflammatory terms in public statements.

The Panel was constituted by Jennifer Seabrook (sitting President), Karen Wood (sitting Deputy President) and Teresa Handicott.

The Panel's reasons in the Colonial 3 Matter will be posted on the Panel's website when they have been finalised.

(B) APPOINTMENTS TO THE TAKEOVERS PANEL

On 9 October 2002 the Parliamentary Secretary to the Treasurer, Senator Ian Campbell, announced the appointment of the following new members of the Takeovers Panel:

Michael Ashforth: Director, Gresham Partners, Perth

Andrew Knox: Partner, Allens Arthur Robinson, Brisbane

Andrew Lumsden: Partner, Corrs Chambers Westgarth, Sydney

Peter Scott: Managing Director, Investment Banking Division, UBS Warburg,
Melbourne

5. RECENT CORPORATE LAW DECISIONS

(A) MIRVAC DID NOT HAVE POWER IN CONSTITUTION TO ISSUE CONSIDERATION IN BID FOR COLONIAL
(By Iain Laughland, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Seabrook, in the matter of the Takeovers Panel and the Corporations Act 2001 (Cth) [2002] FCA 1219, Federal Court of Australia, Conti J, 2 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/october/2002fca1219.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

These proceedings before Conti J arose out of the recent takeover bid for The Colonial First State Property Trust Group ("Colonial"). Following the announcement on 30 July 2002 of a proposal by a conglomerate of the Commonwealth Property Office Fund ("CPA") and Gandel Retail Trust ("GAN") to merge their unit trusts with Colonial, a competing bid by the responsible entity ("Manager") of Mirvac Property Trust ("Mirvac") was announced on 27 August 2002. A revised Mirvac bid announced on 4 September 2002 offered Colonial unitholders either Mirvac stapled securities or a cash/stapled securities alternative, options to subscribe for stapled securities and a capital distribution.

On 24 September 2002 an application was made to the Takeovers Panel ("Panel") by the responsible entity of Colonial for a declaration of unacceptable circumstances. This application included questions of law as opposed to questions of fact and the members of the Panel referred the matter to the Federal Court pursuant to section 659A of the Corporations Act 2001 (Cth) ("Act") for a decision on the questions of law.

The main questions before the Court related to the legal viability of the Mirvac bid and in particular:

(a) Having regard to the constitution of Mirvac, could the responsible entity of Mirvac lawfully issue Mirvac stapled securities to unitholders in Colonial who accepted Mirvac's offer to acquire all of the units in Colonial?

(b) Having regard to the constitution of Mirvac, could the responsible entity of Mirvac lawfully issue options to subscribe for stapled securities in Mirvac to unitholders in Colonial who accepted Mirvac's offer to acquire all of the units in Colonial?

(c) Was Mirvac's offer constituted by the Replacement Bidder Statement capable of acceptance so as to give rise to a contract binding on the Manager to issue the stapled securities and the options consistently with the Mirvac constitution?

(d) Can the responsible entity of Mirvac alter the Mirvac constitution in such a way to allow for the issue of stapled securities and options without adversely affecting members' rights?

(2) Consideration offered by Mirvac

The main issue was whether Mirvac had the power or authority to provide the valuable consideration which it had offered in its takeover bid. This issue turned upon the interpretation of Mirvac's constitution and also section 601GA(1)(a) of the Act.

Section 601GA(1)(A) of the Act provides that:

"The constitution of a registered scheme must make adequate provision for:

(a) the consideration that is to be paid to acquire an interest in the scheme."

Units in Mirvac are stapled to shares in Mirvac Limited and are publicly listed as stapled securities. Clause 4.1 of Mirvac's constitution provides that while units are officially quoted as stapled securities they must only be issued at an application price in accordance with clause 4.4. Clause 4.4 provides that stapled securities in Mirvac may only be issued at an application price equal to the weighted average market price of stapled securities during the 5 business days immediately prior to the date on which the application price is to be calculated.

Mirvac highlighted in its Supplementary Bidder's Statement (No 2) that it had written-off goodwill of approximately $200 million in its forecast, being goodwill which would arise following the issue of the stapled securities. Mirvac advised that the goodwill arising would either be written-off or alternatively amortised over an appropriate period of time. CPA/GAN contended that the result of the write-off would be that the issue of the Mirvac stapled securities would occur at an unauthorised discount to those Colonial unitholders who might accept Mirvac's offer and that this circumvented the proper procedure of clause 4.4 of the Mirvac constitution.

It was submitted by CPA/GAN that the write-off was not supported by any "adequate provision" in the constitution of Mirvac, as required by section 601GA(1)(a) of the Act. CPA/GAN asserted that Mirvac should have foreshadowed in its Supplementary Bidder Statement (No 2) that it expected to write-off the full $200 million in the first year. Mirvac should also have made necessary amendments to its constitution to permit the issue of units at a discount, being an amendment requiring Mirvac unitholders' approval.

Conti J was of the opinion that the CPA/GAN submissions overstated the statement made by Mirvac in it's Supplementary Bidder's Statement (No 2). His Honour adjudged that the statement anticipated a conceivable accretion in value of Mirvac's assets in the context of the takeover, which only in that event, and to that extent, would the writing-off of, in effect, Mirvac's net unit values, occur. It was also concluded that the CPA/GAN submission also made the mistake of implying that the application price for units in Mirvac would be calculated at the time of the Mirvac takeover offer, whereas clause 4.4 of Mirvac's constitution looks forward to "the date on which or as at which the application price is to be calculated".

His Honour further agreed that clause 4.4 of the Mirvac constitution should be read with clause 5.3 of the constitution which provides that an application needs to be accompanied by payment in a form acceptable to the Manager, or a transfer of property of a kind acceptable to the Manager and able to be vested in the Manager or a custodian. This provision supported the contention of Mirvac that payment for Mirvac units may be made in kind, such as in the present circumstances, by the exchange of "property" by way of Mirvac stapled securities for Colonial units.

In response to the first question of law, Conti J found in favour of Mirvac and decided that the Mirvac constitution did make adequate provision for the stated non-cash consideration for acquisition of an interest in Mirvac, in the circumstances of the present attempted takeover of Colonial, and for the purpose of fulfilment of the requirements of section 601GA(1) of the Act. As the Manager had formed the view that the non-cash consideration is acceptable, it was accepted that units in Mirvac would be issued at an application price in accordance with clause 4.4 of the Mirvac constitution.

(3) Mirvac's power to issue options

The questions raised by this issue were firstly, whether the options to be offered by Mirvac comprise "interests" within section 601GA(1)(a) of the Act so that adequate provision must be made for the consideration that is to be provided for their acquisition; secondly, whether Mirvac has power to issue the options; and thirdly, whether Mirvac has power to issue units pursuant to the exercise of the options and in satisfaction of such exercise.

In summary, the submission of CPA/GAN was that there was an absence of power under the Mirvac constitution to issue options to acquire Mirvac units and section 601GA(1)(a) of the Act requires that the constitution make adequate provision for the consideration to be paid for options, if options are able to be issued, and since no provision is in fact made under the constitution, the issue of options to take up units in Mirvac, in the context of the Colonial takeover, is not authorised by the Mirvac constitution.

CPA/GAN also contended that by virtue of section 9 of the Act, the options would constitute interests in Mirvac and, accordingly, options would be subject to the requirements of section 601GA(1) of the Act requiring Mirvac's constitution to make adequate provision for the consideration that is to be provided by the Colonial unitholders to acquire the options. Further because option holders are not members of Mirvac under the constitution but are nevertheless "members" of Mirvac for the purposes of section 9 of the Act by virtue of "holding an interest in a scheme", there exists non-compliance by Mirvac with section 601GA(1) and also section 601GC of the Act.

Mirvac contended that the Mirvac options do not and cannot give the option holders an "interest" in the Mirvac "scheme", and therefore the holders of Mirvac options cannot be a "member" of Mirvac under the Act. Mirvac contended that a member is required to be a person who "holds an interest" in the scheme. It was argued that traditionally, the notion of "holder" in the context of the definition of a shareholder has carried the meaning of "registered holder". Mirvac submitted that this notion carried into the Corporations Act definition of "member", both in relation to a managed investment scheme as well as a company.

Mirvac further submitted that the Corporations Act makes a clear distinction between holders of interests and option holders and in particular reference was made to sections 169(1), 169(6A) and 168(1) of the Act which separate the interests of members and option holders. As a consequence of not holding an interest and not being a member, section 601GA(1)(a) does not require the Mirvac constitution to make provision for the consideration to be paid to acquire the Mirvac options.

Conti J did not believe that Mirvac's arguments carried sufficient weight to circumvent or qualify section 601GA(1)(a) and on the second point, found in favour of GPA/GAN. His Honour determined that the focus must be on the notion of acquiring that interest, and the consideration paid for that acquisition, rather than membership itself. As a result of this finding, it followed that on the third question, the Mirvac offers were incapable of acceptance so as to give rise to a binding contract on the Manager to issue stapled securities and options of Mirvac consistently with the constitution of Mirvac.

(4) Amendment of the Mirvac constitution

The question on this issue was the legitimate scope for amendment of Mirvac's constitution as a result of Mirvac lacking the relevant power to issue options and the lack of "adequate provision" for the consideration that is to be provided for the acquisition of those options.

CPA/GAN contended that if the constitution did not provide the appropriate authority to Mirvac to issue the options, it is not open to the Manager to amend the Mirvac constitution in order to remedy that absence of authority. The necessary authority to amend the constitution would be required to be provided by the current holders of Mirvac units before the Mirvac bid for Colonial could proceed.

The Manager argued that, as the responsible entity of Mirvac, it has the power to implement such modifications to the constitution as may be required to facilitate its bid, in accordance with section 601GC(1)(b) of the Act. That section provides that "the constitution of a registered scheme may be modified or repealed and replaced with a new constitution….by the responsible authority if the responsible entity reasonably considers the change will not adversely affect members' rights". Mirvac declared that such a power was exercisable in the current circumstances because any determination by the Mirvac directors "will not adversely affect members' rights".

A liberal view of section 601GC(1)(b) was adopted in Smith v Permanent Trustee Australia Limited (1992) 10 ACLC 906 where Young J held that where a shareholder is personally affected in a commercial sense by a scheme, such as a watering down of the value of shares in a particular class by increasing the number of shares of that class or reducing capital then it cannot be said that the rights attached to the shares are affected.

However, it was accepted that there is no settled meaning under operation of the words but Conti J accepted in principle the traditional approach adopted by UK authorities which Young J had identified in the Smith case. Conti J determined that at least in some, if not most contexts, the incidents or character of a legal right is to be distinguished from the value of that right in any monetary sense.

Conti J concluded that in the context of the Mirvac constitution, there would be no adverse affect to members' rights as a consequence of an amendment to the effect which Mirvac required to undertake in order to be able to issue options under its bid. However, it was declared that certain relevance was given to the fact that the present proceedings comprised "a contest between two corporate takeover competitors, and not for instance an oppression suit on the part of a unitholder or group of unitholders". There was also no circumstance that he could identify which suggested that any amendment required by Mirvac to its constitution would inherently or intrinsically affect adversely the value of the Mirvac units.

Postscript: Conti J handed down his judgment on 2 October 2002. On 30 September 2002, unitholders in Colonial, CPA and GAN had voted overwhelmingly to merge the various unit trusts. On 3 October 2002, Mirvac obtained permission from ASIC to withdraw all unaccepted offers under its takeover bid for Colonial based on the approval of the unitholders to merge the funds and on the Court's finding with regard to question 3. In a Panel media release on 11 October (see Item 4(A) of this Bulletin), the Panel indicated that in its view it would have constituted unacceptable circumstances for a bidder to proceed publicly with a bid when it did not have constitutional power to issue the consideration offered.

(B) ADMINISTRATION: VALIDITY OF TRANSFER OF EMPLOYEES AS PART OF RESTRUCTURE
(By Alexandra Guild, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Re Coogi Nominees Pty Ltd (Administrators appointed); McCluskey v Karagiozis [2002] FCA 1137, Federal Court of Australia, Merkel J, 12 September 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/september/2002fca1137.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The decision is concerned with an application by administrators under section 447D of the Corporations Act for directions concerning the validity of a transfer of employment between companies in a corporate group as part of a corporate restructure.

The court held that the transfer of over 200 employees of the Coogi group of companies from pre-restructure to post-restructure companies, without their knowledge or consent, was ineffective.

(1) Background

The controllers of the Coogi group of companies restructured the group in March 2000. That restructure included a purported transfer between companies of the employment of about 240 employees, including responsibility for their accrued entitlements. In July 2002, administrators were appointed to most of the pre-restructure and post-restructure companies. The post-restructure companies had paid salaries, taxes and other payments in respect of the employees but lacked assets and the ability to pay the transferred employees their employee entitlements of over $2,500,000.

The administrators had to decide whether the transferred employees are creditors of the pre-restructure or post-restructure companies in respect of their employee entitlements. They therefore sought directions pursuant to section 447D(1) of the Corporations Act as to which of the companies in the group was to be treated as the employer of certain transferred employees for the purposes of the administration.

(2) Decision

Under section 447D(1) an administrator may apply to the court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.

Merkel J noted that the employees were not informed of or consulted about the transfer of their employment, and did not assent to them. It appears that the only information received by employees was the appearance of the new employer on pay slips and group certificates since 2 March 2000. Merkel J cited Nokes v Doncaster Amalgamated Colleries Ltd [1940] AC 1014 as authority for the proposition that an employer cannot transfer a servant from the service of one person to another without their knowledge. Merkel J concluded that the lack of express or implied consent by the employees meant that their employment with their pre-restructure employer never ceased, and their employment with their post-restructure employer did not commence. Therefore almost all of the employees were to be treated as employees of the pre-restructure companies.

Merkel J criticised the conduct of Coogi's controllers, noting that it appeared that they had "pursued their own interests in disregard of the entitlements and interests of their long serving and loyal employees". Merkel J ordered that the costs of all parties to the application, apart from unreasonable costs, be costs in the administration on an indemnity basis.

(3) Comment

The decision illustrates both the wide powers of the court under section 447D(1) and the importance of ensuring employee transfer procedures are properly formulated with consents obtained even in the context of an internal reorganisation.

(C) ADVERTISING AGENCY NOT RESPONSIBLE FOR MISREPRESENTATIONS IN ADVERTISEMENT
(By Bianca Achilles, [Freehills](http://www.freehills.com.au))

Cassidy v NRMA Health Pty Ltd [2002] FCA 1228, Federal Court of Australia, Jacobson J, 3 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/october/2002fca1228.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Overview

On 3 October 2002, Justice Jacobson in the Federal Court held that the advertising agency, Saatchi & Saatchi Australia Pty Ltd ("Saatchi") was not liable as a principal for the misleading representations contained in advertisements made by the company for its client, the NRMA Health Pty Limited and NRMA Insurance Limited ("the NRMA companies").

The ACCC and ASIC brought an action against Saatchi, claiming the respondent had engaged in misleading and deceptive conduct in contravention of section 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) ("the Act"). The applicants sought declaratory and injunctive relief under section 12GD(1) of the Act.

Saatchi had created and developed advertisements for the NRMA companies. Although admitting that the advertisements contained misleading representations, the advertising company denied that it was liable for making those misleading representations.

Justice Jacobson held that whether or not conduct amounts to a misrepresentation is a question of fact to be decided by considering what has been said, what has been done and by whom it was said. These questions must be considered against the background of all the relevant surrounding circumstances. Saatchi could therefore only be considered to have made the misrepresentation if there were facts suggesting to the relevant section of the public that the misrepresentations were made by Saatchi.

His Honour ruled that there was nothing in the advertisement which could possibly convey to the relevant section of the public that Saatchi had made the misrepresentations.

(2) The case

Saatchi created and developed an advertising campaign for the NRMA. Legal sign-off for the advertisements was provided by an in-house solicitor employed by the NRMA companies. The NRMA companies then engaged a separate company, unrelated to Saatchi, to place the advertisements in newspapers.

The advertisements contained misleading statements claiming that the NRMA companies would make all payments of hospital and medical expenses for the delivery of babies for pregnant mothers who were members of a NRMA fund. Saatchi admitted that the advertisements contained misleading representations. The NRMA companies had already reached an agreement with the applicants prior to the hearing. Thus the only issue to be decided was whether Saatchi was responsible for the misrepresentations.

The applicants claimed Saatchi had contravened section 12DA of the Act. The section essentially corresponds with section 52(1) of the Trade Practices Act 1974 (Cth) ("the TPA"). Section 12DA provides that a corporation must not in trade or commerce engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. Section 12GD(1) of the Act gives the Court the discretion to grant an injunction where a party has, amongst other things, engaged, or is proposing to engage, in conduct that would constitute a contravention of section 12DA.

Counsel for the applicants submitted that Saatchi engaged in misleading conduct because it used its creative skills to prepare the advertisements for the NRMA companies, knowing and intending that the advertisements would be published. The applicants also relied heavily on analogy with the law of defamation. They submitted that under the law of defamation, all persons who are accessories to the publication of a libel are considered to be principals in the act of publication.

(3) Reasons for the decision

Justice Jacobson found that Saatchi was not liable as a principal for the misleading representations contained in the NRMA advertisements and dismissed the application.

His Honour held that the key question to be determined was whether the representation was conveyed in circumstances in which Saatchi could be regarded by the relevant section of the public as adopting the representations made in the advertisement. His Honour referred to an earlier Federal Court decision in which Justices Deane and Fitzgerald ruled that in determining whether a misrepresentation had been made, the Court must look at what has been said and what has been done in the relevant circumstances. Justice Jacobson held that it followed from this that the question of who made the misrepresentation must also be a question of fact to be decided by considering the form and content of the advertisement.

Justice Jacobson found that the advertisement was clearly advertising the NRMA companies. This finding was supported by affidavit evidence adduced by the applicants, in which a member of the public said she understood the advertisement to be a statement made by a related company of the NRMA companies. His Honour rejected the applicants' submission that the name "Saatchi" in small print in the bottom right hand corner of the advertisement converted the advertisement into a joint advertisement of the NRMA companies and Saatchi.

Justice Jacobson referred to several authorities who had considered the meaning of the words "making a statement" and "representation" in the context of criminal prosecution under section 53 of the TPA, the making of false or misleading representations. The authorities had established that the making of a statement required more than the mere preparation of a statement such as would be performed by an advertising agency. In the context of section 53, to make a statement, the advertising agency must also either disseminate that statement to potential consumers or the advertisement must actually refer to the advertising agency in such a way that it can be inferred that the advertising agency is making the representation.

Here, Justice Jacobson held that Saatchi merely prepared the misrepresentations. It was the NRMA companies who took the further step of distributing or disseminating the advertisement by hiring a different company to place the advertisement with a newspaper. It was the NRMA companies, and not Saatchi, who actually placed the advertisement upon the path of actual communication to the intended representees.

His Honour also dismissed the applicants' reliance upon the law of defamation, holding that there was no place in the scheme of legislation under either the Act or the TPA for reference to the common law of defamation. The applicants could not therefore rely upon the rule of defamation that all who are accessories to the publication must be treated as principals.

(D) APPEAL AGAINST SECURITIES DEALER AND INVESTMENT ADVISER BANNING ORDER
(Amber Hayward, [Blake Dawson Waldron](http://www.bdw.com.au))

Australian Securities and Investments Commission v Donald [2002] FCA 1174, Federal Court of Australia, Merkel J, 20 September 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/september/2002fca1174.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

In May 1998, Donald, a dealer's representative with ABN AMRO Equities Australia Ltd, procured the price of Burswood shares on the Australian Stock Exchange Automated Trading System to increase to 95c, which was 6.7% above the price previously reached on that day. The trading that caused the price increase was not genuine and resulted in ASIC imposing a banning order on Donald on 20 July 1999 pursuant to sections 829 and 830 of the former Corporations Law (now the Corporations Act). The order prohibited the respondent from doing an act as a representative of a dealer or an investment adviser for a period of four years.

Section 829 provided that ASIC may make a banning order against a natural person if he or she contravenes a securities law.

The contravention of "a securities law" relied upon by ASIC was the contravention of section 998(1) of the Corporations Law, which provided:

"A person shall not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities."

Section 830(1) provided that where the Commission is empowered to make a banning order against a person the Commission may, by written order, prohibit the person, either permanently or for a specified period, from doing an act as a representative of a dealer.

(2) Donald's appeal to Administrative Appeals Tribunal ("AAT") and the Court

Donald applied to the AAT to review the decision by ASIC to make the banning order and subsequently appealed to the Court against the decision of the AAT, which had substituted a banning order for two years for ASIC's banning order for four years. The Court set aside the decision of the AAT and ordered that Donald's application for the review of ASIC's decision be remitted to a differently constituted AAT for rehearing according to law.

On 20 November 2000 the AAT granted a stay of ASIC's banning order pending the hearing and determination of the application for the review of ASIC's decision by the AAT. As a consequence of the stay order Donald was able to obtain a position with BNP in marketing and research.

On 2 July 2001 the AAT set aside ASIC's banning order and substituted a decision that the banning order prohibiting Donald from doing any act as a dealer's representative for a period of 16 months (ending on 22 November 2000) and that the Commission accept a written undertaking to the effect that he:

- enrol in and complete the Business and Finance Practice Industry and/or the Financial Markets Law, Regulation and Compliance courses offered by the Securities Institute;
- co-operate with Australian Stock Exchange in the preparation and presentation of seminars which will consider issues of law, practice and procedure relevant to acting as a Designated Trading Representative;
- undertake for a period of three and a half years from the date of the undertaking not to create, or do anything that is likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities; and
- during the term of the undertaking, give a copy of the undertaking to all licensed dealers by whom he is employed.

(3) ASIC appeal to the Administrative Appeals Tribunal

ASIC subsequently appealed the (second) decision of the AAT to the Court on a question of law, on 2 grounds:

- whether the AAT lacked the power to decide that ASIC was to accept the written undertaking (above); and
- whether the decision to impose a banning order for approximately 16 months was so manifestly inadequate that no reasonable tribunal could have arrived at that decision without erring in law.

(4) Background to the power of the AAT

The review by the AAT is governed by section 43 of the Administrative Appeals Tribunal Act 1975 (Cth) (the "AAT Act"). Justice Merkel stated that "it is now well established that, when reviewing an administrative decision of ASIC under section 43(1), the AAT stands in its place, is empowered to exercise all of the relevant powers and discretions of ASIC for the purpose of reviewing the decision under review and hears the matter de novo in the light of the evidence and material placed before it". He referred to Otter Gold Mines Ltd v Australian Securities Commission (1997) 26 AAR 99 at 106 as authority for this proposition.

The AAT, in reviewing the decision of ASIC made pursuant to sections 829 and 830 of the Corporations Law, was empowered to exercise all of the powers and discretions of ASIC to make a banning order under s 830(1). It was also empowered to make an order under section 831(1) which provided:

"An order made against a person under subsection 830(1) may include a provision that permits the person, subject to such conditions (if any) as are specified to do, or to do in specified circumstances, specified acts that the order would otherwise prohibit the person from doing."

(5) ASIC's submissions

ASIC contended that the AAT is not empowered to exercise the power of the Commission under s 93AA of the Australian Securities and Investments Commission Act 1989 (Cth) (the "ASIC Act"). Section 93AA gives the Commission power to accept a written undertaking. Section 244(2) of the ASIC Act provides that applications may be made to the AAT for a review of certain decisions made by ASIC under that Act but the reviewable decisions do not include a decision made under s 93AA. ASIC contended that the AAT was not empowered to exercise the powers of the Commission under s 93AA because it did not have the power to review a decision made by ASIC under that section. Put simply, the argument was that the AAT was not empowered to do indirectly that which it could not do directly.

(6) Donald's submissions

Donald contended that section 43(1) of the AAT Act empowers the AAT to exercise all of the powers and discretions conferred by "any relevant enactment" on ASIC for the purpose of reviewing a reviewable decision. He contended that as the power conferred under section 93AA is a power and discretion conferred on ASIC, the AAT is entitled to exercise that power pursuant to section 43(1) provided that it is doing so for the purpose of reviewing ASIC's reviewable decision. He claimed that the AAT's exercise of ASIC's powers and discretions under section 93AA is for the purpose of reviewing ASIC's reviewable decision.

A substantial body of authority supports Donald's submissions in relation to section 43(1) of the AAT Act (Re Control Investment Pty Ltd and Australian Broadcasting Tribunal (No 2) (1981) 3 ALD 88 at 92 per Davies J; Fletcher v Commissioner of Taxation (1998) 19 FCR 442 at 452; Secretary, Department of Social Security v Hodgson (1992) 37 FCR 32 at 39-40 per Hill J and Comcare v Burton (1998) 50 ALD 846 per Finn J).

(7) Decision of the Court - power of the AAT

Justice Merkel noted that in the present case, the powers and discretions available to ASIC in relation to Donald included:

- the power to make a banning order for such period as it determined to be appropriate under section 830;
- the power under section 831(1) to include provisions in the banning order that suspended or limited the operation of the order on certain conditions or in specified circumstances; and
- the power to accept a written undertaking under s 93AA of the ASIC Act.

He also noted that "although the banning order has the consequence of excluding an individual from acting as a representative of a dealer or investment adviser, the making of such an order is not designed to punish or impose a penalty on that person". He stated that "the preventive and protective aspects of a banning order are plainly relevant to the exercise of power by ASIC, under sections 830 and 831 of the Corporations Law and the exercise of power by it under section 93AA of the ASIC Act."

In this sense, he stated that there is no reason for taking a narrow view of the powers conferred on the AAT under section 43(1) of the AAT Act. He could not "conceive of any reason why the same range of powers and discretions available to ASIC should not be available to the AAT on a review, on the material before it, of a banning order made by ASIC, provided that the exercise of those powers and discretions was for the purpose of reviewing the decision to make the banning order. It is not to the point that ASIC may have elected not to exercise one or more of these powers."

Justice Merkel concluded that the AAT did have power to make its order that an undertaking be accepted under section 93AA as that power was exercised by it, standing in the shoes of ASIC, for the purpose of the review of ASIC's decision to make a banning order, which was a reviewable decision.

(8) Decision of the Court - penalty

ASIC relied on two grounds of review in relation to the penalty:

- that the AAT failed to take into account a relevant consideration, namely, the need to protect the community against conduct inimical to the integrity of the share market; and
- the decision was so unreasonable that no reasonable Tribunal could have so decided. ASIC accepted that a two year ban without an undertaking could not warrant the Court's intervention but sought to argue that a sixteen month ban with an undertaking was so unreasonable that it would warrant the Court's intervention on the ground of Wednesbury unreasonableness.

As to the first point, Justice Merkel decided the submission was unsustainable as the AAT took into account the consideration referred to by ASIC. He noted it was that consideration that led it to determine that it was appropriate that an undertaking under section 93AA be accepted because it would be protective of the community.

Justice Merkel also rejected the second ground. He stated that ASIC's complaints relate to the weight the Tribunal may have given certain matters and do not attract unreasonableness. He noted that it was open to the AAT to reduce the period of the ban, as it did, because of its view that Donald's employment record since the stay of the banning order and compliance by him with his written undertaking were sufficient protection of the public, notwithstanding his apparent failure to appreciate the nature of his contravening conduct. The AAT's decision was one that was reasonably open to it on the basis of the findings of fact it made.

ASIC's application was therefore dismissed with costs.

(E) PROPOSED "SPIN OUT" OF SHARES BY WAY OF A SCHEME OF ARRANGEMENT
(By Fatmir Badali, [Blake Dawson Waldron](http://www.bdw.com.au))

Sonic Healthcare Limited [2002] FCA 1235, Federal Court of Australia, Conti J, 3 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/october/2002fca1235.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This case concerned an application made pursuant to section 411 of the Corporations Act 2001 (Cth) ("Corporations Act") for orders that Sonic Healthcare Limited ("Sonic") convene meetings respectively of members of Sonic and holders of options to acquire ordinary shares in Sonic, to consider and if thought fit, to approve a scheme of arrangement made first between Sonic and its members and secondly, between Sonic and its option holders, and for that purpose to give directions as to the manner in which the meetings were to be convened and the place at which the meetings were to be held.

(2) The scheme of arrangement

Sonic is an Australian publicly listed company engaged in the pharmaceutical and bio-pharmaceutical industries. At the time of proceedings, Sonic held 59.5% of the issued capital of SciGen Pte Limited ("SciGen"), a Singapore incorporated and based company involved in the development, marketing and sales of a portfolio of bio-pharmaceutical products. In its 2001 Annual Report, Sonic reported that its investment in SciGen no longer dovetailed with its strategic plan to focus on medial diagnostics. The directors believed that the underlying value of SciGen's business and its growth potential could best be achieved by a so called "spin out" of the majority of Sonic's shareholding in SciGen, and the independent stock exchange listing of SciGen on the Australian Stock Exchange ("ASX").

Subject to the spin out being approved by Sonic's shareholders and option holders, Sonic would immediately prior to the spin out subscribe $30 million for additional SciGen shares, thereby taking Sonic's interest in SciGen to 74% of SciGen's total shareholding. Pursuant to the spin out, Sonic would then transfer SciGen shares to its shareholders and certain vendor interest holders representing 62.5% of SciGen shares on issue. SciGen would then issue new SciGen options to Sonic option holders. Sonic would then retain approximately 11.5% of SciGen's shares, and would hold those shares subject to escrow arrangements. SciGen would be simultaneously listed on the ASX.

Accordingly, implementation of the proposal would require a capital reduction, together with a shareholder scheme and an option holder scheme. Under the capital reduction and shareholder scheme, Sonic shareholders would be entitled to receive one SciGen share for each Sonic share held, involving a capital reduction of approximately $0.12 for each Sonic share on issue. Simultaneously with the transfer of SciGen shares to Sonic shareholders, Sonic option holders would be issued one SciGen option for each Sonic option held. The exercise price of the Sonic options would be spread across the Sonic option and SciGen options, and the aggregate of those exercise prices would equal the exercise price of the relevant class of Sonic options prior to the spin out. Simultaneously with the spin out, SciGen would become a separately listed public company on the ASX.

Under the option holder scheme, the reduction in exercise price of the Sonic options that would otherwise apply on the implementation of the capital reduction would be ignored. Each Sonic option holder would be entitled to receive one SciGen option for each Sonic option held by that Sonic option holder at the close of registers. The existing exercise price of each Sonic option would be allocated across the existing Sonic option and the new SciGen option in the relative proportion that the market capitalisation of Sonic, after completion of the spin out bore to the value of the SciGen shares transferred to Sonic shareholders and vendor interest holders under the spin out (being a value of 20 cents per share).

Sonic's directors reported to their shareholders and option holders their belief that the spin out was in the best interests of Sonic, its shareholders and option holders. The directors unanimously recommended that shareholders vote in favour of the resolutions required to implement the spin out and also indicated their intention to vote in favour of the spin out in respect of any shares or options that they owned or controlled. An independent expert's report prepared for the benefit of shareholders and option holders concluded that the likely advantages to shareholders and option holders, if the proposal was approved, outweighed the likely disadvantages.

In the course of his judgement, Conti J highlighted several conceptually significant and unique provisions of the spin out Implementation Agreement entered into by Sonic and SciGen. These included:

- SciGen proposing an ordinary resolution to its shareholders to increase its authorised share capital by 50% and to subdivide its authorised and issued share capital by a factor of 7.6;
- SciGen proposing a special resolution to adopt a new constitution;
- SciGen proposing an ordinary resolution to convert all Class A Ordinary Shares and Class B Ordinary Shares into a single class of Ordinary Shares with equal ranking;
- Sonic subscribing for 150 million additional shares in SciGen (in order to increase its stake-holding to 74%) at Aus$0.20 per share, to rank equally with other shares;
- Sonic convening a general meeting to approve a capital reduction of an equal number of Sonic shares representing, in total, Sonic's cost of the total number of shares to be transferred to Sonic Shareholders under the Shareholder Scheme;
- Sonic convening a scheme meeting to propose the shareholder scheme under which the Capital Reduction amount will be applied as consideration for the transfer by Sonic to its shareholders of interests in shares on the basis that each Sonic Shareholder will be entitled to one SciGen share for each Sonic Share held at the close of registers;
- Sonic convening a scheme meeting to propose the optionholder scheme under which the reduction in the exercise price of the Sonic options that would otherwise be made to reflect the capital reduction be ignored; and each Sonic optionholder be entitled to one SciGen Option for each Sonic Option held by that Sonic Optionholder at the close of registers; and
- SciGen apply for listing of its shares on the ASX.

Sonic applied to ASIC for written confirmation that ASIC had reasonable opportunity to examine the proposed shareholder and optionholder schemes and that it did not propose to attend or make submissions at the Court hearing for Orders under section 411(1) of the Corporations Act. ASIC duly provided such confirmation.

(3) Judgment

Conti J held that the somewhat unique scheme of arrangement should proceed subject to the necessary shareholder and optionholder approvals. He held that the considerations summarised by Emmett J in Central Pacific Minerals NL [2002] FCA 239, namely:

- the likelihood or otherwise that the Court will approve of the arrangement, if the statutory majority is achieved in each case;
- whether there has been compliance with such preliminary matters as are relevant to the holding of the meeting;
- whether there will be sufficient disclosure, to those who would be affected by the arrangement, of its detail and effect; and
- whether there was reasonable opportunity for ASIC to examine the terms of arrangement,

were satisfied in the present case. Orders for proceeding with the scheme were accordingly made.

(F) APPLICATION FOR INSPECTION OF COMPANY REGISTER AND USE OF THAT INFORMATION
(By Erica Martin, [Mallesons Stephen Jaques](http://www.mallesons.com))

Westgold Resources NL v Precious Metals Australia Ltd [2002] WASC 221, Supreme Court of Western Australia, Heenan J, 18 September 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2002/september/2002wasc0221.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

The respondent, Westgold Resources NL ("Westgold") is a shareholder of the applicant, Precious Metals Australia Ltd ("PMA"). In 2000, Westgold commenced an action against PMA seeking damages for alleged breaches of the former Corporations Law (now the Corporations Act) in respect of a prospectus issued by PMA. In 2002, Westgold requested copies of the share registers of PMA for specified dates so that it could communicate with former shareholders to obtain their support for a proposed class action in relation to the prospectus. PMA stated that it would provide this to Westgold but that the listings would include the shareholders name and shareholding only, and not the addresses of the shareholders.

Westgold commenced an application against PMA seeking declarations that the historical registers required to be kept under section 169 of the Corporations Act 2001 ("Act") must include the name, address and share details of each person who stopped being a member of the company within the last seven years. Westgold sought orders requiring PMA to provide Westgold with a copy of its share register, including the name and address of shareholders at each of the dates requested.

PMA applied for a declaration that Westgold's intended use of information from the PMA share registry would constitute a breach of section 177 of the Act and sought an injunction restraining Westgold from using the share registry information for that purpose.

(2) Legislation

(a) Information to be contained in Register

Subsection 169(1) of the Act requires the register of members of a company to include the member's name and address and the date on which the entry of the member's name in the registry is made. If the company has share capital, section 169(3) requires the register to show the number and date of every allotment of shares, the shares held by each member, the class of shares and share certificate numbers, and any amount unpaid on the shares. Subsection 169(7) requires that the register must show the name and details of each person who stopped being a member of the company within the last 7 years and the date on which that person stopped being a member. Section 173 states that a company must allow anyone to inspect a register.

(b) Use of information contained in Register

Section 177 of the Act provides that a person must not use information obtained from a register to contact or send material to a person or disclose information on the register knowing that the information is likely to be used to contact the person.

(3) Decision

(a) Information to be contained in Register

Westgold submitted that the word "details" in subsection 169(7) requires a company to keep the same information about a previous member that the company is required to keep about a present member, which includes the member's address. PMA however, argued that the use of the word "details" was a change from the language employed in subsection 169(1) and this did not require the inclusion of the addresses of former members.

Heenan J concluded that as it may be necessary to identify and communicate with a former member, subsection 169(7) requires a company to keep a register of its former members including the details contained in subsections 169(1) and 169(3).

His Honour held that Westgold was entitled to a declaration that pursuant to subsections 169(1) and 169(7) of the Act, the share register for PMA is required to include the name, address and share details of each person who stopped being a member of PMA within the last 7 years.

His Honour also determined that Westgold was entitled to an order that PMA provide it with the details of former members of the company covering the previous seven year period.

(b) Use of information contained in Register

Heenan J considered the case of O'Brien v Sporting Shooters Association of Australia (Victoria) [1999] 3 VR 231. This case decided that the interests members have in being notified of, and voting at, an election for office bearers of their association was a relevant interest which justified a person communicating with them in order to canvass support for office at the association's annual general meeting. Heenan J said that in the present case however, very little attention was given by the parties to identifying the interests of former members of PMA which might be relevant in determining whether or not the information on the former members register could be disclosed or used under section 177 of the Act.

His Honour stated that the former members of PMA no longer held shares in the company, and as such:

(i) the use of the information obtained from the register is not relevant to the shares which those former members once held in the company; and

(ii) the information obtained from the register is not relevant to the exercise of rights attaching to those interests in any present or future sense.

However, His Honour noted that the information could be relevant to past rights held by former members which might yet be vindicated by statutory remedies under the Act, but that there was no evidence to that effect in the present case.

His Honour concluded that while Westgold was entitled to inspect and obtain a copy of the register of former members of PMA, it was not entitled to use any of the information obtained in order to approach or communicate with former shareholders with a view to obtaining their support for a proposed class action. His Honour granted an injunction restraining Westgold from using the information obtained from the register of former members of PMA for this purpose.

(G) SCHEME OF ARRANGEMENT FOR STAPLED SECURITIES
(By Stephen Magee)

Re The Hills Motorway [2002] NSWSC 897, Supreme Court of New South Wales, Barrett J, 25 September 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/september/2002nswsc897.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

The proposed restructuring of The Hills Motorway by section 411 scheme raises a number of practical issues, relating to:

- what is a "class"?
- recording of telephone calls
- meeting procedure.

(1) Background

Members of the company held a stapled security in the form of a share in Hills Motorway and a unit in a related trust. Under the scheme, the shares would be transferred to a holding company and the units to a holding trust. Members would receive a new stapled security consisting of a share in the holding company and a unit in the holding trust.

(2) Classes

All members had identical rights. However, one member already held the two currently-existing shares in the holding company. Under the scheme, that member would receive two less shares in the holding company than other members.

Overseas members would not receive any securities under the scheme. "Their" securities would be issued to a nominee. That nominee would sell the securities and remit the proceeds to the overseas members.

The Court held that neither situation created a separate class of member. It applied the Sovereign Life test - were the rights and entitlements of the different groups "so dissimilar as to make it impossible for them to consult together"? The focus was therefore on whether the differences between the groups would make it impossible for them to have a single debate. In this case, the differences between the groups could not be said to have that effect:

"Intrinsic value assured to members if the scheme is approved and implemented is the same for those specially singled out as it is for all others. There are also practical considerations underlying the differentiations that give them a rationale that would be readily understood and accepted in the single forum to which the Sovereign Life test directs attention."

(3) Telephone recording

The company raised the issue of whether its helpline calls from members should be recorded. Although telephone recording is only mandatory for Ch 6 takeover bids, the company noted that courts had applied it to schemes involving Australian Co-operative Foods, James Hardie Industries, Homemaker Retail Management and Delta Gold.

Barrett J did not see any need for recording in this case. He adopted a conservative approach:

"It may be that, in some controversial or other special cases, it would be desirable for the court to order that telephone communications be recorded. Nothing that has been put before the court in this case suggests that it is controversial or special; and of its nature it is hard to see how it would be. That being so, there is no need for the positive imposition of such precautions.

"It should nevertheless be said that if controversy does arise and there has been communication with members outside the formal documentary channels, that may become a matter which needs to be addressed upon any application for the court's approval of the scheme. Absence of an order for the monitoring of telephone communications with members relevant to the scheme says nothing about the attitude that would be taken to any particular contact, conversation or message, should it become the subject of complaint or submission at the approval stage. Nor does it say anything about any argument based on s.411(17) - referred to in the submissions - that might be advanced at that stage."

(4) Meetings

Because the scheme involved stapled securities, there would have to be three meetings, each one involving exactly the same people:

- a section 411 meeting of shareholders
- a general meeting of shareholders
- a general meeting of unitholders.

Barrett J acknowledged that neither the law nor good sense allowed all three meetings to be rolled into one. However, he was prepared to allow a meeting procedure that would minimise repetition and overlap:

(a) All three meetings would be declared open at the same time.

(b) The overall scheme would then be outlined to the members.

(c) Two meetings would then be adjourned. The remaining one would then proceed to a debate.

(d) When that debate finished (but before a poll was taken), the meeting would be adjourned to later on the same day.

(e) One of the other meetings would then re-open for debate. When the debate was over, the taking of the poll would be adjourned.

(f) The remaining meeting would then re-open for debate. When the debate was over, the taking of the poll would be adjourned.

(g) All polls would then be taken separately, but at the same time.

(5) Comment

Companies and advisers preparing for a scheme (or other capital restructuring) are always caught on the horns of a dilemma. If they don't separate the members into what a Court would regard as the correct classes, they potentially face problems in obtaining court approval. On the other hand, having too many classes increases the cost (and complexity) of the procedure and can create the opportunity for greenmailing by a small minority in a small class. Barrett J's holding on classes reflects the Courts' increasingly more rigorous approach to this issue.

The question of recording of phone calls during a scheme is a fraught one. There are differing judicial approaches to the issue, and no firm guidelines for companies to follow. The issue only really arose when the Financial Services Reform Act introduced a requirement for mandatory recording during Chapter 6 takeovers, and some judges thought that the concept should also be applied to schemes.

Interestingly, shortly after Barrett J handed down his decision, the Parliamentary Joint Committee on Corporations and Financial Services repeated its call for the recording provisions to be dropped from Chapter 6 (see Item 1(B) of this Bulletin). The apparent lack of judicial unanimity on recording in schemes would presumably be resolved if the Government were to heed this call. It should be noted, however, that the Committee first opposed the recording provisions when they were originally proposed in the FSR Bill; the Government did not follow that recommendation, so it is by no means clear that it will do so now.

(H) APPLICATION OF SECTION 1322 OF THE CORPORATIONS ACT TO INQUORATE MEETINGS OF DIRECTORS
(By Emma Bloomer, [Phillips Fox](http://www.phillipsfox.com))

Whitehouse v Capital Radio Network Pty Ltd [2002] TASSC 78, Supreme Court of Tasmania, Underwood J, 3 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/tas/2002/october/2002tassc78.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Kevin Blyton (Blyton) held 49% of the shares in Capital Radio Network Pty Ltd (CRN). A further 11% of the shares was held by DPIS and the remaining 40% was held by the Opal Trust, which was controlled by Geoffrey Garrott (Garrott). Blyton was the sole director of CRN and controlled the management of the company. He was also the sole director of Radio Snowy Mountains Pty Ltd (RSN).

After separating from his wife, Blyton rearranged his shareholding in CRN in an attempt to minimise any property settlement. Consequently, the Sapphire Trust was created for the benefit of the Garrott and Blyton families. The trust was controlled by Garrott. DPIS transferred its shares in CRN to the Opal Trust and the Sapphire Trust. As a result of this rearrangement, Blyton controlled 49% of the shares of CRN, and the Opal and Sapphire Trusts between them controlled 51% of CRN.

Blyton also resigned as director of CRN and Garrot became the chairman, giving him a casting vote. At the same time, David Leitch (Leitch) was appointed as a director of CRN. Garrot injected $500,000 into RSN in return for 5,000 shares in that company. Conseqently, RSN became a subsidiary of CRN, and Blyton's interest in RSN was reduced from 100% of the shareholding to 23%.

Once a property settlement had been negotiated, Blyton approached Garrott in an attempt to have his interests in CRN and RSN restored. Garrott refused.

Garrott provided Leitch with a notice of directors meeting of CRN at which Michael Ferrall (Ferrall) (the co-trustee of the Opal Trust) was to be appointed a managing director of CRN. Leitch deliberately abstained from attending the meeting so that the resolutions could not be passed for lack of quorum.

Subsequently, Blyton applied to the Family Court for orders restraining Garrott from removing, replacing or appointing any director to CRN. Such an order was in force at the time of these proceedings.

The property settlement in relation to Blyton and his wife provided that the Blyton could purchase the Garrott's interest in CRN and its subsidiaries within a specific time. If this did not occur, Garrott could purchase Blyton's interests. Blyton was to have interim management of the companies.

After the settlement, Garrott approached Paul Whitehouse (Whitehouse) to be a representative of the body corporate under section 250D of the Corporations Act (the Act). Garrott gave notice of a meeting of directors of CRN on 11 April 2002 to Leitch to, amongst other things, appoint Whitehouse as a body corporate representative under section 250D to act on behalf of shareholders to implement directors' responsibilities.

Leitch did not attend the meeting and hence a quorum was not present, however all proposed appointments were duly made.

(2) Proceedings

On 12 April 2002, Whitehouse filed an application for a declaration that the meeting of directors of CRN was not an invalid meeting by reason of there being no sufficient quorum.

Leitch and Blyton responded and themselves sought an order that the resolutions purportedly adopted at the meeting are invalid by reason of the absence of a quorum.

First, the court considered the scope of section 1322(2) of the Act concerning procedural irregularities. The respondents argued that the deliberate decision to convene, commence and persist in a meeting which it was known to be inquorate was not a procedural irregularity for the purposes of this section. However, Underwood J disagreed, finding that there is nothing in the section to indicate that the defects and deficiencies which it identifies as procedural irregularities must arise from inadvertence. His Honour considered that the provision was remedial in operation and so should be given a liberal construction, and noted that the Act prescribes that 'the absence of a quorum at a meeting of directors of a corporation' is one instance of a procedural irregularity. Accordingly, Underwood J held that the absence of quorum at the meeting of directors on 11 April 2002 was a procedural irregularity within the meaning of section 1322(2) even if:

- the meeting was called in the knowledge that it was extremely unlikely that there would be a quorum;
- the purpose of calling the meeting was to attempt to circumvent the effect of orders made in the Family Court; and
- the meeting proceeded in the full knowledge of those present that there was no quorum.

His Honour then considered what was sought to be validated by the declaration being sought. Under section 1322(6), and given the facts of the case two conditions needed to be satisfied before such an order would be made. Firstly, the act, matter or thing, or the proceeding was essentially of a procedural nature, which was found to be satisfied by the Court. The second requirement is that no substantial injustice has been or is likely to be caused to any person by the making of the order sought. His Honour considered that this required a sufficient nexus between the making of the order validating the meeting and the absence of substantial injustice.

The applicant argued that the issue was not any possible injustice arising out of the resolutions passed at the meeting, but rather whether the validation of the meeting itself would cause injustice to any person. Even if a quorum had been achieved and Leitch attended the meeting, the result would have been the same because Garrott would have exercised his casting vote as chairman.

The respondents argued that what was sought to be validated here were the resolutions passed at the meeting, and the validation of these resolutions would be likely to cause substantial injustice. Alternatively, it was argued that Leitch had a right to prevent Garrott and his associates from attempting to take control of the company by staying away from a meeting of directors at which arrangements were proposed to facilitate this. As Leitch could not be forced to attend such a meeting, there would never be quorum at such a meeting, and so the validation of the inquorate meeting would result in injustice to Leitch.

Underwood J concluded that any injustice that has arisen or that might arise by reason of the passage of the resolutions at the inquorate meeting was irrelevant to this issue. The only question to be decided was whether the validation of the meeting, as opposed to validation of the business transacted at that meeting, has not caused substantial injustice to the respondents, nor is it likely to.

His Honour found that Garrott had tried to gain control of CRN and its subsidiaries since 1997, although no dishonesty was considered to attach to this desire to control the company. The court suggested that Garrot may have simply been looking to protect his investment. Nonetheless, Underwood J found that there had been considerable animosity between Garrott and Blyton and that Leitch was attempting to protect Blyton's interests. Garrott was determined to alter the status quo.

His Honour found that Leitch had deliberately abstained from attending directors' meetings of the company at which it was proposed to pass a resolution which would effectively hand control of CRN and its subsidiaries to Garrott. Leitch had relied upon the provision in the articles of association that prescribed a quorum of two directors for a valid directors meeting. The court found that not only was Leitch entitled to do this, it was in fact a more than reasonable stance to adopt given the history between Blyton and Garrott, the injunctions granted by the Family Court, and the settlement executed between Blyton and Garrott in relation to their shareholdings in CRN.

His Honour held that it would work a serious injustice to Leitch and Blyton to allow Garrott to invoke section 1322 in order to deny the right that Leitch had under the articles of association. Further, the court found that to accept the submission of the applicant would render CRN's articles of association worthless, and enable a director with a controlling vote to act as if the other directors did not exist and as if the articles of association conferred no relevant right upon them.

Underwood J dismissed the application and made a declaration that the meeting of directors of CRN held on 11 April 2002 was an invalid proceeding by reason of there being no sufficient quorum.

(I) EXERCISE OF POWERS UNDER THE CORPORATIONS ACT WHERE JOINT LIQUIDATORS ARE APPOINTED
(By Emma Bloomer, [Phillips Fox](http://www.phillipsfox.com))

Harvey v Burfield [2002] SASC 314, Supreme Court of South Australia, Perry J, 20 September 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2002/september/2002sasc314.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Normans Wines was placed in liquidation pursuant to section 439C(c) of the Corporations Act 2001 (the Act), by a resolution of its creditors on 24 September 2001. The liquidators appointed were Anthony Smith and Timothy Burfield. On 13 March 2002, Mr Burfield, acting as one of the liquidators, applied for orders directing the examination of various persons and the production of documents under sections 596A, 596B and 596D(1) of the Act. These applications were supported by an affidavit described as the 'primary affidavit of Timothy Burfield'.

Under section 596A, the court is required to summons a person for examination about a corporation's examinable affairs if an eligible applicant applies for the summons and all other requirements of the section are met. Section 9 of the Act defines an 'eligible applicant' to include 'a liquidator or provisional liquidator of the corporation'.

(2) Proceedings

Two of the applications issued by Mr Burfield sought the examination of and production of documents by Catherine Flower and Timothy Harvey (the appellants). On 3 April 2002, a Master made orders directing the examination of and production of documents by these persons. Ms Flower and Mr Harvey subsequently sought to have these orders set aside, and the applications seeking the orders discharged. At this hearing, the appellants argued that the orders made were invalid because the applications which had led to the making of the orders had been brought in Mr Burfield's name only, rather than in the name of both liquidators. The Master ruled against the appellants and dismissed their applications.

This decision of the Master was appealed, and one ground of the appellants' notice of appeal was as follows:

'The Master erred in finding, notwithstanding section 506 of the Corporations Act, that Mr Burfield alone could exercise the power to seek and obtain the examination orders pursuant to section 596B and section 596D of the Corporations Act.'

Justice Perry began by hearing argument from counsel on this ground, and noted that section 506 of the Act referred to the powers and duties of liquidators, with section 506(4) providing:

'When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as is determined at the time of the appointment, or in default of such determination, by any number not less than two.'

His Honour found that there was no determination (by either a meeting of the company, or the court) at the appointment of Mr Smith and Mr Burfield that either of them could exercise any power given by the Act.

Counsel for the appellants contended that while section 596A(a) of the Act authorised the liquidators to apply for an examination order, bringing such an application amounted to the exercise of a 'power given by this Act' within the meaning of section 506(4), which must be exercised by both liquidators. As the applications issued against Ms Flower and Mr Harvey were in Mr Burfield's name alone, they were invalid and should be dismissed.

His Honour considered a number of decisions concerning the United Kingdom and New South Wales equivalents of section 506(4) of the Act. These supported the proposition that where two or more liquidators were appointed, the appointment should be regarded as joint and not several. As a result, in the absence of any statutory provision to the contrary, liquidators must act together and are unable to authorise any one or more of them to act on behalf of all of them. However, Justice Perry found that section 506(4) qualifies this position in that where there are several liquidators appointed, any two or more of them may exercise any power given by the Act, or, if a determination is made at the time of their appointment (by a meeting of the company, or the court) the liquidator(s) nominated may exercise such powers as are determined.

Justice Perry distinguished the decision relied upon by the Master in dismissing the appellants' application, and found that while the judgment endorsed one liquidator instituting proceedings on behalf of both of the liquidators appointed, the facts indicated that these individuals were actually appointed as joint and several liquidators of the company. As a result, this decision was not applicable to the present case.

Counsel for the respondent argued that because the introductory words of section 506(4) refer to 'several' liquidators, the section did not apply in this situation, as Mr Smith and Mr Burfield did not constitute 'several' liquidators. After considering a number of dictionary definitions of the word 'several', His Honour concluded that the term meant more than two or three, but not very many. Justice Perry noted that this definition of the word 'several' appeared to exclude from the operation of section 506(4) the situation where only two liquidators were appointed to a company.

However, Perry J went on to state that this in itself did not defeat the appellants' argument, because two or more liquidators appointed to a company should be regarded as joint liquidators, and they must act jointly and not severally in the exercise of any powers which may be conferred upon them. His Honour considered that this requirement to act jointly applied when two liquidators were appointed to a company, while section 506(4) applied to alter this requirement in situations where more than two liquidators were appointed. This section provides that where more than two liquidators are appointed, any power given by the Act may be exercised by not less than two liquidators. Justice Perry further found that the presence of section 506(4) in the Act required one to presuppose that without this provision, any power given by the Act to liquidators would necessarily have to be exercised by all of the liquidators jointly.

Finally, His Honour noted that although the definition of an eligible applicant referred to 'a liquidator or provisional liquidator', the principles of statutory interpretation extended this definition to include the plural, that is 'liquidators or provisional liquidators'. As a result, Justice Perry found that because Mr Smith and Mr Burfield were appointed as joint liquidators but did not act jointly in bringing the applications against Ms Flower and Mr Harvey, Mr Burfield did lack the power to bring these applications. His Honour allowed the appeal, and set aside the orders for the examination of the appellants and for the production of documents by them.

(J) CONFLICTS OF INTEREST IN LIQUIDATION
(By Alex Vynokur, [Baker & McKenzie](http://www.bakernet.com))

Williamson v Nilant [2002] WASC 225, Supreme Court of Western Australia, McKechnie J, 18 September 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2002/september/2002wasc0225.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The proceedings in this case arise out of the liquidation of LPO Transact Pty Ltd ("the Company").

Before the Company was placed in provisional liquidation, there were three shareholders in the Company - Rama Naidoo ("Rama") and the plaintiffs in these proceedings, Ian Williamson ("Williamson") and Yogan Naidoo ("Yogan"). There are many disputes regarding the misuse of Company's money between Williamson and Yogan on the one hand, and Rama on the other.

Before the Company entered into provisional liquidation, and while it was still controlled by Williamson and Yogan, District Court proceedings were taken by the Company against Rama.

Rama resisted the claim and on 23 December 1999 took action to wind up the Company on the grounds of oppressive and unfairly prejudicial conduct. Following the appointment of Mr Nilant (the defendant in the present proceedings) as liquidator of the Company, Rama funded an examination of Williamson and Yogan in the Supreme Court. Mr Metaxas (of Metaxas & Vernon) acted for Nilant and conducted the examination on his behalf.

In respect of the District Court proceedings against Rama, no further action has been taken by Nilant (explained by, among other things, the absence of funding).

Williamson and Yogan commenced the present action to remove Nilant as liquidator and to have the liquidation set aside and the Company restored. By way of chamber summons, Williamson and Yogan also sought the removal of the firm of solicitors Metaxas & Vernon who act for the liquidator and have also acted for Rama.

Some further relevant facts are as follows:

(a) On 13 November 2001 Metaxas & Vernon accepted instructions to act for Rama against the Company in the District Court proceedings, taking the matter over from Rama's previous lawyers.

(b) On 14 November 2001, the liquidator held a creditors' meeting of the Company. Ms Karen Vernon (a partner in Metaxas & Vernon) represented the Company's liquidator at the meeting and advised him about a matter raised by Williamson and Yogan.

Only on 15 July 2002 Metaxas & Vernon filed a notice of change of solicitors in the District Court proceedings. Until that date, Metaxas & Vernon were on the record representing Rama in action brought against him by the Company.

At the same time they were retained by the liquidator of the Company (thought not in respect of the District Court action) to act for him in defending the present proceedings.

(2) The decision

His Honour considered that before 13 November 2001 there was no conflict of interest for Metaxas & Vernon. Up until that date, Mr Metaxas had appeared on the examinations on instructions from the liquidator. Even if Rama funded the examinations, no conflict arose, since interested parties can and do often fund actions by a liquidator.

Since 13 November 2001 however, it was held that Metaxas & Vernon have been conflicted, since they owed a duty of loyalty to Rama and, at the same time, owed a duty of loyalty to the liquidator, together with a duty to advise the liquidator in circumstances where the liquidator is obliged to act objectively and impartially.

McKechnie J was of the opinion that in the present case, in fulfilling their role to provide impartial and sound advice to the liquidator, it would be difficult, if not impossible, for the solicitors to put to one side, their role in representing Rama.

His Honour noted that it is not in every case where a solicitor acts for a liquidator and a party interested in the liquidation there will be a conflict. However, in the present case, His Honour saw a sufficient reason to cause Metaxas & Vernon to be removed as solicitors for the liquidator.

His Honour quoted from Contract Corporation, In re Gooch's Case (1871) LR 7 Ch App 207 at 211:

" … it is of the utmost importance that the liquidator should … maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever."

His Honour thought that this is not a case in the present circumstances, where:

(a) the solicitor has come into possession of confidential information while acting for one client and there is a risk that confidential information may be disclosed when acting for another client: Newman v Phillips Fox (1999) 21 WAR 309; and

(b) the solicitor has some form of stake in the outcome such as to raise a query as to the independence of the solicitor from the cause of action: Afkos Industries Pty Ltd v Pullinger Stewart (A Firm) [2001] WASCA 372.

In deciding to restrain Metaxas & Vernon from acting for the liquidator, McKechnie J relied on the test in Grimwade v Meagher (1995) 1 VR 446:

"The objective test to be applied in the context of this case is whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause."

Applying that test to the evidence, his Honour was satisfied that the conflict which may arise between the interests of Rama, which the solicitor must legitimately advance, and the necessity to give impartial advice and representation to the liquidator of the Company is such that the interests of justice require the solicitor be restrained from acting for the liquidator.

(K) POWERS UNDER THE ASIC ACT TO AWARD COMPENSATION TO NON-PARTIES TO A PROCEEDING
(By Megan Manwaring, [Mallesons Stephen Jaques](http://www.mallesons.com))

Medibank Private Ltd v Cassidy [2002] FCA 290, Federal Court of Australia, Sundberg, Emmett and Conti JJ, 13 September 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/september/2002fcafc290.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case involved an appeal from a single judge decision of the Federal Court refusing a motion seeking a summary dismissal of orders sought pursuant to section 12GD of the Australian Securities and Investments Commission Act ("the ASIC Act"). This arose from proceedings commenced by the ACCC (through its chief executive officer, Mr Brian Cassidy) in which the ACCC sought declarations, inter alia, that the respondent, Medibank Private Limited ("Medibank") engaged in misleading and deceptive conduct in relation to financial services in contravention of section 12DA(1) of the ASIC Act in August and September 2000. The ACCC (through its CEO) is a delegate of ASIC in relation to its powers in respect of health insurance.

The only question for determination on appeal was the scope of orders that could be obtained under sections 12GD and GE of the ASIC Act. The decision makes clear that those sections do not authorise the Court to award compensation in favour of persons who are not a party to the proceedings (or were not named in the application with their written consent).

(1) Background

Medibank carries on the business of a private health insurer, which includes the promotion and sale of financial products and the provision of financial services within the definition of "financial services" in section 12DA of the ASIC Act. The ACCC alleged that Medibank made a number of representations which were misleading and/or deceptive to consumers during August and September 2000.

The ACCC sought a number of orders in respect of this conduct, including orders requiring Medibank to notify all affected customers of the misrepresentation and offering to pay compensation as well as providing customer details to the ACCC, presumably so that they could verify compliance with the notification orders (the "Notification and Compensation Orders").

At first instance, Medibank contended that the provisions of the ASIC Act relied on by ACCC, namely, ss 12GD and 12GE, did not empower the Court to grant all of the relief that the ACCC claimed. The primary judge held that section 12GD confers on the Court a general power to make an order compelling a person to perform some stipulated act and that that power is circumscribed only by the requirement that the Court is satisfied that the person has engaged in, or is proposing to engage in, a contravention of a relevant provision of the ASIC Act. Medibank filed an appeal from this decision.

(2) Decision

The Full Bench of the Federal Court held that sections 12GD and GE of the ASIC Act were not broad enough to allow the grant of the Notification and Compensation Orders sought by the ACCC and, accordingly, the proceedings were dismissed in relation to the Notification and Compensation Orders.

(3) Reasoning

Section 12GD relevantly provides that, if the Court is satisfied that a person has engaged in conduct that constitutes a contravention of section 12DA, the Court "may grant an injunction in such terms as the Court determines to be appropriate". Section 12GE relevantly provides that if the Court is satisfied that a person has engaged in conduct constituting a contravention of section 12DA, the Court may also make orders requiring that person to disclose information to the public, or to a particular class of persons, and to publish advertisements, in terms specified in the orders. In considering the scope of these sections, the Court also considered the scope of sections 12GF, 12GJ and 12GM of the ASIC Act, of which section 12GM is most relevant as it contains a power to make compensation orders in favour of persons who were a party to the proceedings (or were named in the application).

The Full Court reached its decision by reviewing the legislative history of sections 80, 80A, 82, 86 and 87 of the Trade Practices Act 1974 (the "TP Act") as those sections were relevantly identical to the language of sections 12GD, 12GE, 12GF, 12GJ and 12GM of the ASIC Act. The key issue was whether those sections gave the Court the power to order compensation in favour of persons who were not a party to the proceedings. There was no doubt that this was the effect of the Notification and Compensation Orders.

The Court traced the legislative history of each of the relevant provisions of the TP Act and found that the clear legislative intent of section 87(1) (with which section 12GM(1) corresponds) was that it was restricted to orders compensating parties to the proceedings only. On this basis, the Court found that section 12GM(1) did not permit the Court to grant compensation orders in favour of persons who were not a party to the proceedings. The Court further held that that the language of section 12GD(1) of the ASIC Act was not intended, of itself, to authorise the Court to order damages in favour of any person who was not a party to the proceeding, particularly given the limitation inherent in the relevant special power (ie section 12GM(1)). In this regard, the Court considered sections 12GM(2) and (3) of the ASIC Act as support for this conclusion as those sections contemplate that ASIC may make an application for compensation orders on behalf of other persons but only where those persons are identified in the application and ASIC has obtained their prior written consent to the application being made.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

A Colla, 'Has the Greenmailer Finally been Eradicated from Australian Corporate Law?' (2002) 20 Company and Securities Law Journal 318

This article examines greenmailing in corporate control transactions, such as compulsory acquisitions, selective capital reductions and schemes of arrangement. The article commences with a discussion of the concept of greenmail and the objections to this practice. The article then discusses how Australian law deals with greenmailing strategies. Recent legislative reforms and judicial decisions are discussed, with particular emphasis on the concepts of "fair value" and "fair and reasonable" under sections 667C and 256B(1)(a) respectively of the Corporations Act. The article draws two conclusions. The first is that the reforms are the result of a deliberate effort by the legislature and the courts to facilitate the acquisition and maintenance of 100% ownership by a shareholder with an overwhelming interest in a company. The second conclusion is that the prima facie liability of a majority shareholder or of a company proposing a selective capital reduction or a scheme of arrangement to pay for the costs of objecting minority shareholders, even if their objections fail, is an issue that requires closer consideration, as this may act as a disincentive to pursuing compulsory acquisition or corporate reconstruction opportunities.

A Lumsden, 'Audit Committee Membership and its Consequences' (2002) 20 Company and Securities Law Journal 340

There has been an extraordinary run of recent actual or perceived financial failures: Halliburton, Enron, Dynergy, Adelphia, Tyco, WorldCom, Global Crossing and Qwest have all been mentioned. In Australia, we have had Harris Scarfe, One.Tel and HIH. Phrases like "earnings management" are now in common parlance. Before the real lessons from any of these "failures" have been learnt, public pressure for accountability and reform will intensify. Nowhere will the pressure be more acutely felt than around those board tables where audit committees meet to discuss their financial statements. Earnings have always and will always be "manageable". The application of accounting principles to a business always involves fine judgment. This article suggests a number of practical measures that audit committee members can take to ensure they are satisfying their obligations under Australian law as directors and delegates and that their discretions are being exercised in a reasonable way.

Note, 'Reflections on the "Quistclose Trust" - Twinsectra Ltd v Yardley' (2002) 20 Company and Securities Law Journal 352

Note, 'New Zealand's Securities Trading Law Reform' (2002) 20 Company and Securities Law Journal 358

Note, 'Survey of the Provision of Non-audit Services by Audit Firms in New Zealand' (2002) 20 Company and Securities Law Journal 360

B Slade, 'Stringent New Disclosure Rules Govern Financial Advisers', New South Wales Law Society Journal, August 2002, page 56

W Wang, 'Selective Disclosure By Issuers, Its Legality and Ex Ante Harm: Some Observations in Response to Professor Fox' (2002) 42 Virginia Journal of International Law 869

R Cunningham, 'Corporate Governance and Foreign Investment Nightmares in Russia: A Case Study of Unified Energy Systems' (2002) 42 Virginia Journal of International Law 889

C Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 Journal of Law and Society 56

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