

# changes

## to the corporations law

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For all of you who work in the corporate law arena watch out !! Recent changes to the Corporations Law came into force on 13 March 2000. Even if you do not practise in this area, it is always useful to update your vast pool of knowledge.

The *Corporate Law Economic Reform Program Act* (or *CLERP* to those in the know) was passed by Federal Parliament last year. *CLERP* introduces significant changes in the areas of directors duties and corporate governance, takeovers, fundraising and accounting standards. The purpose of this article is to provide a VERY brief overview of these changes so you won't look like an idiot in front of your more informed friends. Please note it does not cover ALL the amendments that have been introduced. To those of you who have been *CLERPed* out, my apologies.

### Directors Duties

*CLERP* reiterates the statutory duties of directors and other officers (including a secretary or person who participates in making decisions which affect the business of a corporation). It clarifies the duty of care and diligence that must be exercised by such officers and places the focus on the particular skills and role of the individual director or officer.

A new "business judgement" rule has been introduced which will offer protection from liability to officers who follow it. A business judgement is one which is relevant to the business operations of a corporation. In order to satisfy the requirements of the rule officers must:

- Make the decision in good faith and for a proper purpose;
- Not have a material personal interest in the subject matter of the decision;

- Inform themselves about the subject matter of the decision to the extent they reasonably believe is appropriate; and
- Rationally believe that the judgement is in the best interests of the corporation.

Unless a company's constitution states otherwise, directors may delegate any of their powers provided those powers are exercised in accordance with the directors' instructions. *CLERP* provides that individual directors will not be responsible for a delegate's actions in specific circumstances. A director is also entitled to rely on information or advice provided by an employee of the company, a professional adviser or another director and can therefore avoid liability in certain circumstances.

Where specified criteria are met, *CLERP* enables a disgruntled shareholder with the leave of the Court, to bring a legal action on behalf of the company where the company refuses to do so.

*CLERP* has also rationalised the liability provisions of the *Corporations Law* as they relate to directors and officers. It is now easy to find out when a company may indemnify an officer.

### Takeovers

One of the major changes proposed by the *CLERP* Committee that did not make it through the Senate was the introduction of a mandatory bid rule. This rule was intended to enable a major shareholder to buy out the remaining shareholders in certain circumstances.

The current takeover regime as amended by *CLERP* has been extended to cover all securities issued by a company. In addition, from 13 March 2000, it will apply equally to all listed managed investment schemes.

The method of instigating the bid has been amended. What was a Part A or Part C Statement has been replaced by a more streamlined "bidder's statement" which must be lodged (not registered) with ASIC. In addition, the response by the target, previously called the Part B or D Statement has been renamed the "target's statement". These documents must include all information reasonably required or expected by a shareholder or investor to make an informed assessment about whether to accept the offer.

The new Chapter 6A of the *Corporations Law* introduced by *CLERP* will simplify the procedure by which a holder of more than 90% of a class of securities may compulsorily acquire the remaining securities.

All takeover disputes are to be dealt with by a revamped Corporations and Securities Panel. This panel will comprise takeover experts drawn from all areas of the takeovers arena, including merchant bankers, lawyers and other institutions. In order to remove takeover litigation from the court, only ASIC or State or Commonwealth government may apply to commence court proceedings.

### Fundraising

The amendments to the fundraising provisions of the *Corporations Law* are designed to minimise the costs of fundraising while improving investor protection.

The new provisions enable a company to utilise a prospectus (either full or short form), profile statement (with full prospectus to be prepared) or an offer information statement. ASIC will approve the use of a "short form" prospectus which incorporates by reference information contained in documents lodged with ASIC. A copy

of this additional information must be provided free of charge. A profile statement may be used for offers of securities in industries that ASIC considers suitable. Where their use is approved, a standard prospectus must still be prepared and lodged. An offer information statement is another new concept. It may be used to raise up to \$5 million. It must contain similar information to a profile statement, however no prospectus need be prepared or lodged.

Each of the above documents is called a "disclosure document". ASIC now requires that a disclosure document be lodged, but not registered. The general disclosure requirements for prospectuses have been retained but modified.

The *CLERP* amendments remove the current overlap in the sources of liability for misleading and deceptive conduct, and for misstatements in, or omissions from, a prospectus. All liability provisions for such action can now be found in the *Corporations Law*.

## Accounting Standards

*CLERP* has established the Financial Reporting Council to monitor international accounting standards and be involved in setting Australian accounting standards along with the Australian Accounting Standards Board. The Board has also been established as a body corporate in its own right to enable it to employ staff and acquire property. *CLERP* contains detailed administrative provisions for the management and operations of these bodies.

The objectives of these reforms are to facilitate the development of more effective standards and to promote the consistency of Australian reporting standards with international requirements.

# smarmy bastard

## runs for Council

Jason Newman has never lived down declaring his love for the law. Ever since the *Law Institute Journal* published his inaugural speech, the opening words of which were "I love the law, I love the legal profession", people have been openly sniggering about the "Legal Lothario". Even Andrew Burrell writing in the *Australian Financial Review* said the opening line of the speech "was either smarmy in the extreme or amusingly tongue-in-cheek".

"Someone smarter than me (or smarmier) once said that no publicity is bad publicity. Judging by those standards I guess it was a good move" Jason said of the speech he gave. "The whole speech was tongue-in-cheek to a certain extent, but I had some serious things to say about the law and the Institute. I thought a bit more humour was needed. So many lawyers take themselves so damn seriously. The job is serious enough, as is council. I don't think you need to do it with a carrot up your arse".

Jason is a sixth year litigation lawyer at Hall & Wilcox. After nearly six years in the Young Lawyers' Section and having chaired the section in 1996, he says he is well equipped to reflect the concerns of younger lawyers on the Council. Jason is concerned to ensure that as new lawyers enter the profession they are aware of the "traps for young players" and he sees the Young Lawyers as a way of promoting that awareness.

"Young Lawyers are an essential part of the Institute and the profession and are often at the forefront of those driving reform. The Young Lawyers' Section can have an enormous influence on the way the profession develops. Council is eager to hear the



JASON NEWMAN

section's views, particularly in those areas we are closest to, such as the future of Articles, the structure of law degrees and employment conditions. A balanced work and 'outside' life is something I hope will become more important for the legal profession generally in the next few years. I think the Law Institute should encourage the cultural change that is required by lawyers to make a balanced life possible."

Although Jason knows he's used up his opportunity to make a "shock tactics" inaugural speech, he hopes to stir up some interest in the elections generally. He says that as a member of the last "luddite" profession he wants to be the first to run an election website, which you can find at <http://users.netlink.com.au/~jknewman>.

Jason also welcomes your comments, criticisms, ideas or questions at [jknewman@netlink.com.au](mailto:jknewman@netlink.com.au).