

POSTCARD FROM VANUATU
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inside the volcano but our guides demonstrated the depth of the crater by throwing large rocks into the cavity and counting the seconds for it to reach the bottom. We snacked very quickly on our picnic lunch of tinned corned beef and biscuits and started our journey back. After ten minutes of walking back through the volcanic plateau our journey was again interrupted as the clouds which had suddenly gather unleashed their contents on us. Walking in a torrential downpour at 1270 metres above sea level became suddenly quite frightening when the lightning and thunder started. Being so close to the clouds and the centre of the thunderstorm was frightening as we had no way of sheltering from the fury of the storm. Luckily the storm abated but not before we showered with rain filled with ash, an experience similar to having a giant ash his very large cigarette on you.

The homeward journey took five hours. The dry creek beds we enjoyed walking through on our way up to the volcanoes filled with water and we had to navigate our way down slippery volcanic rock with racing water. At the end of a total return journey of nine hours of constant walking we were looking forward to booking into the nearest hotel. Unfortunately, we couldn't. Thankfully, our host, Gladen offered us a bucket of hot water and a bowl to wash off the ash and dirt.

The following morning we caught the Twin Otter back to Port Vila. This time the weather was good. However, the spousal equivalent and I were very concerned at the gentleman on the plane with his very own lifejacket. He boarded and got off the plane wearing the life jacket. We hoped that those with a fear of flying mistook his lifejacket for sartorial elegance or new fashion.

At Lamien Bay airport on the return journey I was somewhat surprised to see two live roosters in a hessian bag with only their heads peering out for a view (of the cargo hold). We arrived in Port Vila safely but fire blong tufela emi ded tumas. We were both very tired. Lukim Yu

BOOK REVIEW: CLERP AND THE NEW CORPORATIONS LAW 2nd Ed Butterworths 2000

Reviewed by Philip van der Eyk

This is the second edition of a compact book of two hundred and twenty three pages by Sydney based commercial lawyers Ashley Black, Tom Bostock, Greg Golding and David Healey. The first edition was published in 1998 in anticipation of the reforms becoming law.

The "CLERP" amendments (Corporate Law Economic Reform Program Act 1999) commenced on 13 March, 2000 and are so wide ranging as to make any previous reference material, including most standard text books that have not been brought up to date, unreliable in several key areas. The book also includes a treatment of share capital reforms which became effective on 1 July, 1998 (Company Law Review Act, 1998).

CLERP and the New Corporations Law is practitioner oriented and presumes prior knowledge in a number of areas of the Corporations Law as it often discusses the "new" law in terms of the "old". For the general reader, a current textbook that describes the Corporations Law as contemporary law may be more appropriate.

The book deals with fundraising, takeovers, corporate governance, accounting standards and share capital.

The fundraising regime has been substantially reformed. In particular the Corporations Law now recognises the need for the streamlining of small capital raisings and to expand the categories of exemptions.

There is now an exemption from the obligation to lodge a prospectus where there are less than 20 acceptances of an issue of securities in any 12 month period up to a limit of \$2 million. In line with its narrower predecessor, these exempt offerings cannot be public offerings. Nevertheless in a highly networked environment (and the Northern Territory is arguably such an environment) where investors and offerors are "personally known" to one another, this has the potential to be a very handy facility for small to medium enterprises.

There are also two new exempt categories of investor, one being a "rich" investor who

meets a wealth test (to be so declared by the investor's accountant) and a sophisticated investor (to be so declared by the investor's licensed security dealer).

The small capital raising needs of small to medium enterprises is specifically recognised by they being able to make a once off fund raising of up to \$5 million using a simplified disclosure document called an offer information statement.

The amendments also streamline fundraising by providing for a "short form prospectus" as a disclosure document on the condition that "long form" be made available to a potential investor on demand.

Disclosure documents are no longer registered by ASIC. Instead they are lodged after which a 7 day exposure period follows in which no offers can be accepted. ASIC provides a facility it calls "offerlist" on its website (www.asic.gov.au) where any person can view what is on public offer and a signpost to its location.

The takeovers regime has also been substantially reformed. The language has also changed with terms like the old A,B,C and D statements now banished and replaced with less cryptic terms such as "bidder statement". The regime now extends to managed investment schemes and bids can be made for securities other than shares. A compulsory acquisition can now take place outside a takeover bid.

The reforms are also intended to reduce "greenmail" by target shareholders in the post bid mop up process. A bidder is now permitted to compulsorily acquire any securities in the bid class if the bidder has a relevant interest in at least 90% of the securities and the bidder has acquired at least 75% by number of the outstanding securities that the bidder offered to acquire under the bid. The law now also provides that a bidder who has acquired a 90% or better relevant interest in a class *must* offer to buy out the remaining holders of the bid class securities.

Administratively, the role of the Corporations and Securities Panel (which

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everyone calls the Takeovers Panel) is expanded and will replace the Courts as the principal forum for takeover disputes.

The book deals with corporate governance reforms in a particularly lucid and informative manner.

The statutory duties of directors, officers and employees has been recast and grouped more logically in the body of the Corporations Law. In the grouping are the penalties showing clearly that criminal liability only attaches to breaches of good faith, misuse of position or information. The general law duties of good faith, skill care and diligence are now more closely aligned to their statutory equivalents.

The legislature has taken the opportunity to organise the civil penalty regime within the Corporations Law in a more logical way with each contravention clearly linked to a civil penalty if one applies. Directors duties is such an area. In addition there has been a significant procedural change in that a civil penalty proceeding by ASIC no longer stays any future criminal proceedings. This is thought to be one of the main reasons for the paucity of civil penalty applications brought by ASIC since the introduction of the civil penalty regime in 1993.

A statutory defence, known as the "business judgement rule" has been introduced. This defence is available in connection with a contravention of a duty of good faith only can be relied upon by a director who makes a decision in good faith and for a proper purpose, without a material personal interest in the subject, having informed himself about the subject matter and rationally believing the judgement to be in the best interests of the corporation.

While some commentators argue that this is the position reached by the Courts in any case, there is without doubt a level of comfort in having the rule stated as a statutory defence.

The rule and its exceptions in *Foss v Harbottle* have been abolished and a statutory derivative action introduced in its place. This allows an individual member to bring an action on behalf of the company for a breach of an officer's duty against a third party.

"Flood gate mitigation" is provided by requiring prospective plaintiffs to obtain leave of the Court.

The reforms also emphasis that accounting standards are required to lead to the production of relevant, reliable and comparable financial information for the users of financial statements. They are also expected to harmonise (over time) with standards set by the International Accounting Standards Committee.

Also established is an advisory group called the Financial Reporting Council whose members are drawn from professional and business organisations. The Council oversees the setting of accounting standards and reports to the Treasurer as to the effectiveness of those standards.

Practitioners may recall that the Company Law Review Act abolished the concepts of authorised capital and par value for shares from 1 July, 1998.

The book also deals with the two streamlined methods of share capital reduction and share buy back. Significantly there is now no Court confirmation process for a reduction in capital and the Corporations Law provides a number of options relating to share buy backs. Although commencing from December, 1995 (First Corporate Law Simplification Act 1994), provisions concerning share buy backs are now more logically grouped with capital reductions in Part 2J. For example under an equal access buy back under the "10/12 rule", that is the buy back ten percent of shares within a twelve month period, there isn't even a need for an ordinary resolution of the company. Compare this to the general prohibition of only a decade ago.

Conclusion

The book represents a useful practitioners companion guide to the Corporations Law as it now stands. The book assumes prior understanding and knowledge and accordingly may not be useful to lawyer looking at the area for the first time or for others looking for a general treatment of the area. However, for the practitioner who is to take instructions in any of the areas covered, particularly in fundraising or takeovers, the book would be well worth the purchase price.

Philip van der Eyk is a solicitor and formerly operations director and in house counsel for the Australian Securities and Investments Commission in the Territory.

JUDICIAL CONFERENCE COLLOQUIUM 2001: ULURU

The Judicial Conference of Australia will host its next Colloquium at Uluru from 7 to 9 April 2001 at Sails in the Desert Resort at Uluru.

The Colloquium themes are discretion in sentencing and the making of public comment by judicial officers.

The Conference hopes that over 100 judicial officers will attend. Chief Justice Gleeson has agreed to speak.

NT LEGISLATION

Legislative changes in October 2000, notified in the NT Government Gazette

New Acts

37/2000 AustralAsia Railway (Special Provisions) Amendment Act 2000 (s.6 – 29.9.00, Rest N/C)*

43/2000 Energy Pipelines Amendment Act 2000 (8.11.00)*

New regulations

48/2000 Supreme Court Regulations (11.10.00)*

49/2000 Legal Practitioners Regulations (1.10.00)*

50/2000 Supreme Court Rules (18.10.00)*

51/2000 Lands and Mining Tribunal Rules (25.10.00)*

CHIEF JUSTICE GLEESON'S BOYER LECTURES

The Chief Justice of Australia, The Honorable Murray Gleeson AC, presents a series of six lectures entitled *The Rule of Law and the Constitution* on ABC Radio National each Sunday from 5pm until 24 December 2000.

The lectures will also be published by ABC Books and ABC Audio.