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The law governing registered schemes

The second part of this article looks more closely at the regulatory arrangements that apply once a scheme is registered under Chapter 5C of the Corporations Law. These include the duties of responsible entities and their officers, the mandatory governance structures, and member voting rights in registered schemes.

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1 The Corporations Law is the name given to the parallel Acts of each of the Australian Commonwealth and State Parliaments that are intended to create a single national law governing corporations, securities and related matters. The Corporations Law commenced on January 1, 1991. At the time of writing, it is expected that the Corporations Law will be re-enacted as the Corporations Act 2001 (an Act of the Commonwealth Parliament) following referral by the Australian States to the Commonwealth of the power to make laws relating to corporations and financial services. The new national legislation, which does not differ in substance from the current law, should commence on July 15, 2001, and is intended to overcome possible constitutional defects in the existing Corporations Law structure.

2 In this article, the term "fund manager" is used generally to describe the promoter and operator of the scheme.

3 Commonwealth of Australia, *Financial System Inquiry Final Report* (March 1997), para. 11.2.

4 All figures are in Australian dollars.

5 ASSIRT, *Market Share Report—March Quarter 2000* (April 2000).

6 Publicly offered superannuation products were also regulated under this regime from January 1, 1991 until the commencement of SISA in 1994.

7 A trustee related to the manager was permitted in limited circumstances, under ASC Policy Statement 90 (September 18, 1995).

8 ASC Policy Statement 98 (February 6, 1995), para. 22.

9 ASC Policy Statement 89 (February 6, 1995), paras 22–28. For a more detailed discussion of the respective roles of the management company and the trustee under the prescribed interest laws, see P. Hanrahan, *Managed Investments Law and Practice* (CCH Australia Limited, Sydney, 2000), para. 2-300; and P. von Nessen, *A Practical Guide to Managed Investments* (LBC Information Services, Sydney, 1998), chapter 2.

10 For existing prescribed interest schemes, the MIA provided for a two-year transitional period, to July 1, 2000.

11 ALRC/CASAC, *Collective Investments Other People's Money* (Report No. 65, 1993), para. 12.3.

12 *ibid.*, para. 11.

13 For a more complete treatment of the collective investments review and the legislative history and development of the MIA, see Hanrahan, n. 9 above, paras 2-400 to 2-600; and P. Hanrahan, "(Ir)responsible Entities: Reforming Manager Accountability in Public Unit Trusts" (1998) 16 *Company and Securities Law Journal* 76–92.

14 ASIC policy is an important part of the regulatory framework for managed investment schemes. ASIC has the power under the Corporations Law to modify the operation of Chapter 5C, or to grant exemptions from it, in specific or general cases. The basis on which it will exercise this power is explained (along with other matters related to its administration of the Corporations Law) in Policy Statements, Practice Notes, Class Orders, pro forma instruments, information releases and other documents. These documents are available on the ASIC website, at www.asic.gov.au.

15 s. 708 exempts small-scale personal offers (s. 708(1)), offers to certain sophisticated and professional investors (s. 708(8)–(11)), offers to executive officers of the operator (s. 708(12)), some offers to existing members of a registered scheme (s. 708(13)(b)), offers involving no consideration (s. 708(15)) and offers made in connection with a takeover or scheme of arrangement (s. 708(17) and (18)) from the disclosure requirements.

16 s. 601EB(1)(d). These requirements are contained in s. 601FA. The licensing requirements are discussed below.

17 s. 601EB(1)(e). Under s. 601GA, the constitution must deal adequately with the consideration that is to be paid to acquire an interest in the scheme, the powers of the responsible entity in investing or dealing with scheme assets, complaints resolution, winding up and, where relevant, the responsible entity's fees and right to be indemnified for costs and expenses, the responsible entity's power to borrow money, and the members' right to withdraw.

18 s. 601EB(1)(f) and (g). The compliance plan must be signed by the directors under s. 601HC. The contents of a compliance plan are prescribed by s. 601HA. In particular, it must include arrangements for ensuring the identification and separation of scheme assets, the proper functioning of the compliance committee (if there is one), regular valuation of scheme assets, audit of compliance with the plan, and adequate record-keeping.

19 s. 601EB(1)(h). Section 601HG contains the requirements for audit of compliance with the scheme's compliance plan.

20 See s. 784 and ASIC Policy Statement 130.32–130.63. Different criteria are used to assess these factors, depending on the type of scheme. For example, for schemes investing in financial assets, ASIC will usually require that the relevant officers have tertiary qualifications in business, accounting or actuarial studies.

21 s. 784(2A) and ASIC Policy Statement 131.12–131.14.

22 s. 784(2A)—(2D). The basis for calculating net tangible assets is set out in ASIC Policy Statement 131.24–131.26B. Generally, ASIC will approve guarantees provided by Australian ADIs, foreign banks regulated under the Basle Committee standards, and parent or sibling entity guarantees where the guarantor has net tangible assets of at least A$50 million.

23 ASIC Policy Statement 131.20–131.23.

24 ASIC Policy Statement 131.15 and 131.16.

Malta

The Functions and First Two Decisions of the Malta Stock Exchange Tribunal

The Stock Exchange Act of 1990 Act came into force in 1992. The Act established the Council of the Exchange as a regulatory authority responsible for the licensing and supervision of stockbrokers, the listing of securities and the monitoring of trading on the Maltese *Borsa* set up by the same law. The Malta Stock Exchange Tribunal was created by Part III of the Act, which also introduced the first ever rules on insider dealing in Maltese legislation.

Since 1994, however, the principal legislation on insider dealing is the Insider Dealing Act of that year. Some of the original rules of the 1990 Act have been retained, including the provisions dealing with the Tribunal. The Insider Dealing Act of 1994 is largely of a criminal law nature; it establishes a number of insider offences and it does not provide a civil remedy for losses suffered consequent to a breach of the insider dealing provisions. The 1994 Act was broadly mod-

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elled on the U.K. Company Securities (Insider Dealing) Act of 1985 (now repealed).

The primary function of the Tribunal is to investigate allegations or suspicions of insider dealing and other activity termed as other "irregular practices in Exchange dealings" on the Malta Stock Exchange. The Tribunal has no criminal jurisdiction and it is the only authority which, under Maltese law, may order persons found guilty of criminal insider dealing to pay compensation to an injured party who has suffered financial loss.

The 1990 Act assigns to the Malta Stock Exchange Tribunal a number of other significant investor protection functions:

(a) The Tribunal may investigate exchange dealings entered into by unauthorised operators and it may provide for the recovery of proceeds or other assets and the payment of compensation to clients.

(b) It may intervene and issue orders and directives to prevent a contravention of any of the provisions of the Act.

(c) In certain designated circumstances, it may cancel, suspend or restrict the licence of a stockbroker who is not abiding by the established regulations or Stock Exchange by-laws.

The Tribunal consists of a Chairman, who must be an advocate with a minimum of twelve years practice, and two other members possessing relevant expertise and experience. It is appointed for a period of three years; the minimum term allowed by law. The Act obliges the Tribunal to "deal with any matter before it as expeditiously as possible and shall give its decision without delay". It was only during 1999 that the first two cases were submitted to the Tribunal. These were concluded in 2000.

The Malta Stock Exchange Tribunal has to be carefully distinguished from another tribunal operating in the financial services sector, known as the Financial Services Tribunal (FST). The FST plays no significant investor protection function. It was set up to provide a swift and competent mechanism of review for the benefit of operators who may feel aggrieved by a decision of the regulatory authorities under the laws regulating banking, investment services, insurance and certain other financial activities. It has competence to review a variety of regulatory decisions including the "refusal, variation, cancellation or suspension of a licence".

The FST may "confirm, reverse or vary the decision of the competent authority", but it may only intervene where a regulatory body has wrongly applied the law or has abused of its discretionery powers. Any party may appeal exclusively on points of law to the Court of Appeal.

Although these two tribunals have widely different functions, the same persons have been appointed to serve on both Tribunals because the qualifications are similar. The sittings of both Tribunals are open to the public but in particular cases it may deemed more proper to conduct the proceedings in private. The decisions, however, are always given in public.

Current proposals for legislative reforms foresee the end of the Malta Stock Exchange Tribunal and the extension of the competence of the FST to stockbrokers licensed under the 1990 Act. This would certainly streamline the situation and remove certain anomalies inherent in the Tribunal's functions, some of which seem to be more of a regulatory or administrative nature rather than of a judicial nature.

The following is a brief note on the first two cases concluded by the Tribunal during 2000.

Malta Stock Exchange Tribunal, case number 1: prolonged suspension of trading of a listed security; case withdrawn following a joint declaration

The very first case that was submitted to the Tribunal was withdrawn following a joint declaration issued by the two parties on January 13, 2000. The case involved a complaint by the minority shareholders of a leading listed bank against the prolonged suspension of trading of the bank's shares pending the proposed acquisition of the majority shareholding from government by a foreign bank.

When the proceedings opened in 1999, the Council of the Exchange pleaded that the Tribunal had no competence to hear the case. It argued that the phrase "alleged or suspected irregular practices on the Exchange", used in the Malta Stock Exchange Act could not reasonably be interpreted to apply to regulatory decisions of the Council itself. It was intended to cover private transactions and acts carried out by stockbrokers or investors.

In the joint declaration, the minority shareholders declared that they accepted the explanations given by the Exchange for the prolonged suspension of trading. During the course of the proceedings, the Exchange introduced new by-laws to safeguard the interests of minority shareholders in the event of a possible de-listing.

The Malta Stock Exchange Tribunal case number 2: investigation into alleged insider dealing; increase in share capital; competence of the Tribunal; proof required of unpublished price sensitive information of a precise nature

Towards the end of 2000, the Malta Stock Exchange Tribunal concluded its first ever inquiry into an alleged instance of insider dealing. The allegation concerned a local bank whose shares are listed on the Malta Stock Exchange. The chairman of this bank also sat on the board of a foreign corporate shareholder, which held the biggest, though minority, shareholding in the local company. No single shareholder held a majority of shares.

The allegation arose from an interpretation of a series of circumstances originating out of a general policy decision by the local listed company to increase the share capital by means of a future bonus issue in favour of existing shareholders. This decision was taken at a regularly held board meeting of the local company and was to be put in place at some undefined date in the future. Earlier, the foreign shareholder had expressly declared their desire and intention to increase their shareholding in the company. It had also officially applied for and obtained clearance from the Central Bank of Malta, the banking regulator, to increase its shareholding in the company.

Subsequent to this resolution, but before the actual increase in the share capital was implemented, the foreign shareholder acquired a relatively small number of shares on the Stock Exchange according to normal procedures.

The investigation centred on the possible culpability of the foreign shareholder and of its director who served as chairman of the local company. The suggestion was that the foreign shareholder, acting on the basis of the unpublished board decision to make the bonus issue sometime in the future, was positioning itself in order to increase its eventual entitlement to bonus shares.

Under the 1990 Act, the Tribunal has competence to investigate allegations of "alleged or suspected irregular practices

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in Exchange dealings". Noting that the 1990 Act did not define this phrase, the Tribunal decided that it covered "all kinds of mischief and wrongdoings, be they great or small", including acts amounting to insider dealing, despite the fact that a specific law on this subject had in the meantime been passed by Parliament in 1994. The Tribunal reasoned that following the adoption of this Act, it should now apply the definition given to insider dealing provided in the Act.

The Tribunal noted that under the 1994 Act, only individuals (and not companies) could be found guilty of criminal insider dealing. However, the Tribunal held that it could still investigate corporate wrongdoing because the 1990 Act did not preclude this possibility. This was probably correct as the Tribunal's competence was administrative and not criminal — after all, in the event that the Tribunal decides that insider dealing had been committed, it could only adopt administrative measures allowed under the 1990 Act, as well as possibly report its findings to the Council of the Stock Exchange and to the police authorities for any further action these may consider appropriate.

The Tribunal reasoned that the whole case before it depended on proof that there had been wrongful use of unpublished price sensitive information "of a precise n ture". If this aspect was not proved, the case would fail.

Following its investigations, the Tribunal found that ı "concrete" information had been available to the sharehol ers and directors at the time when the share purchases we made: "The information at the time was sketchy and far fro complete." The information then available was not such th if made public, it could have had a significant impact on tl price: "...the information relating to the rights issue availab at the time the purchases were made was so scant that could not have significantly effected the price of the (bank' shares had it been made public. It is relevant to point out th the law uses the word *significant*, meaning that it is n concerned with trivial information which only slightly affec the price."

The Tribunal concluded that that both the chairman ar the foreign shareholder had acted correctly, and that the were insufficient grounds to justify further investigating tl allegation (decision taken on October 6, 2000).

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