The International Comparative Legal Guide to:

Corporate Governance 2010

A practical insight to cross-border Corporate Governance

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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

The corporate entities to which this chapter will refer are public companies admitted to the Official List of ASX Limited ("**ASX**"), which is Australia's principal public securities market.

There are other forms of corporate entity that may be publicly owned, including 'managed investment schemes'. This is a generic term under Australia's corporate law that covers a range of corporate and other structures, which may involve public ownership. Examples of managed investment schemes include cash management trusts, property trusts and many agricultural schemes. Many of the corporate governance rules and principles applicable to companies apply similarly to managed investment schemes, although the focus of this chapter is on public, listed companies.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The *Corporations Act 2001* (Cth) ("**Corporations Act**" or the "**Act**") is the principal legislation regulating companies in Australia. It is an Act of the Commonwealth of Australia that sets out the laws dealing with business entities in Australia. The constitutional history of Australia's corporate law is somewhat complex and tortuous. In summary however, publicly listed companies are now federally regulated under the Corporations Act.

The Australian Securities and Investments Commission ("**ASIC**") is the principal corporate regulatory agency. ASIC is a Commonwealth Statutory corporation created by the *Australian Securities and Investments Commission Act 1989* (Cth) ("**ASICA**"). ASIC's functions include: registering companies; receiving, processing and making available to the public information about companies; investigating suspected contraventions of, and enforcing compliance with, the Act; and exercising discretion to relieve from compliance with regard to particular provisions of the Act. To this end, ASIC publishes regulatory guides that explain and articulate its policies in undertaking its role and exercising the discretion and responsibilities granted to it under the Act.

The Takeovers Panel ("**Panel**") is the primary forum for resolving disputes regarding a takeover bid until the bid period has ended. The Panel is a peer review body, with part-time members drawn predominantly from Australia's takeovers and business communities. There have been several significant constitutional challenges to the role and authority of the Panel in recent times. A decision by the High Court of Australia in 2008 has put many of those challenges to rest, and the role and powers of the Panel have been confirmed (at least for the foreseeable future).

ASX was created when the Australian Stock Exchange and the Sydney Futures Exchange merged in July 2006. As at 31 December 2009, there were 2,181 companies listed on ASX, with a domestic market capitalisation of $1.4 trillion.

For publicly listed companies, ASX is a co-regulator with ASIC in that it prescribes standards for companies admitted to its Official List and reserves power to police those standards. The standards are set out in the ASX Listing Rules, the ASX Business Rules and the business rules of its securities clearing house.

In addition to the ASX Listing Rules, the ASX Corporate Governance Council has produced a guide titled "*Principles of Good Corporate Governance and Best Practice Recommendations*" ("**Principles**"). The Principles are guidelines and are not prescriptive; however, the ASX Listing Rules require that companies disclose in their annual report the extent to which they have followed these Principles. Where companies have not followed these Principles, reasons must be provided for not having followed them.

The Australian Competition and Consumer Commission ("**ACCC**") was established in 1995 to administer the Trade Practices Act 1974 (Cth). Its primary responsibility is to ensure that individuals and businesses comply with Commonwealth competition, fair trading and consumer protection laws. While the ACCC is not a corporate regulator per se, it would be remiss to describe the Australian regulatory landscape without a reference to the ACCC.

1.3 What are the current topical issues, developments and trends in corporate governance?

Recent developments in corporate governance and changes to the law in the past 12 months have brought several new issues to the surface. These include the introduction of a requirement for listed companies to disclose the gender balance of their boards, the strict approach courts are taking in relation to directors' duties, and the ranking of shareholder claims against unsecured creditors' claims when a company is subject to external administration.

ASX announced a proposal on 7 December 2009 to require listed companies to disclose the number of women employees in their whole organisation, in senior management positions, and on the board. This proposal followed the release of statistics suggesting a gender imbalance on companies' boards: only 8.3% of ASX's top 200 listed companies' board members are women, and almost half of the top 200 listed companies have no women on their boards. Once the proposal is implemented, ASX will also require listed

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companies to disclose in their annual report the achievement of gender objectives set by the board. ASX's Corporate Governance Council is expected to outline its recommendations shortly, which will likely take effect as of 1 January 2011.

Recent decisions have shown that Australian courts are now taking a stricter approach to directors' duties. The New South Wales Supreme Court's decision in *ASIC v Macdonald* (No 11) [2009] NSWSC 287 related to seven directors and three executives of James Hardie Industries Limited and their approval of a draft ASX announcement that contained false and deceptive statements. Though the Court's decision arguably did not change the law on directors' duties, it certainly clarified what is required to discharge a director's duty to exercise care, skill and diligence in respect of public announcements that relate to critically important company decisions. In such circumstances, a director cannot simply rely on the opinions of fellow directors, company management and advisers. Directors must also independently scrutinise the accuracy of the contents of announcements. The James Hardie decision also clarified that in circumstances in which important company announcements are being considered, non-executive directors must equip themselves with all relevant board materials and take active steps to verify the accuracy of the information contained in such company announcement. The James Hardie decision is currently subject to appeal on the question of whether there was insufficient evidence to satisfy the trial judge that the ASX announcement was tabled and approved by the board prior to its release.

It has been almost three years since the decision in *Sons of Gwalia Ltd (Subject to Deed of Company Arrangement) v Margaretic & Anor* [2007] HCA 1, in which the High Court held that shareholders' claims against a company rank equally with claims of the company's other unsecured creditors (if the claim against the company is made other than in the member's capacity as a member). In that case it was held that the critical factor to be considered is the character of the debt and not the identity of the claimant. There was considerable debate following this case as to whether the decision should stand or be reversed legislatively. Although the Corporations and Markets Advisory Committee did not recommend change to the law, the Federal Government announced on 19 January 2010 that it would amend the Corporations Act to reverse the decision in *Sons of Gwalia*. The decision to overturn *Sons of Gwalia* will likely result in a more cost-effective administration process. Allowing shareholder claims to rank equally with other unsecured creditors may have increased the potential for shareholder class actions and securities fraud litigation which would have been costly and time-consuming during an administration process.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

Shareholders have a number of rights under the Act. Key shareholder rights include: the right to regular corporate and financial information; the right to vote at general meetings; the right to requisition and call general meetings and to propose resolutions; and the right to appoint and remove company officers.

Beyond this, the Act requires that certain matters be decided by the general meeting of members, including: altering the corporate constitution; consolidating or subdividing the company's shares; reducing the company's issued share capital; altering rights attached to shares; altering the company's status; selective buy-backs or a buy-back exceeding certain limits; and conditions prescribed by the Act.

Certain "Related Party Transactions" require shareholder approval under the Act, the ASX Listing Rules, or both.

The ASX Listing Rules also require that particular transactions be sanctioned by shareholders at a general meeting. For example, ASX may require shareholder approval if a listed company proposes to make a significant change to the nature or scale of its activities. Further, shareholder approval is required if the significant change involves the company disposing of its main undertaking.

In addition, shareholders have statutory minority shareholder remedies under the Act, including: remedies for unfairly prejudicial conduct and oppression; derivative actions; class rights; and the remedy of inspection of books.

Shareholders are the final claimants after creditors and employees have been paid. Ordinary shareholders are the ultimate remaining claimants after preference shareholders have received their due.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Most companies are limited by shares. Limited liability means that a shareholder's exposure to vicarious liability for torts committed by employees in the course of their employment is reduced. Directors and members whose conduct amounts to a tort on their part will ordinarily be liable without limit, regardless of whether at the time of the conduct they were engaged in activity on behalf of the company. However, if the conduct was an honest attempt at performing a contract that the company made with the victim, they will not be liable if the victim agreed to look only to the company for redress for conduct amounting to a breach of the contract. Members will always be liable for fraudulent conduct.

Directors occupy a fiduciary position in relation to the company and courts will prevent directors from using their powers for improper purposes. In contrast, shareholders holding majority control do not stand in a fiduciary position to the company or to the minority shareholders, and they do not exercise any of their powers in a fiduciary capacity.

There is, however, a line of authority that imposes certain limitations on the rights of majority shareholders to exercise freely the voting power attached to their shares.

In the High Court decision of *Gambotto v WPC Ltd* (1995), the court articulated two principles that restrict the voting power of majority shareholders relating to their voting power in the context of altering the company's constitution. The principles highlighted in the decision were that power must be exercised for a proper purpose, and that exercise must not operate oppressively in relation to minority shareholders.

2.3 Can shareholders be disenfranchised?

ASX Listing Rule 6.9 currently states that on a resolution to be decided on a poll, ordinary security holders must be entitled to one vote for each fully paid security. The principle that has historically underpinned Listing Rule 6.9 is described as the 'proportionality principle', meaning voting power should be proportionate to economic interest.

It is likely that any initiative by majority shareholders to use their voting power in a general meeting to disenfranchise the minority would constitute an "abuse of power" and would offend the *Gambotto* principles described above.

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2.4 Can shareholders seek enforcement action against members of the management body?

The Act provides shareholders with broad rights to claim "oppression", which is conduct that is commercially unfair and which is undertaken by the company or those who manage the company. The test under the Act is whether the offensive conduct is either contrary to the interests of the members as a whole, or is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity".

Company law confers rights on members to protect them from abuse at the hands of the controllers of the company. In this context, 'controllers' include both directors, who are subject to fiduciary duties, and (in certain circumstances) the controlling shareholders, who do not occupy a fiduciary position.

Shareholder class actions against companies and their directors have been increasing in frequency and prominence in Australia in recent years.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities by shareholders in the corporate entity/entities?

The takeovers provisions of the Act prohibit acquisitions of relevant interests in voting shares in publicly listed companies where the acquisition would cause someone's voting power to increase above 20 percent, or, where the acquisition would cause someone's voting power to increase from a position above 20 percent. There are certain exceptions to this prohibition including: shareholder approval; an ability to 'creep' (small and limited increases spread over a period of time); and acquisitions that result from a takeover offer made available to all shareholders. Voting power is broadly defined and captures 'power' held through associates and parties acting in concert.

The takeovers provisions apply in a similar way to listed managed investment schemes. They also apply to unlisted companies with more than 50 members.

Substantial shareholdings in publicly listed companies must be disclosed to the company(ies) in which they are held and to the market. A substantial shareholding is defined as five percent or more, and the definition captures holdings of associates. Each change of one percent thereafter must also be disclosed in a similar manner. When the shareholding falls below five percent, that change must also be disclosed.

All shareholding interests, and all changes in those interests, associated with directors of publicly listed companies require disclosure with no threshold applying.

2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

The calling and conducting of shareholders' meetings is governed by the Act as well as by the individual company's constitution (if any) and any applicable replaceable rules. The ASX Listing Rules impose additional requirements on companies with regard to shareholders' meetings.

While companies are required to hold an annual general meeting, it may also hold other general meetings of shareholders throughout the year. Such meetings are often referred to as "extraordinary general meetings".

There are two types of resolutions that may be passed at a shareholders' meeting:

(a) an ordinary resolution; and

(b) a special resolution.

An ordinary resolution is passed by a simple majority vote of the shareholders.

The Act requires certain types of decisions to be passed by a special resolution. A special resolution must be passed by at least 75 percent of the votes cast by shareholders entitled to vote on that resolution. Depending on the nature of the resolution, certain voting exclusions may apply under the Act or the Listing Rules.

The Act allows for a general meeting to be called at the request of shareholders:

a) where the members hold at least five percent of the votes that may be cast at the general meeting; or

b) where it is requested by at least 100 members who are entitled to vote at the general meeting.

Members may also give notice to the company of a resolution that they propose to move at a general meeting. The members proposing the resolution must hold at least five percent of the votes that may be cast on the resolution or the notice of the resolution must be given by at least 100 members who are entitled to vote at a general meeting.

The rights of indirect shareholders will depend on the terms of the nominee/trustee arrangement. As the registered holder of the shares, the trustee or nominee will have the power to exercise the right to vote and to dispose of the shares (notwithstanding that the trustee may be subject to the beneficiary's directions with respect to the exercise of those powers). There are, however, numerous contexts in which the law looks beyond the nominee arrangement to consider the position of the underlying beneficial holder.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A Company is managed by a single board of directors ("**Board**"). The Board is comprised of directors, both executive and non-executive. The duties of directors are the same, whether they are executive or non-executive. In some circumstances however, courts may hold executive directors to a higher standard than non-executive directors.

Within the Board, there are a number of other company officer roles, including the company secretary, CEO and chairperson. Public companies must have at least three directors and one secretary. The Principles recommend that a majority of the Board should be independent.

The Board may appoint various committees to manage particular issues if its company constitution allows it. The Principles recommend the establishment of committees such as a nomination committee and an audit committee. For companies in the top 300 of the ASX All Ordinaries Index, the ASX Listing Rules require that they comply with the Principles in relation to composition, operation and responsibility of the audit committee. Notably, the Principles require that the audit committee be comprised of a majority of independent directors, and that the chair of the audit committee be an independent director.

There are also a number of provisions that ASX requires companies to include in their constitutions, including:

(a) ensuring consistency with ASX Listing Rules;

(b) information about meetings to be provided to ASX; and

(c) payments to directors and increases in fees subject to member approval.

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3.2 How are members of the management body appointed and removed?

At incorporation, members appoint directors to the Board. Subsequent appointments may occur at Board level (if the individual company constitution allows), but members must approve the appointment at the next general meeting of members. The Board may not remove a director of a public company. At general meetings, members may vote to appoint and remove directors and other company officers.

The ASX Listing Rules require that directors be re-elected at least every three years; however, this Rule does not apply to the election of a managing director.

Only natural persons (not companies) of 18 years or over, who have not been disqualified from holding office, may serve as directors. Public companies must ensure that at least two of their directors ordinarily reside in Australia, as must a company secretary.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

The Act allows for the Board to decide on remuneration packages for directors. The Act (and the accompanying Accounting Standards) requires the annual directors' report prepared for members to include details of the nature and amount of remuneration given to key executives. There are disclosure requirements under the ASX Listing Rules that require companies to provide summaries of key executive contracts, such as that of the CEO. Reporting requirements also necessitate that the remuneration amounts be publicly available. Non-executive directors' fees are also decided by the Board, however the cumulative amount of non-executive directors fees paid must be approved at a general meeting of members.

In March 2009, Federal Treasurer Wayne Swan announced that the Commonwealth Government would examine Australia's framework in relation to the remuneration of directors and executives. The Government's Productivity Commission released a report in December 2009, making recommendations for legislative reform, including the following:

(a) removing conflicts of interest through the use of independent remuneration committees and consultants;

(b) prohibiting directors from voting their shares on remuneration reports; and

(c) promoting board accountability and shareholder engagement by enhancing the level of required disclosure and increasing the penalties for boards that do not take shareholders' concerns into account when considering the issue of directors' remuneration.

The Commonwealth Government is currently considering these recommendations. The Government also announced in April 2010 that it will also consider a proposal which seeks to amend the Corporations Act to allow companies to claw back cash bonuses paid to executives on the basis of financial statements where those statements are later found to be incorrect or to contain material misstatements. The Government is yet to issue a discussion paper for public consultation on this issue. New laws effecting the above proposals are currently expected to come into force by 1 July 2011.

In addition, the Commonwealth Government has recently enacted reforms to the regulation of termination payments to give shareholders a greater say in either approving or rejecting payouts, by lowering the threshold at which termination payments require shareholder approval. The Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 was introduced on 23 November 2009, and provides that termination payments relating to directors and key management personnel amounting to more than one year's base salary (as opposed to the previous threshold of seven times one year's base salary) must be approved by shareholders.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

There are no limitations on interests in securities held by directors. Directors may hold securities in the company of which they manage and no limitation exists on the quantity of securities they may hold. Very strict disclosure obligations exist however for all public company directors. Directors must disclose any and all interests they hold in such securities. Any changes in directors' interests must be announced to the market within five business days of that change having taken place. Directors must also be aware of their obligations not to undertake insider trading, therefore many companies impose restrictions on directors dealing in securities other than during certain trading windows when the market is fully informed.

3.5 What is the process for meetings of members of the management body?

Board meetings are called as and when needed, with no specification at law as to the number of meetings required to be held in a calendar year. The directors' report in the company's annual report must, however, indicate how many meetings were held and how many meetings each director attended. There is no requirement as to what business is to be conducted at Board meetings.

Unless individual constitutions specify otherwise, any director may call a Board meeting at any time. A period of reasonable notice must be given so that each director has the opportunity to attend.

The quorum for a Board meeting is usually two directors who must be present at all times during that meeting. However, if a director has a material interest in a particular matter, and so is unable to vote on a particular resolution, the Board must ensure that two directors are still present in order for that meeting to be valid.

Unless a constitution otherwise indicates, voting at Board meetings is conducted by a simple majority, with each director entitled to one vote.

3.6 What are the principal general legal duties and liabilities of members of the management body?

Directors' duties are owed to the company and its members. Directors' duties are derived from three sources: common law; statute law; and particular company duties specified in company constitutions or other contracts.

Common Law Fiduciary Duties include the:

(a) duty to act in good faith and in the best interests of the company;

(b) duty to avoid actual and potential conflicts of interest;

(c) duty not to fetter discretions; and

(d) duty to exercise powers and discharge duties for a proper purpose.

Statutory Duties include the:

(a) duty to exercise powers and discharge duties with a degree of care and diligence;

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(b) duty to act in good faith in the best interests of the company and for a proper purpose;
(c) duty not to improperly use their position to gain an advantage or cause detriment to the company;
(d) duty not to improperly use information to gain an advantage or cause detriment to the company;
(e) duty to disclose all material personal interests in matters that relate to the affairs of the company (exceptions apply); and
(f) duty to prevent the company from trading when insolvent.

A breach of directors' duties may result in a number of civil and/or criminal penalties. Some of these sanctions may include ASIC imposing fines or disqualifying that director from being a company officer for a period of time. Affected parties (members, ASIC, the Board) may seek injunctions from the court to stop a director acting in breach of his duties. A director may also be ordered to pay damages. Criminal sanctions may include fines and/or imprisonment.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

Directors are responsible for the management of the company. Executive directors are responsible for the day-to-day management of the entity, whereas duties of non-executive directors include review, oversight and strategic direction. The secretary has responsibility for ensuring compliance with corporate governance and accounting requirements. The CEO manages the everyday operations of the company. The Chairman is traditionally independent (recommended in the Principles) and is responsible for strategic leadership of the Board. The Principles recommend that the roles of CEO and Chairman should not be exercised by the same person. The Principles also recommend that a code of conduct for key executives be established.

3.8 What public disclosures concerning management body practices are required?

Companies disclose their Board practices in the annual report, which is lodged with ASX and made publicly available. Any Board appointments, resignations or removals must be continuously and immediately disclosed to the market.

The ASX Listing Rules also require that companies disclose in their annual report the extent to which they have complied with the recommendations of the Principles and provide reasons for any instances of non-compliance.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Yes, directors may be indemnified by the company (approved by members) in respect of dealings with third parties. Directors may not however be indemnified for breaches of their duties as Directors. Directors may take out directors' insurance. The Company may take out such insurance on behalf of Directors, though the insurance may not provide protection in those instances where an indemnity from the Company would not be allowed.

4 Corporate Social Responsibility

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Australia's corporate law defines corporate responsibility in terms of a company's best interests, namely the interests of its shareholders, and in some circumstances and contexts the interests of the company's creditors and possibly employees. The core sections of the Act do not make explicit reference to notions of corporate social responsibility.

However, there are various ways in which corporate social responsibility has registered on the legal road map for Australian companies.

Shareholders are able to use the general meeting to seek to have the company adopt various environmental or social policy goals. For instance, they may propose resolutions to include a 'social responsibility' charter in the company's constitution, requiring the board to take into account various social factors.

The ASX Corporate Governance Council has stated that company directors have the power to take broader community factors into account in decision making.

Companies are subject to a range of Commonwealth, State and Territory laws of general application that are designed to protect various interest groups or public values. Directors cannot ignore or subordinate these public obligations because of any notion that interests of shareholders are paramount to compliance with these laws.

While companies are subject to a range of reporting requirements, there is no provision in the Act, or under the ASX Listing Rules that specifically refers to reporting on the social and environmental impact of corporate activities. However, companies may, and many do, choose to report voluntarily on these matters in their various public and shareholder reports.

4.2 What, if any, is the role of employees in corporate governance?

The board of directors is the central organ of corporate governance, charged with the functions of leading and controlling the enterprise. However, in Australia there has long been interest in the potential of institutionalised employee representation on boards. There is an increasing trend of Australian unions exercising a voice at shareholder level on behalf of the employees that they represent.

In this context, it is also noteworthy that Australia has, for some time, had a system of compulsory superannuation. This has resulted in superannuation funds having a prominent role and voice on the share registers of Australian companies on behalf of Australia's workforce. Industry superannuation funds with significant employee representation play a significant role in corporate Australia.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

It is the collective and individual responsibility of all directors to ensure that the company is meeting its disclosure and transparency obligations as required by law and by ASX. In practice, particular officers (such as a company secretary or general counsel) may have roles as compliance officers in a company's disclosure protocol. Legal responsibility however, rests with the directors.

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5.2 What corporate governance related disclosures are required?

All public companies must release annual and half-yearly financial reports. Some public companies are also required to release quarterly reports to the market. There are Australian Accounting Standards Board ("**AASB**") requirements regarding the content that should be included in such reports. The ASX Listing Rules also require that listed public companies immediately disclose to the market any information that would be reasonably likely to have a material effect on the price or value of the company's securities.

As noted earlier, companies are required to report regarding their compliance with the Principles in their annual reports.

5.3 What is the role of audit and auditors in such disclosures?

All public companies must have their annual financial reports audited, as well as having their half-yearly reports either reviewed or audited. Companies must also obtain an auditor's report, which is attached to the Company's reports. Individual companies appoint their auditors at a general meeting of members.

Auditors must be independent so as to avoid any actual or potential conflicts of interest with their role as the company's auditor. Despite recommendations that auditors rotate after a period of time has elapsed, no such requirement currently exists.

The auditor's report to members must indicate whether the auditor believes the company has complied with all relevant laws and accounting standards, as well as whether, in the auditor's opinion, the financial reports prepared by the Board give a "true and fair" view of the company's finances.

5.4 What corporate governance information should be published on websites?

There are no requirements at law for companies to publish corporate governance information on company websites. In practice, many companies publish their company details online, including directors' details, recent public announcements and financial reports.

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Jonathan practises in commercial and corporate law and has broad experience in many aspects of commercial practice, including mergers and acquisitions, public listings, capital raisings, infrastructure privatisation, major projects and financing. He has provided strategic commercial advice to major Australian and overseas corporations across a range of industry sectors, including banking, technology, health, manufacturing and retail.

His major clients include: Nufarm Limited; SEEK Limited, for whom he has acted in a range of strategic investments and in its listing on the ASX; and Slater & Gordon, which Jonathan acted for in relation to its landmark listing on the ASX - the first law firm in the world to list on a recognised exchange.

Jonathan has an honours law degree from The University of Melbourne and was admitted to the partnership of Arnold Bloch Leibler in July 2001.

Established in 1953, Arnold Bloch Leibler is a leading Australian commercial law firm with offices in Melbourne and Sydney. The firm has developed a reputation for results-oriented, commercially focused service, advising clients throughout Australia and international clients dealing in Australia. The firm is regularly involved in some of the most important transactions in the country and is committed to providing innovative solutions by identifying novel ways to work within or through the law to achieve clients' objectives.

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