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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Centre for Corporate Law website – research resources**  The Centre for Corporate Law and Securities Regulation at The University of Melbourne has a wealth of resources on its website dealing with corporate law, corporate governance and securities regulation.  These resources include links to:           Asian-Pacific corporate law and securities regulation sites (links are provided, on a country by country basis, to sites such as stock exchanges, securities commissions, corporate law legislation and corporate law judgments for each of these countries);          world securities commissions (links to approximately 60 securities commissions);          world stock exchanges (links to approximately 110 stock exchanges);          corporate governance (links to a range of organisations which are involved in corporate governance issues);          professional and interest bodies; and          financial news.  The Centre for Corporate Law website also provides free access to corporate law judgments of the High Court, Federal Court and the State Supreme Courts as well as decisions of the Takeovers Panel.  There are over 2,000 judgments on the website.  An advanced search engine allows convenient searching for key words in all judgments.  In addition, it is possible to search for judgments loaded onto the website within specified periods of time (eg in the last day, last week, last two weeks or last month).  Also on the website is a range of topical research papers dealing with matters such as the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), compulsory acquisition of shares, the Takeovers Panel, dual listed companies, and directors' duties. The Centre for Corporate Law has recently published 4 new research reports dealing with:  - [Reforming Not-For-Profit Regulation](http://cclsr.law.unimelb.edu.au/research-papers/" \t "_new) - [Managed Investments: An Industry Report](http://cclsr.law.unimelb.edu.au/research-papers/" \t "_new) - [Use of prospectuses by investors and professional advisers](http://cclsr.law.unimelb.edu.au/research-papers/" \t "_new) - [ASIC enforcement patterns](http://cclsr.law.unimelb.edu.au/research-papers/" \t "_new)  All of these research reports are on the Centre's website.  The address of the Centre for Corporate Law website is [http://cclsr.law.unimelb.edu.au/](http://cclsr.law.unimelb.edu.au/" \t "_new)  **1.2 2003 mergers and acquisitions study**  In March 2004, Ernst & Young released its annual analysis of merger and acquisition activity in Australia. The Mergers & Acquisitions Index (M&A Index) is a barometer of takeover activity among listed Australian industrial companies.  Some highlights of the findings for 2003 include:           The M&A Index increased by 12 per cent in 2003.          The recovery in the mergers and acquisitions (M&A) environment occurred mostly in the second half of the year along with a significant increase in initial public offering (IPO) activity.          In terms of the total value of acquisitions, a higher proportion was financed using cash. Competitive debt markets and low interest rates assisted in this regard.          The material sector has been a strong performer in M&A in 2003 on the back of construction and housing activity.          The strengthening Australian dollar does not appear to have greatly impacted the attractiveness of Australian assets with some significant listed company takeovers by offshore buyers in 2003.          The private equity market has been particularly active over the past year.  The M&A Index is a composite measure of the acquisition activity of all listed industrial companies with a market capitalisation above A$45 million.  The M&A Index numbers are primarily based on the:           total number of acquisitions;          total value of acquisitions; and          average Price to Asset Ratio (PAR) paid for acquisitions.  **Summary of acquisition activity**   |  |  |  |  | | --- | --- | --- | --- | |  | 2002 | 2003 | Movement | | **All acquisitions** |  |  |  | | Number of transactions | 320 | 349 | 9% | | Value of transactions ($M) | $22,414 | $20,476 | -9% | | Average value per transaction ($M) | $70.05 | $58.67 | -16% | | Average PAR per transaction\* | 1.49 | 2.00 | 35% | | **Transactions excluding mega transactions (more than $1billion)** |  |  |  | | Number of transactions | 302 | 343 | 14% | | Value of transactions ($M) | $8,683 | $12,769 | 47% | | Average value per transaction ($M) | $28.75 | $37.21 | 29% |   \*excludes media companies  **1.3 National Australia Bank’s response to foreign currency options trading losses**  On 12 March 2004, the National Australia Bank Chairman, Mr Graham Kraehe, and Chief Executive, Mr John Stewart, announced a four point action plan to fully address all of the issues associated with recent foreign currency options trading losses.  The action plan follows a review by PricewaterhouseCoopers over the last two months involving interviews with over 45 employees and third parties and research into several thousand e- mails, numerous reports and a database of 10,000 transactions. A copy of the PwC report is available on the [NAB website](http://nab.com.au/" \t "_new).  The Board has also received advice from Deloitte about potential conflicts facing PwC as a result of past and current relationships in areas relevant to the review, and probity and governance advice from Blake Dawson Waldron.  Mr Kraehe said: "The Board is confident that a full and fair assessment of all issues has been undertaken and that appropriate remedial actions are being taken to address all of the issues raised in the PwC report and to prevent them from recurring."  **(a) Key points**  Key points in the PwC report include:           the final loss arising from foreign currency options trading announced on 27 January is $360 million           the losses arising from the foreign currency options trading increased significantly between September 2003 and January 2004          four traders on the foreign currency options desk exploited loopholes and weaknesses in systems and processes to hide trading losses and protect bonuses           the trader's activities were contrary to the National's strategy of building customer-focused business           the foreign currency options trading losses were reported to management by several junior employees           no customers were directly or indirectly affected by the foreign currency options trading losses           in the Markets Division there was:  - inadequate management supervision, - significant gaps in back office monitoring functions, - escalation processes that did not work properly, - weaknesses in control procedures, - failure of risk management systems; and - an absence of appropriate financial controls           there is not a suitable compliance culture within this area of the National and a tendency to suppress bad news rather than be open and transparent about problems; and           warning signals, both inside the National and from regulators and other market participants, were not properly acted upon.  **(b) Board changes**  Mr Kraehe said Directors had accepted the proposition in the PwC report that the Board is ultimately responsible for the culture and the reputation of the National, and any losses suffered by shareholders.  "The former Chairman, Mr Charles Allen, and former Chief Executive, Mr Frank Cicutto, resigned earlier this year because they felt that was in the best interests of the National and its shareholders," he said.  "However, the Board accepts that further action is required. I have already announced that we are seeking two additional Directors with banking experience, one from Australia and one from the United Kingdom. This process is well advanced.  "We have also made a separate announcement concerning changes in the Chairmanship of Board Committees and the appointment of a Senior Independent Director in accordance with international best practice in corporate governance."  **(c) Management changes** Mr Stewart said that management changes were also appropriate.  "Primary responsibility for the unauthorised trading rests with four members of the foreign currency options desk and they have been summarily dismissed from the National," he said. "The four traders that have been dismissed are: Mr Luke Duffy, Mr David Bullen, Mr Gianni Gray and Mr Vince Ficarra. The Head of Foreign Exchange in the Markets Division, Mr Gary Dillon, who was the direct supervisor of the four traders, will also be dismissed."  Mr Stewart said the events surrounding the foreign currency options trading losses are being investigated by the Australian Prudential Regulation Authority (APRA), the Australian Companies & Securities Commission (ASIC) and the Australian Federal Police (AFP). Overseas authorities are also reviewing the events and the National's responses.  "These agencies will determine whether any civil or criminal actions will be taken against individuals as a result of the foreign currency options trading losses," he said.  "The National will continue to fully co-operate with the authorities in their investigations."  Mr Stewart said a number of other employees within the National would also be transferred or counselled as a result of the events surrounding the unauthorised foreign currency options trading.  Mr Stewart said the National had decided to review the employment of certain individuals: "Those who will be leaving the National include; the Executive General Manager of Corporate & Institutional Banking, Mr Ian Scholes, the Head of Markets Division, Mr Ron Erdos, and the Executive General Manager of Risk Management, Mr Chris Lewis. Experienced managers have been appointed to these positions on a short term basis until the National completes appropriate recruitment processes."  **(d) Risk and control frameworks**  Mr Stewart said the management team are continuing to implement remedial actions to close gaps and loopholes identified in the PwC report that were exploited by the traders or contributed to long standing breaches of policies and limits. "We will refine our risk management framework to get a more appropriate balance between management and policing functions," he said. "We have already reviewed value at risk limits and reduced our risk exposure."  "Weaknesses in control procedures identified by PwC have been or will be rectified without delay. This includes analysis of daily trading profits and accounts, reporting of all large and unusual transactions, investigation of all off-market rates on high risk transactions, critical review of revaluation rates sourced from third parties and a stronger back office function that properly checks all transactions."  "It is totally unacceptable that employees of the National breach policies and control limits. From now on, there will be a zero tolerance policy towards unauthorised limit breaches at the National."  Mr Stewart said the management team would also review responsibilities between business units to ensure that there would be clear reporting lines and accountabilities between Risk Management, Operations and Finance functions within the National.  "These and other specific issues identified in the PwC report will be addressed quickly and I will report to the Board regularly on our progress in tackling these long standing problems at the National."  **(e) Culture**  Mr Stewart said he was concerned about references in the PwC report to staff that adopt arrogant or aggressive attitudes towards others, or who abrogate responsibility and focus on suppressing bad news rather than engaging in full and frank dialogue.  "We will continue cultural change programs within the National such as Revitalisation and Making a Difference that promote positive and transparent behaviours," he said. "We will ensure that these programs are actively adopted in the Markets Division of the National."  "I am pleased that whistleblowers had uncovered the losses from foreign currency options trading and the National would continue to encourage and protect whistleblowers: "We need more brave people that are prepared to confront bad behaviours," he said.  Mr Stewart said the management team would also review its recruitment processes, the annual appraisal processes and incentive structures to avoid inappropriate behaviours in future at the National.  Download the [full report](http://www.nabgroup.com/vgnmedia/downld/pwcreport.pdf" \o "Pricewaterhouse Coopers Report (PDF)" \t "_new) or visit the [NAB website](http://www.nabgroup.com" \t "_new) for further information.  **1.4 US Public Company Accounting Oversight Board approves standard for audits of internal control**  On 9 March 2004 the United States Public Company Accounting Oversight Board (PCAOB) approved an auditing standard for audits of internal control over financial reporting and proposed amendments to the Board’s existing interim auditing standards to conform them to the new standard.  The auditing standard, "An Audit of Internal Control over Financial Reporting Performed in Conjunction with an Audit of Financial Statements," addresses both the work that is required to audit internal control over financial reporting and the relationship of that audit to the audit of the financial statements.  Section 404(a) of the US Sarbanes-Oxley Act of 2002, and the Securities and Exchange Commission's related implementing rules, requires the management of a public company to assess the effectiveness of the company's internal control over financial reporting. Section 404(b) of the Act, as well as Section 103, directed the PCAOB to establish professional standards governing the independent auditor's attestation, and reporting, on management's assessment of the effectiveness of internal control.  The text of the auditing standard and related appendices can be found on the [Board's website](http://www.pcaobus.org/" \t "_new) under Rulemaking.  The auditing standard on internal control will be submitted to the Securities and Exchange Commission for approval, as required by the Sarbanes-Oxley Act.  Sarbanes-Oxley requires both reports of management about an issuer’s internal controls and an attestation to those reports by the issuer’s independent auditor. The PCAOB standard concerns the latter requirement. Key issues in the PCAOB standard include:  **(a) Attestation means audit**  The standard casts the attestation as an “audit” of internal control over financial reporting, to be integrated with the financial statement audit. It significantly limits the degree to which the auditor can rely on the work of others (management, internal audit) in performing this work – the auditor’s own work must provide the “principal evidence” for the internal control audit opinion. However, the standard does not adopt a specific quantitative threshold and permits the auditor to make qualitative judgments in assessing whether its audit has met this standard.  **(b) Auditors will assess audit committees**  The standard requires that the auditor assess the effectiveness of the audit committee’s oversight of external financial reporting and internal control over financial reporting. The standard provides that it is an issuer’s board of directors that is responsible for evaluating the performance and effectiveness of the audit committee, and clarifies that the auditor is not responsible for performing a separate and distinct evaluation of the audit committee. The standard notes that it is management, not the audit committee, that is responsible for maintaining effective internal controls.  **1.5 APRA releases consultation paper on proposed “fit and proper” standards**  On 2 March 2004, the Australian Prudential Regulation Authority (APRA) released, for public consultation, proposed “fit and proper” prudential standards for authorised deposit taking institutions, general insurance and life insurance institutions.  Under the proposed requirements:           APRA-regulated institutions will need to develop their own fit and proper policies that include assessment of the fitness and propriety of individuals to act in positions of responsibility;           these policies must, at a minimum, address the fit and proper requirements that APRA expects responsible persons to meet, which are set out in the proposed prudential standards; and           APRA will only become involved in an assessment when it has specific concerns about an individual.  APRA’s Chairman, Dr John Laker, said the proposals are the first step in the introduction of harmonised governance requirements for these industries.  “The proposals are designed to reflect community expectations about persons who fill positions of responsibility in these industries and will set minimum benchmarks for people in, or wishing to enter, these industries at director, senior management or advisory level,” he said.  APRA plans further governance initiatives in the form of harmonised prudential standards. Proposals relating to general insurance were put forward in APRA’s discussion paper on ‘Prudential Supervision of General Insurance: Stage II Reforms’, which was released in November 2003. APRA expects to provide further information on governance standards around mid 2004 after it considers responses to the general insurance reforms.  Comments on the consultation paper and the prudential standards are invited by 28 May 2004. A copy of the consultation paper and draft prudential standards are available on the APRA website at [http://www.apra.gov.au/Policy/Draft-Prudential-Standards-Fit-and-Proper.cfm](http://www.apra.gov.au/Policy/Draft-Prudential-Standards-Fit-and-Proper.cfm" \t "_new).  A “fit and proper” regime for the superannuation industry is being dealt with separately through the [Superannuation Safety Amendment Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74178" \t "default), currently before the Parliament.  **1.6 IAASB calls on auditors to take greater action to consider fraud in an audit and to establish rigorous quality control processes**  On 1 March 2004, the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) released a revised International Standard on Auditing (ISA) requiring auditors to be more proactive in considering the risk of fraud in an audit of financial statements and has issued new quality control standards addressed at both audit firms and engagement teams.  **(a) Fraud and the auditor’s responsibility**  The new ISA, “The Auditor’s Responsibility to Consider Fraud in the Audit of Financial Statements,” builds on the new audit risk standards issued last year and requires the auditor to focus on areas where there is a risk of material misstatement due to fraud, including management fraud. The revised standard emphasizes the need for the auditor to maintain an attitude of professional scepticism throughout the audit, notwithstanding the auditor’s past experience about the honesty and integrity of management and those charged with governance.  The standard, effective for audits of financial statements for financial periods beginning on or after 15 December 2004, requires the engagement team to discuss how the financial statements may be susceptible to material misstatement due to fraud and what audit procedures would be more effective for their detection. The standard also requires the auditor to design and perform audit procedures to respond to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls.  **(b) Quality control guidance for audit and assurance engagements**  In its ongoing efforts to encourage high quality performance by the world’s accountants, the IAASB also recently approved two new standards on quality control. The first, *International Standard on Quality Control 1,* establishes a firm’s responsibilities to set up and maintain a system of quality control for all audits and assurance engagements. In addition to setting out guidance on client acceptance and retention criteria that firms should consider, the standard requires that an engagement quality control review must be performed for audits of listed entities and such other engagements as a firm determines.  The review, which must be completed before the audit report can be released, includes consideration of:           Significant risks identified during the engagement and the responses to those risks;           The significance and disposition of corrected and uncorrected misstatements identified during the audit;           Whether appropriate consultation has taken place on difficult or contentious matters and the conclusions arising from those consultations.  The second quality control standard, ISA 220, Quality Control for Audits of Historical Financial Information, establishes standards for the specific responsibilities of firm personnel for an individual audit engagement and is premised on the requirements of the firm-wide quality control standards set out in ISQC1.  To provide firms sufficient time to design and implement the systems required under ISQC1, both of these standards are effective 15 June 2005.  **1.7 IBM announces significant changes in senior executive compensation policies**  On 24 February 2004, IBM announced a series of changes to further align the equity-based compensation of its senior executives with the interests of shareholders. The changes were approved by the Compensation Committee of the IBM board of directors.  One change will ensure that the company's senior executives benefit from outright, annual grants of stock options only after shareholders realize at least 10 percent growth in their investments.  In addition, IBM senior executives will be able to acquire market-priced stock options only if they first invest their own money.  The new policies, which apply to Chairman and Chief Executive Officer Samuel J Palmisano and the top 300 IBM executives worldwide, will begin in 2004.  IBM said it believes it is the first major company, inside or outside the information technology industry, to set such requirements for equity-based executive compensation.  Details of the changes are as follows:           Premium-priced stock options: Effective immediately, IBM will only make outright, annual grants of stock options to senior executives with a strike price (the fixed price at which shares may be purchased in the future) that is 10 percent higher than the market price on the day the options are issued.  As a result, IBM executives will not realize any value from these so-called "out of the money" options until IBM's share price increases more than 10 percent from the date the options are issued and the options are vested.           "Buy first" market-priced options: The only way IBM senior executives will be able to acquire stock options at market prices is if they first purchase IBM shares of a corresponding value at the market price with their own money. This program will begin in 2005.  For example, in order for a senior executive to acquire market-priced stock options with a target value of $18,000, the executive must first invest a portion of his or her annual cash bonus to purchase $9,000 of IBM stock. The executive then must retain ownership of all of the purchased shares for at least three years in order not to forfeit the entire option grant.  While IBM senior executives already have minimum company stock ownership requirements, this unique, "buy first" policy further encourages executive ownership of the company while ensuring they experience the same ups and downs of ownership as shareholders.  Senior executive compensation at IBM is based on company, business unit and individual performance. Equity in the company, such as stock options, is generally granted annually to most executives as part of their compensation and as a retention tool. Options are also granted annually to high-performing employees as a retention tool; that program will not be affected by these changes.  Option recipients must wait four years before earning the right to exercise 100 percent of an option grant. Options expire after 10 years.  **1.8 Kodak board of directors enhances corporate governance guidelines**  On 17 February 2004, Eastman Kodak Company's Board of Directors voted unanimously to enhance the company's corporate governance guidelines. In addition, the board adopted strengthened board independence standards, implemented an enhanced director selection process and adopted a director code of conduct.  The board also approved new director qualification standards and implemented a process enabling shareholders to communicate directly with the board's Presiding Director, Richard S Braddock.  These latest enhancements will ensure that Kodak's practices and policies meet or exceed requirements of the Sarbanes-Oxley Act, the New York Stock Exchange's recently finalized corporate governance listing standards, and the Securities and Exchange Commission's new disclosure rules regarding nominating committee functions.  The guidelines are available on the Corporate Governance section of [Kodak's website](http://www.kodak.com/go/governance" \t "_new).  Additionally, Kodak announced it would begin expensing stock options starting January 1, 2005. Kodak made the decision in response to a Financial Accounting Standards Board announcement last October concerning stock option accounting, and a shareholder proposal requesting that Kodak expense stock options, which received a majority vote at last year's annual meeting.  **1.9 Recent report on proxy voting at general meetings**  The following conclusions and recommendations are drawn from the latest Corporate Governance International report on proxy voting at general meetings of the Australian Stock Exchange largest 200 companies in 2003.  The full report, which was issued in March 2004, is available for download at:  [http://www.cgi.au.com/user1/1336/doc/Proxy%20Voting%20Report%202003.pdf](http://www.cgi.au.com/user1/1336/doc/Proxy%20Voting%20Report%202003.pdf" \t "_new)  **(a) Conclusions**  CGI drew the following conclusions from the subject matter of the report:  1. The level of proxy voting in major ASX-listed companies has continued to increase, if unspectacularly and not to the levels in the major markets of UK (55%) and USA (80%).  Proxy instructions in 2003 in a sample of 161 widely held major ASX-listed companies represented on average 44% of total voting capital.  Comparable results (albeit with some difference in sample companies) were 2002 – 41%, 2000 – 35% and 1999 – 32%.  2. Research by Computershare estimates the level of ownership of ASX200 companies by Australian institutional investors at around 36%. Statistics provided by major Australian custodian JPMorgan indicate a substantial increase in 2003 in the level of proxy voting by its Australian institutional clients. That increase followed JPMorgan’s introduction of arrangements to encourage and facilitate proxy voting by its clients centred on convenient electronic proxy voting. CGI understands that another major Australian custodian is contemplating introducing similar arrangements.  There is, therefore, considerable scope to lift the Australian level of proxy voting well above the 44% figure.  3. The 161 companies in the 2003 sample held 171 meetings and submitted 880 resolutions in their 2003 notices of meeting for proxy (or other) vote. Except for a handful, including a few board challenges by “external” candidates, all of those resolutions were board sponsored.  Of those 880 resolutions, 4 companies withdrew a total of 6 board sponsored resolutions from shareholder vote prior to or at their meetings. 5 of those withdrawn resolutions related to remuneration of directors. 4 withdrawals were actually or presumably as a consequence of institutional proxy voting and/or lobbying.  All 874 of the remaining board sponsored resolutions were submitted to shareholder vote at the meetings and all were passed by the requisite majority of votes (simple majority or 75% majority, depending on the subject matter).  4. The top 5 “Against” proxy votes in the sample (all on board sponsored resolutions related to remuneration of directors submitted to shareholder vote at the meeting) ranged from 29% down to 12% of total voting capital. While those figures are up on the prior year, none was sufficient to defeat the resolution, all 5 of which, as indicated in 3 above, were passed by the requisite majority of votes.  5. CGI’s voting recommendations on those 880 resolutions were “Approve” 76% and “Against” 21%, almost half of the latter being on remuneration resolutions.  CGI is instructed by its institutional clients to apply the highest standards to its analyses of resolutions submitted to shareholder vote so that the client can take that advice into account as part of its own practical decision on how to vote.  Such a practical voting decision will validly take into account a number of other factors and in many cases that may validly result in a vote to support the Board sponsored resolution.  In CGI’s experience, however, there is always a hard core of Board sponsored resolutions each year, mainly relating to remuneration, which, in CGI’s view, do not merit shareholder support on any rational basis. Those certainly exceed the single digit number of withdrawn resolutions referred to in 3 above.  6. In CGI’s view, therefore, it is not merely a matter of getting the overall institutional proxy voting level up but also of improving the quality of the institutional practical voting decision in some cases.  **(b) Recommendations**  1. The institutional investor bodies, and especially ACSI and ASFA representing major Australian super funds and IFSA representing major Australian fund managers, should immediately appoint appropriately staffed and adequately resourced committees to review the contents of this report and the new Myners report and ICGN Statement on Institutional Shareholder Responsibilities.  2. In particular, ACSI, ASFA and IFSA should:  a. Consider endorsing, jointly if that can be agreed, the new Myners report, and especially the specific steps recommended for each of the participants in the proxy voting process, as equally applicable to the Australian system (on the basis that our system and its participants are essentially identical to those in the UK).  b. As part of that, agree and publish a target for introduction of electronic voting capabilities by the main 2004 Australian proxy season in October and November of this year.  3. Adoption by institutional shareholders of the best practices set out in the ICGN Statement on Institutional Shareholder Responsibilities will go a long way to lift not only the quantum of overall institutional proxy voting levels in ASX-listed companies but also the associated quality of institutional voting decision-making. ACSI, ASFA and IFSA should, therefore, simultaneously review the ICGN Statement with a view to issuing well prior to the main 2004 Australian proxy season in October and November of this year, again jointly if that can be agreed, a version tailored to Australian conditions.  4. As part of that, ACSI, ASFA and IFSA should specifically consider:  a. The entirety of institutional shareholders’ fiduciary responsibilities to their clients and beneficiaries – not just their responsibility to vote shares;  b. In particular, the conflict of interest provisions and associated safeguards canvassed in the ICGN Statement; and  c. The further issue of stock lending and other sophisticated arrangements relating to “vote renting” referred to in the CGI report.  5. Parliament and regulators (ASIC and ASX) should:           Keep a close watching brief on the progress of 1 to 4 above;          Promptly amend s251AA of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to close the loophole identified in the CGI report;          Police due compliance by ASX-listed companies with the reporting requirements of that section;          Take prompt and effective action to close the “regulatory gap” analysed in the CGI report;          Review whether large-scale professional proxy solicitation and “vote renting” in the Australian market of the type referred to in the CGI report should be subject to some form of regulatory oversight, if not control.  6. Trustees of superannuation or investment funds and other fiduciaries who rely on professional investment managers should, for their own and their beneficiaries’ protection, take a close interest in, and should push for implementation of, all of these recommendations. They should also press their custodians to introduce, if they have not already done so, arrangements to encourage and facilitate proxy voting by institutional investors centred on convenient electronic proxy voting.  **1.10 IOSCO report on fees and expenses in managed investments**  In February 2004 the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Elements of International Regulatory Standards on Fees and Expenses of Investment Funds".  The report is aimed at identifying common international best practices standards in the area of fees and expenses in investment funds through the identification of what regulators should seek to achieve when dealing with some of the issues raised by fees and expenses.  These best practices will evolve over time as regulators may take into account those stated in the report by adapting their approach.  These best practice standards deal with issues that were identified at this stage as key issues and where regulatory best practices were agreed upon, namely those raised by:           disclosure of fees and expenses to the investor;          conditions of remuneration of the fund operator;          performance fees;          transaction costs;          hard and soft commissions on transactions;          fees associated with funds that invest in other funds (including funds of funds);          fee differentiation in multiclass funds; and          fees and changes in fund's operating conditions.  The report is available on the [IOSCO website](http://www.iosco.org/library/" \t "_new). |
| **2. Recent ASIC Developments** |
| **2.1 ASIC grants temporary relief to additional law societies during period of consultation**  On 22 March 2004 the Australian Securities and Investments Commission (ASIC) published two new Class Orders [[CO 04/0265]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co04-265_pdf" \t "_new) & [[CO 04/0266]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co04-266_pdf" \t "_new) which amend the following class orders:           Class Order [[CO 03/1094]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co03-1094_pdf" \t "_new) *Law societies – professional indemnity scheme and fidelity funds*; and           Class Order [[CO 03/1095]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co03-1095_pdf" \t "_new) *Law societies – statutory deposit accounts and public purpose funds.*  The original class orders were published on 11 March 2004, the end of the transition period for the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default).  The recent amendments operate so that the temporary relief granted under the earlier two class orders applies to additional law societies (or their associated entities). These are the Queensland Law Society, the Law Society of the Australian Capital Territory and the Law Society of Tasmania.   The amendments by [CO 04/0265] also permit LawCover Pty Limited, an associated entity of the Law Society of New South Wales, to obtain the relief granted under [CO 03/1094].  'ASIC has previously granted temporary relief to the law societies of New South Wales, South Australia, Western Australia and the Northern Territory (or their associated entities), until 1 July 2005, in respect of the operation of their professional indemnity schemes, fidelity funds, statutory deposit accounts and public purpose funds', ASIC Director Financial Services Regulation, Legal and Technical Operations, Ms Pamela McAlister said.   'This relief was granted pending the outcome of the Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers (see Media Release 82 of 2003 of the Federal Treasurer), and to permit ongoing consultation by the Federal Government and ASIC. The law societies of other states and territories have since applied for similar relief and it has been granted on the same basis', Ms McAlister said.   Further details about the conditions of relief are available from ASIC [Information Release 03-43](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR+03-43+ASIC+provides+temporary+relief+during+period+of+consultation+?openDocument" \t "_new): ASIC provides temporary relief during period of consultation.  Copies of the Class Orders can be obtained from ASIC's Infoline by calling 1300 300 630 or from the ASIC website at [www.asic.gov.au/co](http://www.asic.gov.au/co" \t "_new)  **2.2 ASIC relief to allow mixed money to be paid into insurance brokers' s981b trust accounts**  On 16 March 2004, the Australian Securities and Investments Commission (ASIC) issued a class order which provides limited relief to insurance brokers regarding their ability to pay money into a trust account under section 981B of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).  The class order [CO 04/189] allows other money, paid in a single sum together with client monies, to be paid into a trust account established and maintained under section 981B of the Act by a financial services licensee who is an insurance broker.   Section 981B generally permits only client monies (which are connected with a financial service provided to, or a financial product held by, the client) to be paid into a section 981B account. It does not allow non-client monies, such as remuneration payable to the broker, or monies not connected with a financial service or the client's financial product, to be paid into these accounts.   The class order relief modifies paragraph 981B(1)(b) to allow payment into an insurance broker's section 981B account of mixed payments (ie a single payment of client monies and non-client monies). The relief, however, requires the licensee to pay out of the account any non-client money within five business days.   The relief is only available to insurance brokers.   Insurance broker, as defined in the class order, means the holder of an Australian financial services license who is authorised under the licence to provide a financial service relating to contracts of insurance and who, in providing that service, predominantly acts on behalf of intending insureds.  ASIC has provided this limited relief to reduce the commercial inconvenience to insurance brokers and their clients of requiring separate payments of client money and broker remuneration, while essentially maintaining the protections over client money afforded by the trust account regime.  Copies of the Class order are available from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.3 ASIC policy statement: managed discretionary account services**  On 15 March 2004, the Australian Securities and Investments Commission (ASIC) released Policy Statement 179 on the regulation of managed discretionary account services (MDA services).   ASIC's policy approach (in summary form) to the regulation of MDA services was issued on 6 January 2004 in Information Release 04–01, 'ASIC policy approach to the regulation of managed discretionary accounts'.  As outlined in January, the policy statement details ASIC's exemption for operators of MDA services (MDA operators) from the managed investments provisions in Chapter 5C of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) and the product disclosure provisions in Part 7.9 of the Act. To have the benefit of this relief, MDA operators must comply with the licensing and conduct provisions in Parts 7.6 and 7.7 of the Act and some additional conduct requirements designed to promote consumer protection.   'Our policy approach aims to tailor the regulatory regime for operators of MDA services without minimising the protections available to retail clients who use them', Director of Financial Services Regulation, Legal and Technical Operations, Ms Pamela McAlister, said.   'MDA services are often promoted to retail clients on the basis that they contain an investment program or strategy which is suitable for the individual client. As a result, ASIC believes that MDA services can be effectively regulated through a supplemented application of the licensing and conduct requirements, including those relating to personal advice.   'These tailored requirements replace the need for MDA operators to comply with the managed investment and financial product disclosure requirements of the Corporations Act. In addition, ASIC has allowed for transitional arrangements to enable MDA operators time to meet the requirements in our policy', Ms McAlister said.  Copies of PS 179, [Information Release 04–01](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR+04-01+ASIC+policy+approach+to+the+regulation+of+managed+discretionary+account+services?openDocument" \t "_new) and related class orders are available from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.4 FSR disclosure to be clear, concise and effective**  On 10 March 2004, the Australian Securities and Investments Commission (ASIC) confirmed that it expects key disclosure documents produced by financial services providers to be clear, concise and effective.   'Some industry participants have told us that their lawyers are advising them to produce Statements of Advice (SOAs) running to 80 or 90 pages in order to comply with the requirements of financial services regulation. This is not what we would expect to see under the law, and it is not helpful to consumers. ASIC sees disclosure under the new law as a consumer-centric regime, focussing on the consumer's information needs', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said.  ASIC has already issued guidance about disclosure documents such as Financial Services Guides, Statements of Advice and Product Disclosure Statements (See [Policy Statement 168](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=PS168_pdf" \t "_new) Disclosure: Product Disclosure Statements (and other disclosure obligations) and [Policy Statement 175](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=PS175_pdf" \t "_new) Licensing: Financial productadvisers – conduct and disclosure).  'In ASIC's view, the law is clear about what needs to be contained in such documents. However, if product issuers and advisors believe they need to produce overly complex documents in order to comply with the law, ASIC is prepared to consult with them and issue further guidance', Mr Johnston said.  Responding to some media comment about when an advisor might have to provide a SOA to clients, Mr Johnston said, 'It is not the case that a SOA needs to be provided every time an advisor talks to a client. Often those discussions will be about the existing investment strategy for the client with no further advice being given, for which the existing SOA my well suffice', he said.  ASIC also confirmed that a SOA need not always take the same form. In many circumstances, it will be acceptable to update advice in a shorter document, referring back to the original, more comprehensive SOA.   ASIC understands that many financial service providers will take a conservative course and produce documents which are 'boiler-plate'. ASIC has asked the Financial Planning Association to provide it with examples of SOAs it considers overly long and complex.   'However, we are also aware of examples which are in a shorter form and which correctly balance the disclosure of all information the client needs, with the requirements for the information to be presented in a clear, concise and effective manner', Mr Johnston said.  **2.5** **New data matching program between ASIC and Insolvency and Trustee Service Australia (ITSA)**  A data-matching program commenced on 2 March 2004 with the cooperation of the Insolvency and Trustee Service Australia (ITSA).  The program will match data from the ITSA National Personal Insolvency Index (NPII) with data from ASIC's public database to identify persons automatically disqualified from managing corporations by operation of s206B(3) and (4) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The results of the program will be used by ASIC to investigate possible breaches of the law.   The [program protocol](http://www.asic.gov.au/asic/asic_infoco.nsf/byheadline/ITSA+data+matching+protocol?openDocument" \t "_new) developed in consultation with the Office of the Federal Privacy Commissioner provides more information about this new program.  Both ASIC and ITSA adhere to the Privacy Commissioner's Guidelines on Data-Matching in Commonwealth Administration that includes standards for data-matching to protect the privacy of individuals. |
| **3. Recent ASX Developments** |
| **(a) FSR Transition**  ASX advises that, according to the records maintained by ASX and ASIC, all ASX Participating Organisations and RIOTs and all ASX Futures Participants obtained Australian Financial Services Licences ahead of the 11 March 2004 ASIC deadline for transitioning to the new regime.  **(i) New rules take effect**  As foreshadowed, new ASX Market Rules, ACH Clearing Rules and ASTC Settlement Rules along with their associated procedures came into effect on 11 March 2004. The rules are available at both ASX Online and the [ASX website](http://www.asx.com.au/" \t "_new).  **(ii) Terminology in new rules**  Certain existing agreements contain terminology that has either been replaced or removed under the relevant new operating rules. However ASX has advised that these agreements do not require novation or re-execution as the existing agreements provide for amendment from time to time.  **(iii) Derivatives Client Agreements under the ASX Market Rules and ACH Clearing Rules**  With respect to Client Agreements under the ASX Market Rules and the ACH Clearing Rules, the ASX Group has issued blanket “no action” relief in certain circumstances. These circumstances are set out in Participant Circular 116/04 dated 15 March 2004.  **(iv) AFS Licence terminology**  The changes to the rules also have implications for AFS licensees. ASX has been liaising with ASIC in relation to the implications for Participants of terminology on AFS Licences which refers to old rules and ASX Group entities. ASIC has advised that until such time as variations are made to the licence conditions of existing AFS licensees affected by the changes, ASIC will take the position that:  “1. licensees who currently operate lawfully under the old ASX, ASXF and OCH structures and who have the benefit of the condition in [PF 209.10] may continue to operate under the new ASX structure as if the definition of "market participant" for the purposes of [PF 209.10] includes:  a) a market participant as defined in the operating rules of the ASX (other than a market participant which is only a principal trader as defined in the operating rules of the ASX) who is required to comply with the ASX's operating rules, taking into account any waiver by ASX; and b) a participant as defined in the operating rules of ACH who is required to comply with ACH's operating rules, taking into account any waiver by ACH; and  2. licensees who currently have a "Registered Independent Options Trader" authorisation may continue to carry on business as if references in the AFS licence to "Registered Independent Options Trader" or "RIOT" are references to "Principal Trader as defined in the ASX operating rules".”  **(v) Capital requirements and commencement of the new market rules and clearing rules**  Some key points regarding implications of the new rules regarding capital requirements are summarised in the attachment to Participant Circular 105/04 dated 9 March 2004. The Circular contains an Appendix which sets out which rules apply to which participants and an attachment which contains a detailed analysis of the capital requirements under the new regime.  **(b) Listing rule amendments**  **(i) ASX Listing Rule Amendments - Capital Raising Mechanisms** Progress of ASX's proposed Listing Rule amendments dealing with capital raising mechanisms, which were exposed for public comment in October 2003 and proposed to take effect on 31 March is set out below.  **(ii) Proposed increase of 15% limit under Listing Rule 7.1**  The submissions received in response to ASX's proposed Listing Rule amendments expressed wide support for the proposal to increase the limit for issues of securities that may be made without shareholder approval under listing rule 7.1 (the Limit) from 15% to 20%.  However, some respondents expressed concern that certain investors may be disadvantaged by the proposed increase, in the absence of provisions limiting the price discount of securities issued under the Limit.  Taking into account concerns expressed by these stakeholders and after liaising with ASIC, ASX has decided to further consider possible alternatives in relation to increasing the Limit. ASX may therefore issue a further discussion document seeking the views of stakeholders in relation to the proposal and any alternatives, with a view to introducing rule amendments in this regard at the earliest opportunity.  As a result, any changes to the limit on placing capacity in listing rule 7.1 will not take effect on 31 March.  **(iii) Proposed amendments to take effect as from 31 March**  ASX intends to proceed with the following amendments, which will come into effect on 31 March 2004.           A new exception from listing rule 7.1 for securities to be issued under a security purchase plan (SPP) that does not require a prospectus or Product Disclosure Statement, pursuant to ASIC relief. The exception will not extend to issues to an underwriter of an SPP, and will be limited to issues of not more than 30% of ordinary issued capital, at a price that is not less than 80% of the average market price.           Reductions to the timetables for both renounceable and non-renounceable pro rata issues of 42%, from a total of 40 business days to a standard total of 23 business days.           A new exception from the rule for securities issued with investor approval under the takeover provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).           Certain technical amendments, including those relating to convertible securities.  **(iv) Other proposed amendments deferred for further consideration**           Proposed provisions to give investors the ability to confer a general mandate on an entity to issue securities with an unlimited discretion for a period of up to 13 months. ASX will undertake further analysis in this regard.           The proposal to include an issue to the underwriter of a dividend or distribution reinvestment plan in listing rule 7.2 exception 7.  ASX will advise listed companies about the revised proposal by way of further update, as soon as possible.  ASX has also determined not to proceed with rule amendments to listing rule 7.7 to remove the special New Zealand directive.  **(v) Technical Listing Rule amendments - Financial Services Reform Act - ASX Market Rules, ASTC Settlement Rules & ACH Clearing Rules**  Technical listing rule amendments consequential to the introduction of the ASX Market Rules, ASTC Settlement Rules and ACH Clearing Rules (the Rules) took effect from 11 March 2003. The amendments reflect changes in cross-references, nomenclature and definitions, as those changes are introduced in the Rules. The Listing Rules available on the ASX website and ASX Online have been updated to include these changes, and they will be incorporated in hard copies of the Listing Rules containing the amendments in relation to capital raising mechanisms, effective 31 March 2004. Listed entities and subscribers to the Listing Rules will receive these updates shortly. |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Mildura Co-operative Fruit Company Limited: Panel makes declaration of unacceptable circumstances and accepts undertakings**  On 8 March 2004, the Panel announced that it had made declarations of unacceptable circumstances in the Mildura Co-operative Fruit Company Limited proceedings. The Panel has concluded the proceedings as a result of the applications made by Mildura Investment Company Pty Ltd (MIC) and the application made by Mildura Co-operative Fruit Company Limited (MCFC) following acceptance by the Panel of undertakings to the Panel provided by MIC and MCFC.  **(a) Background**  The Panel received two applications from MIC (the MIC Applications) pursuant to sections 657A, 657E and 657D of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) in relation to MIC’s takeover bid for all of the ordinary shares in MCFC (the Bid). In MIC’s first application dated 27 January 2004 (the First Application), MIC applied to the Panel for a declaration of unacceptable circumstances and interim and final orders. In MIC’s second application dated 28 January 2004 (the Second Application), MIC applied to the Panel for a declaration of unacceptable circumstances and final orders.  On 30 January 2004, the Panel received an application by MCFC (the MCFC Application) under sections 657A and 657D of the Act for a declaration of unacceptable circumstances and final orders in relation to the Bid.  On 2 February 2004, the Panel decided to conduct proceedings (the Proceedings) in relation to the issues raised in the MIC Applications and MCFC Application.  It should be noted that the Panel also received an application by MIC on 11 February 2004 under section 657A for a declaration of unacceptable circumstances and final orders. This application was withdrawn before the Panel commenced proceedings in relation to it.  **(i) MIC applications**  MCFC has sent a copy of its target’s statement (the Target’s Statement) to each holder of ordinary shares and each holder of preference shares in MCFC.  The Target’s Statement refers separately to the existence of provisions in MCFC’s constitution which provide for limits (the Takeover Restrictions) on the number of ordinary shares which one person may hold or vote, which the directors of MCFC have a discretion to vary.  On 23 January 2004, MIC wrote to MCFC alleging that the Target’s Statement failed to meet the disclosure requirements under the Act, contained statements that were misleading or deceptive and that various statements contravened section 638(5) of the Act. On 27 January, MCFC wrote to MIC responding to the allegations raised by MIC.  Also on 23 January 2004, MIC wrote to MCFC asking MCFC to confirm that it did not receive any advice (whether written or oral, formal or informal) from any qualified person (such as KPMG) as to the value of MCFC’s ordinary shares or as to the adequacy, reasonableness or fairness of the Bid.  On 25 January, MCFC wrote to MIC stating that it had not received any opinion from any qualified person as to the value of MCFC’s ordinary shares or to the adequacy, reasonableness or fairness of the Bid. However, in their response, MCFC stated that its directors had engaged in preliminary discussions with KPMG concerning the value of MCFC shares (the KPMG Advice).  The Target’s Statement assessed the adequacy of the consideration offered by MIC under the Bid by reference to (among other things) a comparison between the bid price and the net asset backing of MCFC according to MCFC’s most recent financial statements; and comparisons between the price/earnings ratio and dividend multiple derived from the bid price and price/earnings ratios and dividend multiples for companies included in a stock exchange index (the S&P/ASX Small Ordinaries Index) (the Bid Price Comparisons).  The First Application concerned the use in the Target’s Statement of statements by Mr Armour and his solicitors and statements based on statements made by them in contravention of section 638(5) of the Act. Details of the First Application are contained in the Panel’s Media Release TP 04/07.  The main issues in the Second Application concerned whether MCFC should disclose details of the KPMG Advice in its Target’s Statement; whether or not the Target’s Statement should have been dispatched to preference shareholders; whether the Target’s Statement was misleading by statements and omissions regarding the Takeover Restrictions; whether the Bid Price Comparison was misleading; and whether statements in the Target’s Statement about Mr Armour and MIC’s expertise in running MCFC’s business were misleading.  **(ii) MCFC application**  MIC published newspaper advertisements, and Mr Armour made statements to the media, stating that, should MIC obtain control of MCFC under the Bid, it would cause MCFC to review the prices MCFC pays to suppliers for produce (Grower Payments) with a view to ensuring that Grower Prices are at least at market level and endeavouring to ensure that, wherever possible, Grower Prices are above the rate that would otherwise be set by the market. MIC made no specific statement about intentions in relation to Grower Payments in the Bidder’s Statement.  In the MCFC Application, MCFC alleged that Mr Armour’s statements regarding Grower Payments did not explain what the review would entail or how the increased rates would be achieved.  **(b) The Panel’s decision**  **(i) Section 638(5) – consent**  The Panel has accepted an undertaking from MCFC that, among other things, it will send to each shareholder a supplementary target’s statement (the Supplementary Target’s Statement) which prominently at the beginning of the document states that by including Mr Armour’s statements in the Target’s Statement without his consent, MCFC failed to comply with subsection 638(5) of the Act.  Nevertheless, the Panel decided to make a declaration of unacceptable circumstances, as MCFC breached subsection 638(5). That provision is an important part of the machinery of Chapter 6, it creates an offence of strict liability, and is basic to the incidence of civil and criminal liability for statements made in takeover documents. MCFC did not obtain the consent of Mr Armour to use his statements in the Target’s Statement, nor the form and context in which he was quoted. In addition, the Target’s Statement did not state that Mr Armour had consented to the use of the quotations, as the section requires.  The Panel considered that the obligation to provide all material information in subsection 638(1) does not prevail over the prohibition on using a person’s statement without their consent in subsection 638(5) because the specific prohibition in that subsection overrides the general obligation in subsection (1). The Panel noted that MCFC made no attempt to seek the consent of Mr Armour to the use of the quotations.  The Panel considered an appropriate course of action would have been for MCFC to consult with Piper Alderman to seek Mr Armour’s consent to include the relevant quotations in the Target’s Statement prior to releasing the Target’s Statement. If that consent was not forthcoming, MCFC could then have applied to ASIC for an exemption from subsection 638(5) on the basis that those statements were material to shareholders and would assist them in making an informed decision whether to accept MIC’s offer.  **(ii) Preference shareholders**  The Panel did not make a declaration on this issue. The Panel formed the view that the terms of the covering letter sent to preference shareholders with the Target’s Statement were such as to ensure that MCFC’s preference shareholders were not misled by having been sent the Target’s Statement into believing they could accept the bid for their preference shares. That letter also made it clear that it was highly unlikely that any of the preference shares would be converted into ordinary shares during the offer period.  These matters having been made clear, the Panel saw no harm in MCFC having provided copies of the Target’s Statement to its preference shareholders, whether or not it was required to do so.  **(iii) Bid price comparisons**  The Panel found that the use of the Bid Price Comparisons analysis was misleading on the basis that the Target’s Statement did not explain with sufficient clarity that the Bid Price Comparisons were only presented on the basis of an assumed proposal to acquire a controlling interest in MCFC and were not appropriate to the assessment of a bid for a minority interest in MCFC.  The Panel decided not to make a declaration of unacceptable circumstances following acceptance by the Panel of undertakings provided by MCFC that it would set out in the Supplementary Target’s Statement limitations to the use by offeree shareholders of the Bid Price Comparisons in responding to the Bid, in particular that they only related to the valuation of the company as a whole and not to a minority interest in it.  **(iv) Takeover restrictions**  The Panel found that the Target’s Statement did not disclose with sufficient clarity the MCFC’s directors’ views and intentions regarding the Takeover Restrictions and the effect of the Takeover Restrictions on the Bid Price Comparisons analysis.  The Panel decided not to make a declaration of unacceptable circumstances following acceptance by the Panel of undertakings provided by MCFC that it would, among other things, set out in the Supplementary Target’s Statement how the directors of MCFC would exercise their powers under the Takeover Restrictions in relation to the Bid, and whether the directors would restrain transfers and voting of shares for which acceptances of offers under the Bid are accepted under the Takeover Restrictions.  **(v) MIC’s expertise in running MCFC**  The Panel did not find the statements in the Target’s Statement regarding MIC’s expertise in running MCFC were misleading or deceptive, taken in context, or that they created an impression that MIC would run MCFC’s business, without necessary expertise.  **(vi) KPMG advice**  The Panel reviewed the KPMG Advice (which included a paper titled “Indicative Pricing Analysis” dated 15 January 2004), a letter from KPMG to MCFC, and a witness statement from KPMG that the result of the valuation exercise in their analysis supported the MCFC directors’ assessment of the bid price in the Target’s Statement.  On the basis of that information, the Panel was satisfied that KPMG’s analysis did not attract the principle in Ridley MI v Joe White Maltings (1996) 22 ACSR 319 that an expert valuation report in the hands of a target board may be material information which subsection 638(1) requires the board to disclose in the relevant target’s statement.  **(vii) Grower payments**  The Panel found that Mr Armour’s comments concerning MIC’s intentions about Grower Payments were misleading as they tended to induce a belief that if MIC obtained control of MCFC, it was probable that Grower Payments would increase for which there appeared to be no reasonable basis, and also had the potential to cause confusion among shareholders. However, the Panel decided not to make a declaration following acceptance by the Panel of undertakings provided by MIC that it would send shareholders a supplementary bidder’s statement (the Supplementary Bidder’s Statement) stating whether the review of Grower Payments would apply to dried fruits, citrus or other produce, stating whether MCFC has power to increase relevant Grower Payments unilaterally and setting out its grounds for believing that MCFC could sustainably make Grower Payments above the rate that would otherwise be set by the market (or that it has no grounds for such a belief).  However, the Panel decided to make a declaration of unacceptable circumstances because MIC did not formulate and disclose intentions regarding the Grower Payments in its bidder’s statements (the Bidder’s Statement) on the basis that this constituted a serious departure from the policy of paragraphs 602(a) and (b)(iii).  In making these decisions, the Panel considered the special nature of a co-operative and formed the view that the ongoing trading relationship between suppliers and the co-operative is generally a critical issue when supplier-members decide whether to accept a takeover bid for an agricultural or trading co-operative. In that context, details of the intentions of MIC in relation to Grower Payments were material to shareholders to enable them to make an informed and critical assessment of the offer.  In his reported comments, Mr Armour did not make sufficiently clear the distinction between increases to Grower Payments to dried fruit suppliers and citrus suppliers. Accordingly, they implied that MCFC had the unilateral power to control the Grower Payments in relation to dried fruits, as well as citrus.  Given MIC’s acknowledged lack of expertise regarding MCFC’s business, its stated concern to maintain the profit level of MCFC, its stated concern about MCFC’s existing profit level and the magnitude of the Grower Payments relative to MCFC’s profit, as disclosed by MCFC’s financial statements, the Panel was concerned that MIC’s and Mr Armour’s reported statements about Grower Payments appeared to lack a reasonable basis.  **(c) Undertakings**  As mentioned earlier, the Panel has accepted undertakings offered by both MIC and MCFC. The Panel has required MIC and MCFC to prepare supplementary statements and to provide them to the Panel for its review. The Panel invited comments from the parties on the supplementary statements.  The Panel has approved the supplementary statements for distribution, on the basis that they give effect to the parties’ respective undertakings. In accepting the supplementary statements as complying with the undertakings, the Panel is not endorsing them in any other way.  **4.2 Panel publishes final guidance on funding arrangements**  On 5 March 2004, the Takeovers Panel published its Guidance Note on Funding Arrangements for Takeovers.  The final version had been significantly amended in response to comments received when the Panel released a draft for public consultation.  The Guidance Note is based on the Panel's view that a bidder must at all times have, and be able to show that it has, a reasonable basis to believe that it will be able to perform its obligations under the takeover bid.  The Panel has taken the opportunity not only to provide guidance on this issue but also on the disclosure aspects associated with these issues, focussing on the matters which must be disclosed in the bidder's statement.  The Guidance Note points out that what may be required to satisfy this requirement can, and in most cases will, change throughout the course of a takeover from the time it is announced to the time it becomes unconditional.  The Panel notes that this may also require supplementary disclosure to be made by the bidder at critical times; for example when the bid becomes unconditional.  The Panel has also published on its website a paper that sets out its response to the major external comments that the Panel received on the consultation draft.  The Funding Arrangements Guidance Note is available at [Guidance](http://www.takeovers.gov.au/display.asp?ContentID=122" \t "_new) and the Public Consultation Response Statement is available at [Consultation](http://www.takeovers.gov.au/display.asp?ContentID=10" \t "_new).  **4.3 Correction of takeover documents – Panel publishes draft guidance note for public comment**  On 27 February 2004 the Takeovers Panel released for public comment a draft Guidance Note on correction of Takeover Documents.    The draft  Guidance Note seeks to assist the market by indicating the standard of disclosure that the Panel wishes to see in disclosure documents (such as bidder's and target statements, notices of meeting and shareholder letters) relating to transactions affecting the control of companies and managed investment schemes to which Chapter 6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) applies.  It also discusses some of the considerations that the Panel will take into account when dealing with a defective disclosure and the remedies that it may impose where the documents fall short of the standard that the Panel requires.  The draft Guidance Note is available on the [Takeovers Panel’s website](http://www.takeovers.gov.au/" \t "_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 Does section 440D of the Corporations Act apply to winding up proceedings?** (By Fiona Hammond, Blake Dawson Waldron)  Australian Prudential Regulation Authority v Rural & General Insurance Limited [2004] FCA 185, Federal Court of Australia, Gyles J, 5 March 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/march/2004fca185.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/march/2004fca185.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Federal Court has held that leave of the Court pursuant to section 440D of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) is not required in order to proceed with a winding up proceeding in the absence of the written consent of an administrator.  **(b) Facts**  Australian Prudential Regulation Authority (APRA) commenced proceedings for the winding up of Rural & General Insurance Limited (Rural & General). The hearing of the application was adjourned and, in the interim prior to the recommencement of the hearing, Rural & General resolved to appoint an administrator pursuant to section 436A of the Act.  **(c) Issue for determination**  It was submitted on behalf of Rural & General that section 440D required that leave be granted for the winding up proceeding to proceed in the absence of the written consent of the administrator. APRA submitted that section 440D does not relate to winding up proceedings, which are specifically dealt with under section 440A.  **(d) Section 440A and section 440D**  Section 440A of the Act states that a company under administration cannot be wound up voluntarily, except as provided by section 446A. The Court may adjourn the hearing of a winding up application if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up. The Court is not to appoint a provisional liquidator if the Company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration.  Section 440D provides that during the administration of a company, a proceeding against the company cannot be begun or proceeded with except with the administrator's written consent, or the leave of the Court.  **(e) Case law**  Gyles J referred to a number of cases in order to determine whether section 440D relates to winding up proceedings.  Hall v Mercury Information Technology (South Australia) Pty Ltd [2002] FCA 272 concerned whether an application for the appointment of a provisional liquidator of a company which was already in administration required leave pursuant to section 440D. The application sought the appointment of a provisional liquidator as a precursor to an order for winding up and appointment of liquidators. It was contended that the application was not a proceeding "against the company" but rather a proceeding "in respect of the company" (Young v Sherman (2002) 20 AGLC 149). Stone J found it difficult to imagine how a proceeding seeking such an order could be other than a proceeding "against the company", and stated that if this was correct then under section 440D, the leave of the Court was required if the application was to proceed.  In GIO Workers Compensation (NSW) Ltd v Primbee Pty Ltd [2003] NSWSC 591, an application for winding up was commenced before the appointment of the administrators. Austin J observed that section 440A is arguably an exhaustive text and on this basis it would be otiose for the legislature to require leave or the consent of an administrator under another provision.  In Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd (2003) 47 ACSR 197, Austin J made an order under section 440D granting leave to commence winding up proceedings on terms intended to echo section 440A(2) – that is, on terms that the appointment of a provisional liquidator would not be made if the Court was satisfied that it would be in the interests of their creditors that those companies should continue under administration rather than be wound up.  **(f) Statutory Construction**  Gyles J observed that section 440D(1) appears to be comprehensive in its terms, and noted that this is reinforced by the express exclusions in subsection (2). His Honour stated that there is no necessary inconsistency between section 440D and section 440A, as the latter would still have operation when the application for winding up or for the appointment of a provisional liquidator comes on for hearing in the event of prior leave having been granted pursuant to section 440D.  Gyles J noted that Division 6 of Part 5.3A, dealing with the protection of a company's property during administration, contains a series of provisions dealing with discrete topics, the first of which is section 440A specifically dealing with winding up. His Honour observed that section 440A deals with particular proceedings, and section 440D deals with proceedings generally. APRA submitted that the general provisions should be construed as not covering the proceeding dealt with by the particular provision, appealing to the principle of construction, "generalia specialibus non derogant" (general things do not derogate from special things). Gyles J observed that it is not easy to see how leave pursuant to section 440D(2) is to be assessed, bearing in mind section 440A(2) and (3).  Rural & General submitted that this principle applies only where, and to the extent that, the special and the general provision are in conflict and that where (as here) a general provision is found in the same division of the same Act as the special provision, a conflict is unlikely to be inferred. It was submitted that, if both sections can operate harmoniously, there can be no implied derogation from the scope of one by the other. It was submitted that these sections can operate together as each related to a separate time, and this proceeding was not yet at the stage where section 440A could operate.  Gyles J did not find the Explanatory Memorandum relating to the Act to be of assistance in this case. His Honour noted that, while there has been much discussion as to the interplay between Part 5.3A administration and winding up, the cases to which he referred focused on section 440A, as have the commentators.  **(g) Judgment**  Gyles J concluded that the better view was that a winding up proceeding is not caught by section 440D. In coming to this conclusion, his Honour considered the whole of Division 6, with regard to the place it occupies in Part 5.3A, which in turn was considered in the overall context of Part 5. Part 5.3A administration is one form of external administration in insolvency, winding up is another. Gyles J stated that neither is necessarily entitled to precedence, and the inter-relation is dealt with by section 440A. In each form of external administration it is necessary to have a moratorium for what might be called external claims, and that is the role of section 440D. Gyles J referred to section 444E in observing that the legislature clearly distinguishes between a winding up proceeding and a proceeding "against the company".  **5.2 Application for stay of criminal proceedings due to exposure to double jeopardy**(By Nghi Tran, Phillips Fox)  Regina v Adler [2004] NSWSC 108, Supreme Court of New South Wales, James J, 5 March 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/march/2004nswsc108.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/march/2004nswsc108.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  This was an application by Rodney Adler for an order that the criminal proceedings brought against him be permanently stayed on the ground that they constitute an abuse of process. The criminal proceedings were alleged to constitute an abuse of process on the basis that in earlier civil proceedings brought against Mr Adler by the Australian Securities and Investments Commission (‘ASIC’) Mr Adler had already been punished for the same conduct as was the subject of the criminal charges.  **(a) The civil proceedings**  The conduct the subject of both the earlier civil proceedings and the criminal charges relate to Mr Adler’s conduct as a director of each of HIH Insurance Limited (‘HIH’), HIH Casualty and General Insurance Limited (‘HIHC’) and Pacific Eagle Equity Pty Ltd (‘PEE’).  In the civil proceedings it was found that between 15 June 2000 and 30 June 2000, Mr Adler had caused PEE to purchase a total of 3,924,545 shares in HIH for a total price of $3,991,856.21. Mr Adler also caused HIHC to draw a cheque in favour of PEE in the amount of $10 million which was banked into PEE’s account. The purchase price of the HIH shares was paid by PEE out of the $10 million paid by HIHC to PEE. On 7 July 2000, PEE entered into a deed which made PEE the trustee of the Australian Equities Unit Trust (‘AEUT’) and made the HIH shares purchased by PEE assets of the AEUT.  In the civil proceedings it was also found that Mr Adler had caused PEE as trustee of the AEUT to acquire from Adler Corporation, at cost, shares in companies called dstore Limited, Planet Soccer International Limited and Nomad Telecommunications Limited. Mr Adler had also caused PEE as trustee of the AEUT to make unsecured loans to morehuman Pty Limited, Pacific Capital Partners Pty Ltd, Intagrowth Fund No. 1 and PCP Ensor No. 2 Pty Limited. Mr Adler was associated with all of these companies. The funds used for all of these 7 transactions came out of the $10 million paid by HIHC to PEE.  In the civil proceedings, based on the conduct detailed above, Santow J made declarations against Mr Adler to the following effect:  (a) Mr Adler contravened section 209(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) by being involved in the contravention by HIH and HIHC of section 208 by providing a financial benefit to a related party, being PEE;  (b) Mr Adler contravened section 260D(2) of the Corporations Act by being involved in the contravention by HIHC of section 260 by providing financial assistance to PEE to acquires shares in HIH; and  (c) Mr Adler had breached his directors duties to HIH, HIHC and PEE under sections 180(1), 181(1), 182(1) and 183(1) of the Corporations Act in relation to the payment of $10 million by HIHC to PEE, the purchase of HIH shares by PEE and the other 7 transactions using the $10 million paid by HIHC to PEE.  **(b) The criminal proceedings**  Based on the same conduct, the indictment on which Mr Adler was arraigned on 5 September 2003 contained 5 counts, to all of which Mr Alder pleaded not guilty. In summary there were 3 counts alleging that Mr Adler had engaged in stock market manipulation by inducing PEE to buy shares in HIH with the likely effect of increasing, maintaining or stabilizing the price of HIH shares on the Australian Stock Exchange. The other two counts alleged that Mr Adler had disseminated information knowing it to be false in relation to HIH shares so as to induce people to purchase shares in HIH. The allegations of disseminating knowingly false information related to conversations Mr Adler had with Mr Mellish, a journalist with the Australian Financial Review.  **(c) Submissions of the parties and decision of James J**  It was submitted by counsel for Mr Adler that the criminal proceedings should be stayed as an abuse of process because of the exposure of Mr Adler to double jeopardy. This was on the basis that Mr Adler had already been punished, by the pecuniary penalty orders made in the civil proceedings, for substantially the same conduct as was alleged in the criminal proceedings.  James J, in concluding that the criminal proceedings did not constitute an abuse of process, addressed the following legal issues:  1. James J accepted the submission by counsel for the Crown that the elements of the criminal offences were different from the elements of the causes of action in the civil proceedings. As such no plea in bar was available to Mr Adler in the criminal proceedings.  2. His Honour regarded the civil causes of action and the criminal offences to also be different in another important respect. The purpose of the civil causes of action was to enforce the obligations of a director or an officer of a company involved in a contravention by a company and to provide remedies for wrongs done against the company or its shareholders. On the other hand, the purpose of the criminal offences of stock market manipulation was to protect the integrity of the market and to punish wrongs to potential purchasers of shares in a company.  3. Counsel for the Crown had sought to rely on what McHugh, Hayne and Callinan JJ had stated in paragraph 33 of the joint judgment in Pearce v The Queen (1998) 194 CLR 610, namely that because “the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose.” His Honour accepted the interpretation submitted by counsel for the Crown that the passage was dealing generally with the subject of the staying of proceedings on the grounds of abuse of process. James J did not think that the passage was limited in its application to cases in which two or more offences were charged in the same indictment as was the facts in Pearce.  4. Under section 1317M of the Corporations Act a court could not make a pecuniary penalty order against a person for a contravention of a civil penalty provision, if the person had already been convicted of an offence constituted by conduct that was substantially the same as the conduct constituting the contravention. On the other hand, under section 1317P of the Corporations Act, criminal proceedings could be started against a person for conduct that was substantially the same as conduct constituting a contravention of a civil penalty provision, even though a pecuniary penalty order had already been made against the person. Counsel for Mr Adler submitted that section 1317P would undermine public confidence in the administration of justice by the courts, if the extent to which a person was punished for his conduct depended on a decision of the executive as to whether the first proceedings to be brought against a person should be civil penalty proceedings or criminal proceedings. This argument was rejected by James J.  James J stated that the extent to which an offender is punished for his conduct always depends on decisions made by the prosecuting authorities, whether to prosecute and, if so, what charges should be laid. Decisions taken by the executive which affect the extent to which an offender is liable to be punished for his conduct would not undermine public confidence in the administration of justice by the courts.  His Honour thought that the proper interpretation of section 1317P was that the starting of criminal proceedings against a person for conduct that is substantially the same as conduct which has been found in earlier civil penalty proceedings to be a contravention of a civil penalty provision is not ipso facto or per se an abuse of process. However, a court had power to grant a stay of criminal proceedings, in an appropriate case, by having regard to other matters.  **(d) Conclusion**  James J dismissed the application for a stay of the criminal proceedings brought against Mr Adler. James J concluded, independently of section 1317P, that because of the important differences between the elements of, and the different purposes served by, the civil causes of action and the criminal offences, the criminal proceedings did not constitute an abuse of process.  Section 1317P reinforced James J’s conclusion that the criminal proceedings should not be stayed as an abuse of process. Section 1317P specifically authorises the starting of criminal proceedings against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision and notwithstanding that a pecuniary penalty order has been made against the person.  A court has power to stay criminal proceedings falling within section 1317P, on the basis of matters other than that the conduct charged in the criminal proceedings is substantially the same as the conduct constituting the contravention of a civil penalty provision. However, in Mr Adler’s case, there were no such other matters or no sufficient such other matters.  **5.3 Authority of director to enter into a contract on behalf of a company**(By Rebecca Taube, Freehills)  L.K. Bros Pty Ltd (Receivers and Managers Appointed) v Gerald Collins and Philip Jefferson and Landmara Pty Ltd [2004] QSC 026, Supreme Court of Queensland, Chesterman J, 27 February 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/february/2004qsc026.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/february/2004qsc026.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  This decision concerns the ability of a director to act as an agent for their company and subsequently bind the company in an enforceable agreement, despite the fact that the agreement was not properly executed according to the company’s constitution.  **(a) Background**  The company had entered into a franchise agreement on 14 April 2003 allowing it to operate as a part of the Night Owl convenience store chain. In conjunction with this agreement, a charge deed was also signed on 7 April 2003. The company had two directors, Mr Louati and Mr Komoto. Both directors had a limited command of English, and had difficulty communicating with each other, let alone understanding legal and commercial documents. Only Mr Louati resided in Brisbane and was involved in the day-to-day management of the company and its business. Mr Komoto, also the father-in-law of Mr Louati, resided in Japan.  It quickly became apparent that the company was unable to properly administer the business, and the respondents, as receivers of the business, sought to enforce the mortgage debenture contained in the charge deed.  The company submitted that the deed was improperly executed, and therefore unenforceable. Mr Louati’s signature appeared in two places: once above the word “Director” and once above the words “Director / Secretary.”  **(b) Findings**  Justice Chesterman noted that the company’s constitution clearly contemplated that two distinct persons’ signatures would be required to manifest the company’s assent to a contract. Accordingly, this mode of execution “is one which, if followed, has the consequence that the [company] itself executes a contract. The clause does not preclude the [company] from being bound to the terms of a written agreement where the agreement is executed by an agent for the company.”  Here, only one director’s signature was present. That director could be understood to be acting within the terms of section 126(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which states:  “A company’s power to make, vary ratify or discharge a contract may be exercised by an individual acting with the company’s express or implied authority and on behalf of the company.”  Further, section 227 of the [Property Law Act 1974 (Qld)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12558" \t "default) states:  “(1) Contracts … may be made or effected by any body corporate…as follows –  (a) a contract … which if made or effected by or between individuals would by law be required to be in writing, signed by the party to be charged with it or effecting the same, may be made by the corporation in writing signed by any person under its authority, express or implied; …  (2) A contract … made or effected under this section shall be effective in law, and shall bind the corporation and the corporation’s successors and all other parties to the contract.”  Even though there was no resolution to effect Mr Louati’s appointment as agent for the company, Justice Chesterman found that a number of facts suggested there was implied authority for Mr Louati to act its behalf:           Mr Louati owned 5/6ths of the issued shares and therefore could exercise effective control at general meetings;           Mr Komoto could not understand the language of the jurisdiction of the business, and could not read or comprehend the relevant business and company documents;          Mr Louati did not communicate with Mr Komoto with regards to the company, and according to his testimony, “he simply never discussed such matters with him in person, through other people or over the telephone”;          Mr Komoto essentially played no part in the company’s commercial endeavours; and           there was a course of conduct by which Mr Louati essentially made all the decisions for the applicant company.  These factors suggested Mr Louati had the authority to act as agent for the company in signing the charge deed, and rendered it subject to the relevant mortgage debenture.  Justice Chesterman held that despite irregularities in the execution of the deed, the director had acted in the capacity of an agent for the company and was therefore still able to bind the company in contractual arrangements, in a manner authorised by the Corporations Act 2001 and the Property Law Act 1974. The charge deed was therefore valid.  **5.4 Misleading advertising – can advertisers be responsible for misleading and deceptive content?** (By Elizabeth O’Donovan, Deacons)  Cassidy v Saatchi & Saatchi Australia Pty Ltd [2004] FCAFC 34, Full Court Federal Court of Australia, Moore, Mansfield and Stone JJ, 25 February 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fcafc34.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fcafc34.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case dealt with the issue of whether an advertising agency, Saatchi & Saatchi Australia Pty Ltd, (the Respondent) which used its skills to create and prepare an advertisement for a client which conveyed misleading representations to viewers of the advertisement, was engaging in misleading and deceptive conduct for the purposes of section 12DA of the [Australian Securities & Investments Commission Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (ASIC Act) which is in similar terms to section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) (TPA).  The Australian Competition and Consumer Commission (ACCC) appealed to the full court of the Federal Court of Australia against the decision of a single judge of the Federal Court of Australia who held that the Respondent had not breached section 12DA of the New ASIC Act.  This case has received attention in the media due to the warnings given by Graeme Samuel, the ACCC’s chairman, that the media must be aware of its responsibilities in relation to the provisions relating to misleading and deceptive advertising under the TPA.  The appeal was dismissed and the decision at first instance that the Respondent had not breached its responsibilities under section 12DA of the ASIC Act was upheld.  **(b) Facts**  The Respondent provided advertising services to the NRMA Pty Ltd (NRMA) over the course of several years. The NRMA ran a series of newspaper advertisements which represented that pregnant women could have their babies delivered without making any payment for hospitalisation or medical expenses. The advertisements stated that NRMA would make every payment for its fund members irrespective of how advanced the pregnancy was at the time when the mother joined the fund.  There were some disclaimers in small print to the advertisements. However, a pregnant woman was fully covered only after payment of any policy excess or ‘co-payment’. Women who were pregnant at the time of joining the fund were required to have completed a 12 month waiting period with NRMA or with their existing fund.  It was not disputed that the advertisements contained representations which were misleading. The issue was whether the misrepresentations contained in the advertisements were “made by the Respondent” for the purposes of finding the Respondent liable under section 12DA of the ASIC Act.  The Respondent submitted that it had prepared the advertisement for NRMA in the knowledge that, if approved, they would be likely to be published as part of an advertising campaign. It was accepted that the Respondent did not approve the advertisements or authorise or arrange for their publication. There was no claim that the Respondent aided or abetted the contravention by its principal of s 12DA of the ASIC Act or that it was knowingly concerned in the contravention of s 12DA by its principal.  Stone J of the Full Court, noted that the statutory schemes found in both the TPA and the ASIC Act distinguish between principal and accessorial liability and that there were good policy reasons for preventing liability from being cast too widely.  The learned judge at first instance considered whether the Respondent could have “made the misrepresentations” by having created the advertisements with the intention or knowledge that they would later be published by NRMA by placing them in newspapers. However, her Honour held that it was the NRMA who, although utilising the Respondent’s expertise in advertising, had decided what message to convey to the public and, ultimately, whether or not to deliver that message.  Her Honour accepted that the Respondent had produced the advertisements in question, their content was approved by NRMA and that the approval included a legal “sign off” by the NRMA’s in house legal counsel. Her Honour also took the view that the advertisements did not convey to the public that the misrepresentations were made by the Respondent. Her Honour did not accept that the appearance of the Respondent’s name at the bottom of the advertisement was sufficient to convert the advertisement into a joint representation by NRMA and the Respondent.  **(c) Decision**  The Full Court upheld the decision at first instance and found that the Respondent had not breached its responsibilities under section 12DA of the ASIC Act.  The court’s findings appear to be based upon the distinction between the creation of representations which are misleading and deceptive and the act of dissemination of those representations. In this case, although the advertisements were created by the Respondent and then used by the NRMA to mislead or deceive people, there was nothing in the Respondent’s conduct in and of itself which could be categorised as directly misleading or deceptive.  Therefore, the court took the view that the Respondent did not engage in misleading or deceptive conduct as the NRMA retained ultimate control over what was done with the misleading advertisements.  **5.5 Appointment of provisional liquidator – whether court should refuse application to appoint provisional liquidator where receiver already appointed** (By Nicole Evison, Corrs Chambers Westgarth)  National Investment Institute Pty Ltd (ACN 098 189 863) (In Liquidation) v Property Corporate Services Pty Ltd, in the matter of Property Corporate Services Pty Ltd (ACN 098 898 572) [2004] FCA 175, Federal Court of Australia, Victorian District Registry, Goldberg J, 27 February 2004.  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fca175.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fca175.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Background**  This case concerns a determination by the Federal Court as to whether it should refuse an application pursuant to section 472(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the “Act”) for the appointment of a provisional liquidator where a receiver had already been appointed. The Federal Court was also called upon to determine whether section 532(2) of the Act precluded the appointment of the provisional liquidator on the grounds that the appointee was a partner of an officer of the respondent company, Property Corporate Services Pty Ltd (“PCS”).  **(b) Facts**  This case concerned PCS, the treasury entity of a group of companies ultimately owned and controlled by Mr Henry Kaye (the “Henry Kaye Group”). On 25 February 2004, the plaintiffs, National Investment Institute Pty Ltd (in liquidation) (“NII”) and Andrew Hewitt (in his capacity as liquidator of NII) (“Mr Hewitt”) made application to the Federal Court for the following orders:           that PCS be wound up in insolvency pursuant to sections 459A and 459B of the Act;          in the alternative, that PCS be wound up on just and equitable grounds pursuant to section 461 of the Act; and          that, until the hearing of the winding up proceedings, the court appoint a provisional liquidator pursuant to section 472(2) of the Act.  Mr Gregory Keith, a partner of Mr Hewitt at Grant Thornton, was nominated for the role of provisional liquidator. The defendant, PCS, supported by Mr Smith (a property developer) and LAS Investments Corporation Pty Ltd (“LAS”) (a company associated with Mr Smith) opposed the orders sought.  **(c) Decision**  **(i) Involvement of LAS and the sale of the Marrickville property**  On 23 November 2003, a governing deed was executed by PCS, Mr Kaye, other companies in the Henry Kaye Group, Mr Smith and LAS under which Mr Smith and LAS agreed to provide financial accommodation by way of forbearing to sue for the repayment of financial accommodation. This governing deed was subsequently varied by a deed of variation on 8 December 2003 whereby Mr Smith and LAS agreed to procure an additional advance in respect of a property development (the “Marrickville property”) by Marrickville Holdings Pty Ltd (“Marrickville Holdings”).  On 24 November 2003, ASIC registered a fixed and floating charge over the assets of PCS in favour of LAS in respect a number of commercial transactions and property developments engaged in by LAS with companies in the Henry Kaye Group. A second charge was registered on 13 January 2004 over the assets of Marrickville Holdings in favour of Mr Smith and LAS.  On 26 February 2004, Mr Smith and LAS appointed Mr Barry Taylor as receiver and manager of the assets and property of PCS pursuant to the charge registered on 24 November 2003.  The Court noted that, following settlement of the Marrickville property, PCS, as one of two creditors of Marrickville Holdings, should receive approximately $5.62 million of an estimated $6 million if distributed on a pro-rata basis. Settlement of the Marrickville property was to be effected on 1 March 2004.  **(ii) Indebtedness of PCS to NII**  During the course of Mr Hewitt’s administration of NII, the accounts showed a loan by NII to PCS in the amount of $29.1 million. This loan was not documented or recorded in writing, however, in the governing deed of 23 November 2003, Mr Kaye and the companies in the Henry Kaye Group acknowledged that PCS owed NII approximately $29 million.  **(iii) Appointment of provisional liquidator**  Goldberg J held that the appointment of a receiver by Mr Smith and LAS to the assets of PCS was no bar to the appointment of a provisional liquidator. Goldberg J stressed the importance of appointing an independent person to take control of the affairs of PCS having noted the connection between Mr Kaye’s interests and the interests of Mr Smith and LAS under the governing deed. Goldberg J provided:  “It is essential that an independent person take control of the affairs of PCS as soon as possible to ensure the integrity of the recoverability of the debts and obligations otherwise due to it. … Although it might be contended that a receiver under a debenture charge is a person who is independent of the directors of, and shareholders in, the company, it must be remembered that Mr Kaye’s financial fortunes are intimately tied up with those of Mr Smith and LAS. By virtue of clause 6.1 of the governing deed, Mr Kaye had a personal interest in having the interests of Mr Smith and LAS preferred over other creditors.”  Goldberg J also had concerns in respect of undertakings given by Mr Kaye on 30 January 2004 at the hearing of an application by ASIC to appoint receivers over the property of Mr Kaye and PCS. Mr Kaye and PCS undertook not to transfer, deal with, diminish, mortgage, assign or dispose of any of their assets otherwise than for full value and in the ordinary course of business, or to meet legal or living expenses. Goldberg J did not consider that the undertakings provided adequate protection for PCS “from having the funds that would otherwise be available to it” from Marrickville Holdings. After considering the above issues and accepting the fact that PCS was in fact insolvent, not trading and there was a likelihood that the company would be wound up, Goldberg J was satisfied that a provisional liquidator should be appointed to PCS.  **(iv) Leave to appoint Mr Keith as provisional liquidator**  It was argued by PCS that Mr Keith was precluded from being appointed provisional liquidator as he was the partner of an officer of PCS. Goldberg J, however, granted leave to Mr Keith pursuant to section 532(2) of the Act to seek to be appointed provisional liquidator of PCS. Goldberg J was motivated by the short time frame within which a provisional liquidator would need to move to protect the proceeds of the Marrickville property given that it was to settle on 1 March 2004.  **(v) Undertaking by the plaintiffs as to damages**  As a condition for the appointment of the provisional liquidator, the plaintiffs were ordered to give an undertaking as to damages. Relying on the decision of Austin J in Lubavitch Mazel v Yeshiva, the plaintiffs submitted that the undertaking was not necessary as it was “not conceivable that the provisional liquidator could not cause any damage to LAS”. However, Goldberg J was of the view that it is not a question of whether the appointment of the liquidator causes damage, rather, it is a consideration of “whether there are any appropriate reasons against requiring the party seeking the appointment” to give the undertaking. On the facts presented, he did not find that any appropriate reasons existed. However, Goldberg J did limit Mr Hewitt’s undertaking to his recourse to the assets of NII.  **5.6 Attendance of administrator at creditor’s meeting by video link conference**(By Sonia McMillan, Phillips Fox)  Holzman v New Horizons Learning Centre (Canberra) Pty Ltd [2004] NSWSC 90, New South Wales Supreme Court, Palmer J, 24 February 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/february/2004nswsc90.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/february/2004nswsc90.htm" \t "_new)  or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Background**  The administrator of four companies made an application to the NSW Supreme Court seeking an order permitting him to attend a meeting of creditors by video conference link. The meeting of creditors was to be held pursuant to section 439A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) which requires that the ‘administrator is to preside’.  An order was sought by the administrator to ensure that attendance by video conference link, as opposed to personal attendance, complied with the requirement ‘to preside’.  The application by the administrator was made under section 447A which gives the Court discretionary power to make any order it thinks appropriate in relation to a particular company in the context of administration.  **(b) The relevant facts**  The four subject companies are part of a group of subsidiaries of a holding company, each of which conducted a franchise business respectively in Canberra, Perth, Adelaide and Brisbane.  The intention of the meetings of creditors was to propose a Deed of Company Agreement for consideration by the respective creditors. These Deeds were to be provided by the directors of each company to the administrator prior to the proposed meetings.  The administrator was obliged to convene and hold the meetings as a matter of urgency because of the time limit imposed by section 439A(5). Given these time constraints, that each meeting was to be held in a different city, that the administrator required time to review the proposed Deeds of Company Agreement, and that the estimated cost of personal attendance at each meeting was in excess of $15,000, an order was sought to enable appearance by video link rather than in person.  **(c) The meaning of ‘to preside’**  The administrator’s uncertainty as to whether or not appearance by video link was sufficient to comply with the requirement ‘to preside’ imposed by section 439B, was based on two recent decisions of the NSW Supreme Court in which this requirement was considered.  In Bovis Lend Lease Pty Ltd v Wily (2003) 45 ACSR 612, Austin J stated that a meeting convened under section 439A in which the administrator ‘is to preside’ requires the administrator to be ‘physically present’.  Austin J confirmed this interpretation in Re A&D Hagan Pty Ltd (Receiver and Manager Appointed) (Administrator Appointed) (2003) 46 ACSR 434 where he stated that section 439B requires the administrator ‘to chair the section 429A meeting personally’.  Both of these cases involved a different factual matrix to the present application, as they involved the respective administrators seeking an order to appoint a nominee to chair the relevant meeting.  **(d) The decision**  Palmer J agreed with the decisions of Austin J in the above named two cases, stating that the language of section 439B suggests that the administrator must be physically present in the same room as the creditors during a meeting. Therefore, upon a true construction of the section, an administrator cannot preside at a section 439A meeting by video conference link unless obtaining an order under section 447A.  Palmer J stated that in issuing an order under section 447A, the overriding consideration was whether or not, in all of the circumstances, the creditors would be disadvantaged.  In this case, Palmer J concluded that the creditors would not be disadvantaged at the proposed meetings if the administrator attended by video conference link. Attending by video conference would be financially beneficial, and it would also give the administrator more time to consider the proposed Deeds of Company Agreement, in light of the time frames involved.  Palmer J expressly stated that if the issues raised by creditors were complex and difficult such that discussion was inhibited by the video link, the creditors could vote to adjourn for further discussion at meetings at which the administrator was physically present.  The orders sought by the administrator were made.  **5.7 Proceeding against a company in administration – the scope of section 440D of the Corporations Act** (By Adam Baxter, Mallesons)  Arpic Pty Ltd v Austin Australia Pty Ltd [2004] NSWSC, New South Wales Supreme Court, Barrett J, 24 February 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/february/2004nswsc83.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/february/2004nswsc83.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  The defendant is a building contractor, who was undertaking construction work for the plaintiff. Following a progress claim by the defendant, and subsequent adjudication under the [Building and Construction Industry Security of Payment Act 1999](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=17378" \t "default) (“BCI Act”), an amount was deemed payable by the plaintiff to the defendant.  The plaintiff complied with the adjudication according to section 23 of the BCI Act, depositing the money to be held in trust in a Westpac account, to be paid to the defendant pending the conclusion of the ongoing dispute. The defendant applied to Westpac and obtained the money prior to the pending arbitration. The plaintiff sought, and obtained, an interlocutory order that the defendant had, contrary to the BCI Act, unlawfully obtained the money, and must pay the money into a designated account to be held pending a court order. The defendant company subsequently appointed administrators under Part 5.3A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  The plaintiff originally advanced a claim that did not effectively seek payment of the money to the plaintiff. The plaintiff therefore made an application for leave to amend and make effective a claim requesting summary judgment that the defendant must pay the amount in question to the plaintiff. The issues were:  (1) Whether section 440D of the Corporations Act applies to the application for leave to amend the summons in the way formulated by the plaintiff; and  (2) Whether leave under section 440D should be granted in respect of the application for summary judgment and, if needed, in respect of the application for leave to amend the summons.  Section 440D provides that during the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator’s written consent or with the leave of the court.  In refusing the application, Justice Barrett reasoned:  (i) The overall effect of the plaintiff’s proposed amendment would amount to an additional claim in respect to the asserted wrongs already the subject of the claims in the summons. Since section 440D prohibits any step properly regarded as “proceeding with” the “proceedings” commenced by the summons against a company in administration, the plaintiff’s application for leave to amend is subject to section 440D.  (ii) Since the plaintiff’s case for legal entitlement to a money judgment is not self-evident, leave in respect of the application for summary judgment should not be granted. This follows the principle in Foxcroft v The Ink Group Pty Ltd (1994) 12 ACLC 1,063 that the purpose of section 440D is to allow the administrator to have time to assess the situation and work out a situation that is in the common interests of the creditors. Therefore only an exceptional case would warrant leave to proceed under section 440D.  **5.8 Obtaining the Court's approval to enter into settlements**(By Candice Murdock, Blake Dawson Waldron)  Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as trustee of the Ansett Australia Ground Staff Superannuation Plan) v Ansett Australia Limited (Subject to a Deed of Company Arrangement) [2004] FCA 130, Federal Court of Australia, Goldberg J, 24 February 2004  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fca130.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/february/2004fca130.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  The case of Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Limited [2004] FCA 130 follows litigation between the parties in the Supreme Court of Victoria and the Court of Appeal. In this case the parties sought the Court’s approval to enter into terms of settlement and that each of the two parties could properly perform and give effect to the terms of settlement arising from the litigation.  **(a) Background of proceedings**  The Ansett Australia Limited group of companies (Ansett) was placed in administration under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in September 2001. Most of the Ansett employees were terminated, some, after many years of service. That service gave rise to a number of employee entitlements, including superannuation payments.  It became apparent to the administrators that Ansett did not have sufficient funds to cover all employee entitlements. Consequently, the Commonwealth Government advanced funds as a loan to Ansett to “top up” the funds to pay employee entitlements, to the extent that those entitlements were not able to be met from the assets of Ansett. Under this arrangement, the Commonwealth Government ranked in priority as an employee, ahead of non-employee unsecured creditors.  During the administration an issue arose as to whether Ansett employees had been retrenched by the administrators in such circumstances as would give rise to an entitlement of employee members of the Ground Staff Superannuation Plan (the Plan) to a superannuation payment based on retrenchment. The trustee of the Plan, Ansett Australia Ground Staff Superannuation Plan Pty Ltd (Trustee) argued that the member employees were entitled to additional superannuation payments, and that its claim to have the fund topped up to meet members’ entitlements should receive priority over the claims of other Ansett creditors. The administrators argued that even if the employees were entitled to the additional superannuation payment, the priority of the Trustee’s claim had been relegated by the Ansett creditors to that of an unsecured creditor pursuant to the Ansett Deed of Company Arrangement.  Ansett entered into the deed of company arrangement in May 2002 after extensive consultations, which preserved the position of the Commonwealth but relegated the position of the Trustee to that of an unsecured creditor. In doing so, the deed of company arrangement varied the order of priority that would otherwise apply under the Corporations Act 2001.  The Trustee commenced proceedings in the Federal Court in June 2002 seeking to have the deed of company arrangement terminated or amended so as to delete or vary the provisions that denied priority to the Trustee’s claim. However, the Trustee commenced proceedings in the Supreme Court of Victoria due to perceived jurisdictional issues in the Federal Court. The Federal Court proceedings were adjourned pending the outcome of the Supreme Court proceedings.  The Supreme Court held that the retrenched members of the Plan were entitled to superannuation payments, however Ansett’s obligation to pay further funds into the plan did not attract priority under the Corporations Act. The Trustee appealed to the Court of Appeal and the administrators cross-appealed. The appeal was allowed and the cross-appeal adjourned.  Following the Court of Appeal decision, the parties returned to the Federal Court and revived the adjourned proceedings. By the time the matter came before Goldberg J in November 2003, it was estimated that the parties in litigating their claims had incurred costs in excess of $3 million. Consequently, a significant amount of money was being removed from the funds available to be distributed to Ansett employees. Given this, Goldberg J referred the matter to mediation with a direction that the ACTU, the represented unions and the Commonwealth be entitled to participate in the mediation. The court proceedings were adjourned.  As a result of the mediation of the proceedings, the parties reached an agreement in principle. However, in order to give effect to the agreement, the parties required a court order allowing for the variation of the deed of company arrangement and directions that the parties could give effect to the terms of settlement reached and distribute funds accordingly.  **(c) Proposed settlement**  The terms of the settlement provided for the deed of company arrangement to be varied to reflect a new priority regime by which the administrators would distribute assets to priority creditors. As a result, the Trustee’s claims were given priority over those of unsecured creditors.  **(d) Approving the terms of settlement and the proposed distribution of assets by the Trustee**  **(i) Terms of settlement**  Generally the courts will not give directions to administrators approving decisions of a purely commercial or business nature. However, this case involved legal issues as rights and duties were being compromised and causes of action were being given up.  So far as the Trustee was concerned, the Court has the power to make orders and give directions regarding the conduct of litigation and the compromise of claims by trustees. Although the court can direct that it is proper for a trustee to enter into terms of settlement, the court will not examine the precise terms of the compromise as this is solely the concern of the trustee. Similarly, a court cannot direct a trustee how to exercise a discretion, however the trustee may seek a direction that it is not improper or beyond power to exercise its discretion in a particular way.  Whilst the court has the power to make appropriate orders and directions regarding the variation of a deed of company arrangement under the Corporations Act, there was an issue as to whether it was appropriate for the court to sanction the settlement. The court emphasised that it can only decide whether the parties have the power to enter into the terms of the settlement. The Court will not settle the provisions of the terms of settlement. Seeking the court’s approval to enter into the terms of settlement merely provides the parties with the protection of an order protecting them from collateral attack for entering into the compromise on the basis that they had no power to do so or that it was an improper or inappropriate exercise of power to do so.  The effect of an order to vary a deed of company arrangement would deny creditors the opportunity to vote on the variation of the deed. Therefore the competing interests of the parties to the deed needed to be evaluated. In deciding whether to approve the terms of settlement, the court considered the competing interests of the parties; whether all interests that might be affected by the terms of settlement were represented in court; the nature of the litigation; the time it had taken for the matter to come to trial and the prospects of the litigation continuing through to another appellate hearing. The overarching concern was the substantial delay (over two years) in Ansett employees gaining access to their entitlements. The effect of approving the terms of settlement was that a distribution could be made to Ansett employees.  In these circumstances, the court approved the terms of settlement and the Trustee entering into the terms of settlement.  **(ii) Proposed distribution of assets by the Trustee**  The Trustee had received advice from an actuary on what would constitute a fair and equitable allocation of the assets remaining in the Plan and sought the Court's approval of a distribution of assets in accordance with that advice.  The court directed the Trustee to distribute the remaining assets in accordance with the actuary's advice. The manner in which the Trustee proposed to distribute the assets was devised on a fair consideration of the interests of members, on the advice of an experienced actuary, and in circumstances where there was no suggestion of a lack of good faith or ulterior purpose.  **5.9 Ability of trustee to implement a scheme of arrangement and whether this would constitute fraud on the minority** (By Adam Schwab, Freehills)  Arakella v Paton [2004] NSWSC 13, Supreme Court of New South Wales, Justice Austin, 30 January 2004  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/january/2004nswsc13.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/january/2004nswsc13.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Background**  The GNS Trading Trust (“Trading Trust”) is a wholesaler of stationary and office supplies. Most of its customers are newsagents which operate in New South Wales, Queensland and Victoria. The Trading Trust was established in 1989 to concentrate the buying power of disparate newsagencies into a single entity and allow the small newsagencies to obtain supplies at cheaper prices. The Trading Trust has 3,400 customers (most of whom are newsagents) and 365 unitholders.  Unfortunately, the Trading Trust deed was poorly drafted and as a result, the deed had been breached in various ways. In addition, the Trading Trust failed to comply with the registration and disclosure requirements of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the “Corporations Act”) relating to the issue of units.  To overcome these problems, the Trustee proposed that a new company (“NewCo”) be established to acquire the units of the Trading Trust. The acquisition would occur via a scheme, in which existing unitholders would be issued with 100 per cent of the shares in NewCo. NewCo will subsequently operate in accordance with the (relatively) inexpensive regime applicable to private companies. NewCo’s constitution would not include the unworkable aspects of the Trading Trust deed.  However, for the proposal to be accepted, the court needed to determine:           whether section 81 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "default) (“Trustee Act”) (see below) is wide enough to confer upon the trustee the ability to amend the trust deed to allow it to implement a scheme of arrangement; and          whether amending the terms of the trust deed for the purpose of implementing the transaction (upon receiving approval from a special majority of shareholders) will be considered ‘fraud on the minority’ in light of the principles enunciated by the High Court in Gambotto v WCP Limited (1995) 182 CLR 432 (“Gambotto”).  As a side issue, Justice Austin made an order under Part 8 rule 14 of the [Supreme Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11562" \t "default) allowing the unitholders of the Trading Trust to be represented by a Mr Geoffrey Paton. His Honour noted that “Mr Paton has the qualification and experience to act appropriately as a representative of the unitholders, and that his connections with the Trustee…do not compromise his position.”  **Findings**  **(b) Is a Trustee able to amend a trust deed to implement a scheme under the Trustee Act?**  The Trustee submitted that section 81 of the Trustee Act empowers a trustee to amend the terms of a trust instrument for the purposes of making a beneficial transaction (notwithstanding the fact the trust instrument does not permit amendments).  Section 81 provides that the court may confer upon the trustee the necessary power where any:  “…sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure or transaction is in the opinion of the court expedient, but…cannot be effected by reason of the absence of power.”  Justice Austin stated that the court cannot exercise its power under section 81 unless:           the court is of the opinion that the proposed transaction is expedient in the management or administration of the trust; and          the transaction cannot be effected by reason of the absence of any power vested in the trustee.  Justice Austin noted that the second limb of the test would clearly be satisfied as the Trading Trust deed does not permit the transfer of unitholders’ units to NewCo in exchange for the issue of shares in NewCo.  His Honour also agreed with the Trustee in relation to the first limb of the test, noting that:  “trusts created by the Trading Trust deed are trusts for the purpose of conducting a business for the benefit of participating newsagents. [An] essential component of such a business trust is that in normal circumstances, beneficiaries are expected to enter into participation when they commence a newsagency business, and depart when they cease to conduct their newsagency business. [Therefore] matters touching upon the issue, redemption and transfer of units are therefore matters arising in the management and administration of the stationary and office supply business conducted by the Trustee.”  **(c) Can an order be made empowering a Trustee to affect a beneficial interest?**  An issue also arose with respect to section 81 as to whether “there is an implied limitation to the effect that it [section 81] cannot be used where the transaction in question involves an alteration of beneficial interest.”  In relation to this point, his Honour considered various authorities, most notably, the decisions of Rath J in Perpetual Trustees Limited v Godsall and McLelland CJ in Permanent Nominees (Aust) Limited v National Australia Managers Limited. Justice Austin noted that [at 112]:  “[while] the Court’s power under section 81 cannot be used to subvert the beneficial disposition in the trust instrument…if an order is made in the management or administration of trust property, it is permissible under the section to accommodate the beneficial interests to the new situation created by the order.”  However, despite agreeing in principle to the Trustee’s submissions, Justice Austin declined to make an order under section 81 in this instance until he was satisfied that the unitholders have an appropriate opportunity to be heard in relation to the proposal.  **(d) Will a scheme accepted by 75 per cent of unitholders be upheld under the Gambotto principles?**  The other key issue considered by the court was whether the circumstances of the amendment to the Trading Trust Deed for the purposes of implementing the transaction would constitute a fraud on the minority, according to the principles enunciated in Gambotto.  The majority of the High Court in Gambotto held that alteration of a company’s articles of association so as to confer upon the majority power to expropriate the shares of a minority will be a fraud on the minority unless: (i) it is exercisable for a proper purpose and (ii) its exercise will not operate oppressively in relation to minority shareholders.  However, Justice Austin rejected the application of the Gambotto principles in this case because:           in the present case, the trust instrument will be amended pursuant to the orders of the Court. If the Court were to form the view that there was some procedural or substantive unfairness to unitholders or any group of them in the implementation of the proposal, it would be duty-bound to decline to make the order.          the proposed amendment will treat all unitholders equally, uniformly replacing their units with shares. Noting the decision of the majority of the New South Wales Court of Appeal in Heydon v NRMA Ltd (2001) 51 NSWLR 1, Justice Austin held that “the ratio in Gambotto has no application where the proposed amendment will replace all interests with another species of property in a manner that treats the interest-holders equally, at any rate (as here) there is no ‘majority’ voting bloc”; and          even if the Gambotto principles do apply, the amendments to the Trust Deed are being undertaken for a “proper purpose”. In this case, if the proposal is not adopted, the trustee will have to close down or sell the newspaper supplies and office products business as a result of the breaches of trust and the Corporations Act. As such, the “proper purpose” test from Gambotto would be satisfied.  **5.10 Section 197(1) Corporations Act (director’s personal liability) applied despite full indemnity from trust assets available to corporate trustee** (By Emma Bailey, Mallesons)  Hanel v O’Neill [2003] SASC 409, Supreme Court of South Australia, Mullighan, Debelle and Gray JJ, 11 December 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2003/december/2003sasc409.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2003/december/2003sasc409.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Parties**  Mr O’Neill owned a shopping centre in Kingswood.  Mr Hanel was the sole director of Daroko Pty Limited (“Daroko”), a tenant in the Kingswood shopping centre, in its capacity as the trustee of the Daroko Unit Trust.  **(b) Background**  In March 2001, Mr Hanel gave notice on behalf of Daroko that Daroko intended to vacate the property on 30 June 2001. Daroko vacated the premises on 30 June 2001, some two years and three months before the lease was due to expire on 30 September 2003.  In July 2002, Mr O’Neill obtained judgment against Daroko in the Adelaide Magistrates Court for breach of lease. Daroko failed to pay the judgment debt and Mr O’Neill then obtained judgment against Mr Hanel for the debt.  Daroko and the Daroko Unit Trust had no assets, because Mr Hanel had caused Daroko to pay the company’s net profit for the previous financial year to a beneficiary of the trust, in August 2000.  Clause 21 of the Daroko Unit Trust’s trust deed indemnified Daroko out of the assets of the trust.  This case was the appeal by Mr Hanel against that judgment.  **(c) The legislation**  The main legal issue was whether, in the absence of sufficient trust funds, Mr Hanel was personally liable for Daroko’s debts pursuant to section 197(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Section 197(1) provides that a director of a corporate trustee will be liable for the debts of the trustee if the trustee:  “(a) has not, and cannot, discharge [all or part of] the liability…; and  (b) is not entitled to be fully indemnified against the liability out of trust assets.  This is so even if the trust does not have enough assets to indemnify the trustee...”.  There was a further question as to whether the magistrate should have considered Mr Hanel’s defence that O’Neill failed to mitigate his loss, by declining to approve an assignment of Daroko’s lease to a new tenant proposed by Mr Hanel.  **(d) The court’s decision**  Mr Hanel argued that personal liability under section 197(1) did not apply because Daroko was entitled to a full indemnity under the Daroko trust deed, irrespective of the fact that the Daroko Unit Trust did not have sufficient assets to cover the debt.  A majority of the court (Justice Debelle dissenting) rejected Mr Hanel’s argument. The court held that whether Daroko was entitled to be indemnified out of the assets of the Daroko Unit Trust was a question of fact as well as law. If there were no assets in the Daroko Unit Trust, there was no entitlement to be indemnified for the purposes of section 197(1).  **(e) A purposive approach to section 197(1)**  Section 197(1) is the statutory successor of section 233(2) of the Corporations Law. Section 233(2) had been interpreted such that where a corporate trustee was entitled to be indemnified out of the trust assets, its directors were not liable merely because the trust assets were insufficient to indemnify the corporation for the relevant liability.  The question arose as to whether the repeal of section 233 and enactment of section 197 indicated a legislative intention to alter the liability of directors of corporate trustees. A majority of the court held that section 197 represented an extension to the liability of trustee company directors.  Justice Gray found that section 197(1) did not simply re-enact section 233 by use of different words - the fact that a new provision had been enacted to replace the old indicated a legislative intention for change. Justice Gray said that the words “This is so…” would be superfluous, and have no work to do, if the mere fact that there was an indemnity in the trust deed meant the section would not apply.  On that basis, Justice Gray found that section 197(1) should be construed in such a way that directors of a corporate trustee would be personally liability for debts incurred by the corporation where there are insufficient trust assets to meet the debt.  Justice Mullighan agreed with this approach, and stated that it would be inconsistent with the purpose of section 197(1) for directors of corporate trustees to avoid personal liability simply by ensuring that the relevant trust deed indemnified the corporation against liability, even in circumstances where the directors caused depletion of the trust assets.  **(f) The dissent**  Justice Debelle (dissenting) found that the repeal and re-enactment of a legislative provision (albeit in different terms) cannot be assumed to evince an intention that Parliament “necessarily intended to alter the law”. Justice Debelle examined the words in section 197 and found they substantially re-enacted section 233. Justice Debelle found that the effect of the sentence “This is so…” is such that where there is a legal basis for a full indemnity of the corporate trustee, the directors will continue not to be liable for the corporations’ debts, even where the trust assets are insufficient to fully discharge those debts.  Justice Debelle gave effect to the indemnity in clause 21 of the Daroko trust deed and accordingly, found that Mr Hanel could not be held personally liable under section 197(1) for Daroko’s debts.  **(g) Duty to mitigate loss**  Mr Hanel also argued that an alleged breach by Mr O’Neill of a duty to mitigate his loss raised an arguable defence. Justices Mullighan and Gray agreed that the question of mitigation was relevant to the extent of Daroko’s liability and that the defence raised by Mr Hanel ought to have been considered by the magistrate at first instance. The appeal was allowed and the matter remitted to the magistrate for trial. |
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