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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Public lecture – Independent directors in family controlled public companies**Melbourne Law School 2006 WE Hearn Lecture - Guests at the table? Independent directors in family controlled public companiesSpeaker: Professor Deborah DeMottWednesday 6 December 2006, 6pm for 6.30pmMelbourne Law School185 Pelham Street, CarltonLight refreshments will be offered following the lectureRegistrations by 1 December 2006Email: law-rsvp@unimelb.edu.au (Hearn in heading please)Telephone: (03) 8344 1153This is a free public lecture (please rsvp to the email address above). The lecture is sponsored by Clayton Utz.The roles and duties of directors in public companies are under greater scrutiny than ever before. In Australia and the United States, public company boards must include directors who are independent. When a public company is controlled by a family or in some way identified by an association with its founder's family, the meaning of independence becomes more complex, as does the position of directors. This is especially so when questions arise concerning management succession, a major shift in the company's business activities, or a potential change in control.Deborah DeMott is the David F. Cavers Professor of Law at Duke University. Since 1995 Professor De Mott has served as the Reporter for the American Law Institute's Restatement (Third) of Agency. Between 2000-2002, she held a secondary appointment as Centennial Visiting Professor in the Law Department of the London School of Economics. Along with numerous other publications, Professor DeMott is the author of a treatise, Shareholder Derivative Actions, published in 1987 and a casebook, Fiduciary Obligation, Agency and Partnership (1991).**1.2 Corporate and financial services reform proposals**On 16 November 2006, the Parliamentary Secretary to the Treasurer, the Honourable Chris Pearce MP released for public comment a proposal paper containing 35 proposals to refine and simplify aspects of Australia's corporate and financial services regulation.The proposals take into account the views presented during consultation on the April 2006 Corporate and Financial Services Regulation Review Consultation Paper and include measures to reduce the burden of regulation in the areas of:* financial services regulation;
* company reporting obligations;
* corporate governance;
* fundraising;
* takeovers; and
* compliance.

Comments are sought on these proposals. Written submissions may be lodged with the Treasury until 22 December 2006. There will be opportunity early next year for further dialogue with the Treasury in the course of drafting the Bill to deal with issues of technical detail.The paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1189" \t "_new).**1.3 Reform of EU investment fund market** On 16 November 2006, the European Commission published its plans for the modernisation of the EU framework for investment funds, which now account for over €5500 billion of assets. The improvements, which are put forward in a White Paper, will simplify the current Directive on investment funds in order to ensure that investors receive useful cost and performance disclosures when selecting funds and to make it easier for the industry to achieve cost savings and specialisation benefits across the single market. Following further studies on cost-effectiveness and investor protection, the Commission plans to propose these changes in autumn 2007, in the form of amendments to the current Directive. Meanwhile the Commission will also look at whether there is a need to make similar changes for other fund products, especially real estate funds that are not covered by the current EU framework.The White Paper proposes targeted changes to the current EU framework for investment funds (the 'UCITS Directive'), which does not adequately reflect the challenges facing the industry today and can give rise to unnecessarily high compliance costs and missed investment opportunities. The changes would: simplify the notification procedure; create a framework for the cross-border merger of funds; create a framework for asset pooling; enable fund managers to manage funds domiciled in other Member States; improve the quality and relevance of the key disclosure documents to the end investor; and strengthen supervisory cooperation to monitor and reduce risk of cross-border investor abuse. The White Paper also proposes to review options for establishing a European 'private placement regime', allowing financial institutions to offer investment opportunities to qualified investors across the EU.The Commission has developed the White Paper on the basis of extensive consultation and debate with consumers, industry practitioners and policymakers over a period of two years. It builds on responses to the Green Paper of July 2005 (IP/06/152), and on three reports from specially constituted expert groups (IP/06/915). It also responds directly to the concerns raised in the March 2006 report of the European Parliament on asset management. The White Paper is available on the [Europa website](http://ec.europa.eu/internal_market/securities/ucits/index_en.htm%22%20%5Ct%20%22_new).**1.4 Australian auditor independence requirements comparative review** On 15 November 2006, the Parliamentary Secretary to the Treasurer, the Honourable Chris Pearce MP, released a comparative review of the Australian Auditor Independence Requirements.The comparative review compares the Australian requirements with those in Canada, the European Union, the United Kingdom and the United States.The overall conclusion of the comparative review, which was prepared by the Treasury, is that, despite differences in terminology, institutional arrangements and legal frameworks, there is a substantial underlying equivalence between the Australian requirements and international best practice standards.The comparative review is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1184" \t "_new).**1.5 IAASB issues exposure drafts to enhance the clarity of standards on materiality, misstatements, and communications with those charged with governance** As part of its comprehensive program to enhance the clarity of international standards, the International Auditing and Assurance Standards Board (IAASB), an independent standard-setting board under the auspices of the International Federation of Accountants (IFAC), issued on 15 November 2006 three exposure drafts of proposed International Standards on Auditing (ISAs) that follow its new clarity drafting conventions. These exposure drafts form part of the IAASB's 18-month program to redraft existing standards and to develop new and revised standards following the new drafting conventions.The following three proposed standards have been redrafted following the new drafting conventions: * ISA 320 (Revised and Redrafted), Materiality in Planning and Performing an Audit;
* ISA 450 (Redrafted), Evaluation of Misstatements Identified during the Audit; and
* ISA 260 (Revised and Redrafted), Communication with Those Charged with Governance.

Respondents are asked to comment on the application of the new drafting conventions only. Comments on all three exposure drafts are requested by 15 February 2007. The exposure drafts are available on the [IFAC website](http://www.ifac.org/Guidance/EXD-Outstanding.php%22%20%5Ct%20%22_new).**1.6 Insolvency reforms** On 13 November 2006, the Parliamentary Secretary to the Treasurer, the Honourable Chris Pearce MP, released the draft Corporations Amendment (Insolvency) Bill 2007 for public comment. The draft Bill details an integrated package of reforms to improve the operation of Australia's insolvency laws and is the first comprehensive package of insolvency law reform since the Harmer Review in 1988.The Bill proposes the introduction of important disclosure requirements, an improved registration regime, reforms to support the $23 million assetless administration fund and enhancements to the insolvency processes themselves.The Bill aims to reduce the cost of insolvency proceedings for the benefit of creditors generally, for example by rationalising advertising and meeting requirements and by allowing for greater use of modern technology throughout proceedings. A key new innovation is a proposed statutory pooling process, which will allow for savings and improved returns to creditors through the consolidation of multiple insolvency proceedings for related companies.The Bill includes measures to improve protections for employee entitlements by according the Superannuation Guarantee charge the same priority as other employee entitlements, and by preventing administrators reducing the priority of employee entitlements without the agreement of employees. They supplement the $62 million extension to the General Employee Entitlements and Redundancy Scheme announced last year.The Bill also includes measures to inform creditors better about key issues that arise in insolvency processes. There will be a new requirement for information to be provided to creditors to allow them to make an informed judgment about remuneration proposals submitted by administrators. Administrators will also be required to make a statement of independence to creditors prior to their appointment.Comments are requested by 23 February 2007.Amendments to implement the Government's decision to adopt the UNCITRAL Model Law on Cross-Border Insolvency will be enacted as a separate Bill. The Model Law has been exposed for comments previously.The Bill and Explanatory Memorandum are available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1186" \t "_new).**1.7 Major accounting firms statement on financial reporting and auditing** On 9 November 2006, the six biggest international audit firms issued a report setting out their shared view of the steps that must be taken to strengthen financial reporting and the audit function. To benefit the global financial markets and their stakeholders, the report urges completion in the near term of current convergence processes, notably the effort by the International Accounting Standards Board (IASB) and the US Financial Accounting Standards Board (FASB) to harmonise differences between international and US reporting standards, as currently envisioned. The report is available on the [IASB website](http://www.iasb.org/News/Press%2BReleases/Major%2Baccounting%2Bfirms%2Bunited%2Bin%2Bsupport%2Bfor%2Bconvergence%2Bof%2BIFRSs%2Band%2BUS%2Breporting%2Bstandards.htm%22%20%5Ct%20%22_new).**1.8 UK Companies Bill receives Royal Assent** On 8 November 2006, the UK Companies Bill received Royal Assent. The Act introduces major changes to UK company law. The first measures to be introduced will include provisions on company communications to shareholders. These will be introduced in January 2007, saving businesses over £50 million by using electronic communications rather than paper.The clauses on takeovers which give the Takeover Panel power to make rules within a statutory framework will also be one of the first areas introduced. Measures relating to disclosure to the market and clarification of the liability attaching to such disclosures will also come in at an early stage. All parts of the Act will be in force by October 2008.The Companies Act includes measures that:* give greater clarity on directors' duties, including making clear that they have to act in the interests of shareholders, but in doing so have to pay regard to the longer term, the interests of employees, suppliers, consumers and the environment;
* encourages narrative reporting by companies to be forward-looking, covering risks as well as opportunities, with explicit requirements for quoted companies; and
* gives an option for all directors and shareholders to file a service address on the public record rather than a private address.

Shareholder engagement will also be promoted through enhancing the powers of proxies and making it easier for indirect investors to be informed and exercise governance rights in the company. The Act also allows shareholders to agree to limit the auditors' liability to the company to what is fair and reasonable.The Act also includes a new offence for recklessly or knowingly including misleading, false or deceptive matters in an audit report.A power is provided in the Act to require institutional investors to disclose how they use their votes. The UK Government has made clear that it hopes that the market will provide such disclosure without the need to exercise the power and that regulation would not be put in place without prior consultation and a detailed cost analysis.The Act also paves the way for the UK Financial Reporting Council to undertake regulation of the actuarial profession, following the Penrose report into Equitable Life.The Act includes measures to benefit private companies including:* new model articles;
* no need to have a company secretary unless the company wants one; and
* no need to have an AGM unless the company wants one.

The Act extends to the whole of the UK, so that there will no longer be a separate regime for Northern Ireland.**1.9 IFAC proposes guidance to help companies develop codes of conduct** Effective codes of conduct are a key element of strong corporate governance and internal controls within businesses worldwide. Recognising the critical role that professional accountants in business play in these areas, on 8 November 2006 the International Federation of Accountants' (IFAC) Professional Accountants in Business (PAIB) Committee issued draft new guidance to assist companies and their professional accountants in developing and implementing a code of conduct. The proposed new good practice guidance, 'Defining and Developing an Effective Code of Conduct', highlights the varied roles of professional accountants in business in driving and supporting organisational ethics and conducting ethics programs. It also provides practical guidance on the design and development of such codes.The PAIB Committee previously issued an exposure draft on developing codes of conduct in January 2006. Following significant comments and suggestions received, the committee made extensive changes to the content of the guidance. In the new exposure draft, the committee is recommending an approach based on developing a values-based organisation and a values-driven code. The aim is to promote a culture that encourages employees to "do the right thing" and allows them to make appropriate decisions.This exposure draft will serve as the foundation for the committee's long-term work program to develop principles-based pronouncements. A preface document and explanatory memorandum on developing these new pronouncements will be exposed for public comment in early 2007.Further information is available on the [IFAC website](http://www.ifac.org/Guidance/EXD-Outstanding.php%22%20%5Ct%20%22_new).**1.10 FSA discussion paper on private equity market**On 6 November 2006, the UK Financial Services Authority (FSA) published a discussion paper on the impact that the growth in the private equity market has had on the UK's wholesale markets and how the FSA is meeting the challenges this poses. The FSA believes that the private equity market is an increasingly important component of international capital markets and makes a key contribution to the efficiency of these markets. However, recent market developments have prompted the FSA to consider whether it currently exercises an appropriate level of regulatory engagement with the sector. The FSA is seeking feedback from the industry and public policy makers on whether it has correctly identified the risks posed by the growth in the private equity market and the suitability of its regulatory approach in addressing these risks.The FSA will establish an alternative investments centre of expertise by integrating private equity firms and supervision staff into the existing hedge fund managers supervision team and will continue its proactive monitoring of institutional leverage and credit markets. Given the growth in this market the FSA has been increasing its engagement and understanding of the sector, and as part of this work has recently completed a survey on the leveraged loan market which was also used to feed into the recent European Central Bank survey.The paper also outlines some potential additional data gathering which may be undertaken, proposals for increased co-operation with trade associations and targeted thematic work.DP06/6 'Private Equity - A discussion of risk and regulatory engagement' is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/114.shtml%22%20%5Ct%20%22_new).**1.11 2006 corruption perception index** On 6 November 2006, Transparency International (TI) launched the 2006 Corruption Perceptions Index (CPI). The 2006 Corruption Perceptions Index is a composite index that draws on multiple expert opinion surveys that poll perceptions of public sector corruption in 163 countries around the world. It scores countries on a scale from zero to ten, with zero indicating high levels of perceived corruption and ten indicating low levels of perceived corruption. A strong correlation between corruption and poverty is evident in the results of the CPI 2006. Almost three-quarters of the countries in the CPI score below five (including all low-income countries and all but two African states) indicating that most countries in the world face serious perceived levels of domestic corruption. Seventy-one countries - nearly half - score below three, indicating that corruption is perceived as rampant. Haiti has the lowest score at 1.8; Guinea, Iraq and Myanmar share the penultimate slot, each with a score of 1.9. Finland, Iceland and New Zealand share the top score of 9.6. Countries with a significant worsening in perceived levels of corruption include: Brazil, Cuba, Israel, Jordan, Laos, Seychelles, Trinidad and Tobago, Tunisia and the United States. Countries with a significant improvement in perceived levels of corruption include: Algeria, Czech Republic, India, Japan, Latvia, Lebanon, Mauritius, Paraguay, Slovenia, Turkey, Turkmenistan and Uruguay. A concentration of so-called 'failed states' is apparent at the bottom of the ranking. Iraq has sunk to second-to-last place, with pre-war survey data no longer included in this year's CPI. Intermediaries who began operating during the United Nations Oil-for-food programme continue to play a central role in driving corruption. The Volcker Commission reported that 2,392 companies paid kickbacks or made other illicit payments to the Saddam Hussein regime in the context of the programme, often through intermediaries. While the industrialised countries score relatively high on the CPI 2006, there continues to be major corruption scandals in many of these countries.Transparency International recommends:1. Promotion and, where necessary, adoption of corruption-specific codes of conduct by professional associations for their members, for instance the International Bar Association, International Compliance Association, and professional associations for accountants.2. Public education to ensure that honest intermediaries better understand their role.3. Legal or professional sanctions for legal, financial and accounting professionals that enable corruption;4. Greater scrutiny of the role of insufficiently transparent financial centres in facilitating corrupt transactions. The 20 countries with the least perceived corruption are, in order:* Finland
* Iceland
* New Zealand
* Demark
* Singapore
* Sweden
* Switzerland
* Norway
* Australia
* Netherlands
* Austria
* Luxembourg
* United Kingdom
* Canada
* Hong Kong
* Germany
* Japan
* France
* Ireland
* Belgium

The Corruption Perceptions Index is available on the [Transparency International website](http://www.transparency.org/news_room/latest_news/press_releases/2006/en_2006_11_06_cpi_2006%22%20%5Ct%20%22_new).**1.12 FSA sets out priorities for its review of retail distribution** On the 2 November 2006, the UK Financial Services Authority (FSA) set out the five key priorities for its review of the distribution of retail investments. It also called on the industry to play the lead role in delivering market solutions to provide better outcomes for consumers, producers and distributors. The FSA launched its Retail Distribution Review in June this year with the specific aim of identifying and addressing the root causes of problems that continue to emerge in the retail investment market (which includes banks, life insurers, financial advisers, building societies and fund managers). Following extensive discussions with the industry and others, the FSA has identified the following five themes to be addressed by the review:* The sustainability of the sector;
* The impact of incentives;
* Professionalism and reputation;
* Consumer access to financial products and services; and
* Regulatory barriers and enablers.

The FSA will publish a Discussion Paper in the middle of next year, setting out the analysis, initial conclusions and recommendations.Further information is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/112.shtml%22%20%5Ct%20%22_new).**1.13 CFO survey** On 2 November 2006, KPMG published the results of a survey indicating that top performing CFOs have efficient finance functions enabling them to spend less time on cost control and more time on strategic decision making.The KPMG report titled 'Being the Best' found the majority of CFOs (80 per cent) in average-performing companies focussed predominately on cost control, compared to 64 per cent of CFOs from high-performing companies who spend more time on strategic support. Specifically, the top finance teams' focus is on managing risk and guiding investors and the organisation on business performance rather than analysing financial data. Compliance obligations was cited by 62 per cent of the respondents as one of the main restrictions on finance's ability to focus on providing strategic insight. CFOs are also finding efficiencies through centralising and standardising processes which also enable a single view of finance across their company. The report found 30-50 per cent of companies are now handling their treasury management and financial reporting, transaction processing within a shared service centre. Key statistics from the report include:* 80% of CFOs at average-performing companies predominately focus on cost control;
* 43% of CFOs are dissatisfied with their ability to undertake planning, budgeting and forecasting;
* 64% of CFOs at high-performing companies spend more time on decision support activity with 46% saying they will play a leadership role in this area in the next two years;
* 26% of CFOs from average-performing companies say they are excellent at reporting business results compared with 40% from top performing companies; and
* 62% of CFOs said compliance had absorbed time that could have been spent more profitably elsewhere, with 67% of CFOs expecting compliance focus to increase over the next three years.

Further information is available on the [KMPG website](http://www.kpmg.com.au/default.aspx%22%20%5Ct%20%22_new).**1.14 Draft guidance on the operation of the market abuse directive** On 2 November 2006, the Committee of European Securities Regulators (CESR) launched a 2nd set of draft guidance for public consultation on the "Operation of the Market Abuse Directive". Following the first two years of experience gained under the new market abuse regime, CESR is of the view that it is appropriate to provide further guidance to market participants regarding common understandings developed amongst supervisors with the intention of achieving a convergent application of the legal requirements on a day-to-day basis.In this second draft guidance issued for consultation, CESR has developed in relation to Articles 1-6 of the Directive, a draft common understanding amongst CESR Members regarding treatment of the following aspects of the directive and associated issues concerning market abuse:1. What constitutes inside information?The guidance in this context gives further clarification on: a 'precise nature' as a term set out in the Directive; further guidance on making information public; amplifies what is meant by the concept 'information likely to have a significant price effect'; a non exhaustive list of purely indicative types of event or information which may constitute inside information.2. When is it legitimate to delay the disclosure of inside information?CESR provides a few indicative examples of the two circumstances mentioned in Article 3 (1) where it provides for the legitimate delay of disclosure of inside information. For example, the guidance provides indicative examples in relation to: confidentiality constraints relating to competitive situations; product development; selling of major holdings in another issuer; and impending developments that could be jeopardised by disclosure.3. When are client orders inside information? This includes guidance regarding client's pending orders as inside information; and guidance of a 'precise nature'.4. Insider lists in multiple jurisdictions: CESR proposes and would commit itself to a mutual recognition system to be put in place (ie: a competent authority would accept an insider list maintained in accordance with the rules of another CESR member).Further information is available on the [CESR website](http://www.cesr.eu/%22%20%5Ct%20%22_new).**1.15 Compensation for loss in the financial services sector** On 2 November 2006, the Australian government published draft regulations dealing with compensation for loss in the financial services sector.The Government has completed its review of possible compensation arrangements for losses by retail clients who may make successful claims against financial services licensees in the financial services sector. The review was initiated in 2002 to promote discussion on what, if any, compensation arrangements should be put in place and, if so, what it should cover and the appropriate mechanisms. The Government has called for submissions on the draft regulations.Further information is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1181" \t "_new).**1.16 FRC report on auditor independence** On 1 November 2006, the Australian Financial Reporting Council's (FRC) second auditor independence report was published and outlines the work undertaken by the FRC in 2005-2006 in the performance of its auditor independence functions. The report also sets out the findings of the FRC as a result of that work and, where appropriate, the action taken by the FRC in respect of those findings.In 2005-2006, the FRC addressed each of the core issues that, together, make up its auditor independence functions: systems and processes of Australian auditors, quality review programmes and disciplinary procedures of the professional accounting bodies as related to auditor independence, the teaching of ethics by, or on behalf of, those bodies and compliance by companies with audit-related disclosure requirements. In addition, the FRC gave consideration to international developments in the area of auditor independence.The overall conclusion that the FRC has reached during 2005-06 is that the auditor independence framework in Australia is operating effectively. No systemic issues were revealed as a result of the significant work undertaken by the various parties. The examination of the quality review programmes of the professional accounting bodies concluded that the programmes for reviewing members and firms that undertake audits comply with International Federation of Accountants (IFAC) and Australian professional pronouncements, although the consultants qualified their findings because they did not review files and thus were unable to conclude that the processes and procedures had been followed. The consultants recommend that the files from the quality review programme of the Institute of Chartered Accountants in Australia (ICAA) should be available to the FRC so that it can sight evidence that the professional accounting bodies' quality review policies and procedures, as they relate to auditor independence, have been followed.The consultants have also noted the absence of a requirement for auditors in Australia to belong to a professional accounting body as a pre-requisite for registration as a company auditor and for the continuation of that registration. The FRC has monitoring responsibilities over the quality review, teaching of ethics and disciplinary arrangements of the professional accounting bodies as related to auditor independence, but in view of accountants not being required to be members of a professional accounting body to be registered as an auditor, it cannot provide oversight through the professional bodies over a segment of the auditing industry.The consultants have also highlighted the concentrated structure of the Australian audit industry around the Big Four accounting firms, and recommend further research on the structure of the industry.The examination of the disciplinary procedures of the professional accounting bodies indicated that the procedures of each body are adequate. However, the consultant has identified a number of threshold issues concerning the purpose and role of the professional bodies in disciplining auditors, their relationship in this area with ASIC and the Companies Auditors and Liquidators Disciplinary Board (CALDB), and the CALDB's ability to initiate disciplinary actions in the public interest. These issues warrant further examination and consultation with the professional bodies and other stakeholders by the FRC, which the FRC intends to undertake as part of its 2006-2007 work programme.The examination of the teaching of ethics by, or on behalf of, the professional accounting bodies has found that the depth of understanding of ethical issues by officers of the three bodies and by members of accounting firms, their commitment to deal with these issues and steps being taken to do so, is well beyond anything observed in other disciplines, business or professions, including law. The consultant has also made a number of recommendations on ways to enhance the teaching of ethics in the profession. These recommendations will be subject to further examination and consultation with the professional bodies and other stakeholders by the FRC, which the FRC intends to undertake as part of its 2006-2007 work programme.The FRC's work on monitoring the overall compliance by companies, registered managed investment schemes and disclosing entities with audit-related disclosure requirements of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and accounting standards was based on information supplied by ASIC from their accounts surveillance programme and the Australian Stock Exchange Ltd (ASX). The results of ASIC's review (which did not cover the full range of disclosure requirements) showed that the majority of the financial reports examined complied with the requirements examined as part of the review. A similar conclusion was reached by the ASX.The full report is available on the [FRC website](http://www.frc.gov.au/reports/2005_2006_AAIR/index.asp%22%20%5Ct%20%22_new).**1.17 Rise in credit risk** Australian companies are becoming increasingly likely to experience financial distress and insolvency, according to Dun & Bradstreet's (D&B) Corporate Risk Analysis published on 31 October 2006. The data reveals that over the last three quarters the number of companies rated 'moderate' or 'very high' risk has risen to its highest level in 18 months, with almost four in ten (37.8%) companies are now falling into these categories. At the opposite end of the scale, the number of companies rated 'low risk' has decreased to its lowest level in 18 months, just over two in ten (23.9%) now fall into this category. **(a) Industry comparison*** The Agriculture and Mining industries each have almost 6% of businesses classified as 'very high' risk. However, the Agriculture industry has seen a gradual downward trend in the 'very high' risk category over the last three quarters, from 6.2% at Q1 to 5.8% at Q3.
* The Services industry has consistently been the least risky sector with more companies rating as 'low' risk over the last 18 months than any other industry.
* 84.9% within the Services industry rated either 'low' or 'average' risk. The Wholesale industry is close behind, with 76.9% of companies rated either ‘low’ or 'average' risk.

**(b) SMEs vs big business*** Companies with less than 100 employees are more likely to be rated 'very high' or 'moderate' risk.
* Less than one fifth (19.4%) of companies with between 10 and 50 employees rated better than 'average' risk.
* Organisations with between 100 to 199 employees tend to have a lower credit risk. More than eight in ten (83.3%) companies fall in the 'low' or 'average' risk categories – 36.8% of those are 'low' risk.

**(c) State vs State*** In Q3, Queensland rated the riskiest State, with more than four in ten (42.9%) companies falling into the 'moderate' or 'very high' risk category; almost 10% of those being 'very high' risk – the highest of any state.
* Year-on-year, Queensland has seen the greatest increase of 'very high' risk companies than any other state – an increase of 2.1% overall to 9.6%.
* Western Australian has the widest spread of high and low risk companies. It has more classified as 'low' risk (26.6%) than any other state and also the second highest level of 'very high' risk (8.9%).
* Overall, South Australia is the least risky state, with almost two-thirds (64.7%) of companies falling into the 'low' and 'average' risk categories.
* New South Wales also rates favourably, with the least amount of companies classified as 'very high' risk (6.5%).

Further information is available on the [D&B website](http://www.dnb.com.au/general/press_releases/press_release.asp?id=pr_2006_1031" \t "_new).**1.18 New contract needed for Australia's federal system** On 28 October 2006, the Business Council of Australia (BCA) urged a new approach to fix endemic problems in federal–state relations that are costing Australia billions in wasted government spending and lost economic opportunity according to the BCA.The BCA published "Reshaping Australia's Federation: A New Contract for Federal–State Relations" that proposes a 12-point plan, including a federal convention to help map out a new way forward for the future.BCA research reveals federal–state inefficiencies are already a major economic issue costing taxpayers at least $9 billion a year. Put another way, these inefficiencies require an additional tax burden of $1100 a year to be imposed on every Australian household.Reshaping Australia's Federation identifies costs to the economy caused by overlap, duplication and cost shifting between the Commonwealth and the states, unnecessary state taxes and overspending on programs because of lack of oversight or accountability. It highlights that education, health, infrastructure and taxation are among the key areas where dysfunctional federalism is causing inefficiencies that are holding the economy back.A priority of Reshaping Australia's Federation is the creation of a 'common market' that allows the free flow of people, goods and services around the country.It proposes giving the Council of Australian Governments (COAG) a year to make significant progress with harmonising key business regulation. If COAG fails, the Commonwealth will need to step in and provide leadership to create a common market.The BCA's 12-point plan outlines a process that can be used to agree on a new approach to federal-state relations. Key points include:* a federal convention to be held to develop a framework for re-assessing the respective roles of the Commonwealth and the states;
* the convention to examine the pros and cons of the Commonwealth taking over the management and regulation of key national markets;
* COAG agreeing to set a deadline of the end of 2007 for significant progress in achieving a common market through harmonisation of those regulatory 'hot spots' already agreed by COAG;
* if significant progress in achieving outcomes is not made, the Commonwealth developing national business schemes for core areas of business regulation, allowing corporations to elect to opt into those schemes and out of state-based schemes;
* the Commonwealth and the states agreeing on constitutional amendments allowing the states and the Commonwealth to set up effective cooperative arrangements;
* establishing a federal commission to identify issues requiring a collective response from governments, advise on response options and report to COAG on progress in implementing COAG agreed reform agendas; and
* reforming the fiscal arrangements between the Commonwealth and the states to close the gap between which government raises revenue and which spends it, to increase accountability and reduce blame shifting.

Further information is available on the [BCA website](http://www.bca.com.au/%22%20%5Ct%20%22_new).**1.19 Shareholder rights consultation paper** On 26 October 2006 the UK Department of Trade and Industry (DTI) published a consultation document on the European Commission's proposal for a Directive on Shareholder Rights. The consultation period closes on 19 January 2007.The proposed Directive contains a range of measures relating to shareholder communications and meetings designed to enhance shareholder rights. Matters on which the DTI seeks comments include:* Scope (Article 1) - the proposed Directive is currently limited in its application to issuers whose shares are traded on a regulated market.
* General meeting notice (Article 5) - whether the proposed 30 day notice period (in contrast to the current UK 21 and 14 day periods) is appropriate for all company meetings, if not, what should be the minimum notice period, and whether it should be possible to call some kinds of meetings on shorter notice.
* Rights to add items to the agenda for general meetings and table draft resolutions (Article 6) - whether these rights for shareholders should be restricted, and what the thresholds should be for exercising these rights.
* Admission to general meeting (Article 7) - whether there should be a maximum 30 day record period for voting, and whether the Directive should prescribe any other parameter for the setting of record dates (e.g. that the record date must be at least a certain number of days after the date on which the notice of meeting is issued).
* Right to ask questions (Article 9) - whether it is necessary or appropriate to impose obligations on companies relating to the asking and answering of questions at company meetings.
* Voting in absentia (Article 12) - whether the ability of members to vote by post or electronic means, without appointing a proxy, is necessary and whether it should be mandatory for Member States to permit it or for companies to offer it.
* Voting upon instructions (Article 13) - whether this article would be effective in ensuring that rights can be exercised where shares are held through intermediaries acting on behalf of a number of different clients.

The consultation document is available on the [DTI website](http://www.dti.gov.uk/consultations/page34861.html%22%20%5Ct%20%22_new).**1.20 US board of directors survey** Almost half of US directors (47 percent) sit on only one public company board, and a total of 78 percent sit on one or two, according to the latest "What Directors Think" study conducted by PricewaterhouseCoopers LLP and published on 23 October 2006. Almost nine out of ten responding boards (86 percent) also report that their performance is formally evaluated on a regular basis. Of that number, six in 10 boards (59 percent) took action or implemented plans as the result of the evaluation.Also, six in 10 boards (59 percent) employ their internal general counsel to perform this evaluation, while only 15 percent use an outside attorney, and another 14 percent use either an internal officer or outside advisor. Board evaluations have been ratcheting up over the past few years, as all boards have generally implemented the NYSE requirements in this area.Other notable trends of this year's survey include: * Sixty-nine percent of respondents say they find their executive sessions to be very useful to the board and believe the CEO clearly understands their value; while 22 percent find them useful to the board but are unsure whether the CEO appreciates them. Seven percent say they are not particularly valuable to the board, while 1 percent say they are not valuable and have actually strained the CEO/board relationship.
* Boards are not yet ready to fully embrace the Internet. Fifty-seven percent of directors are not ready to hold board meetings online. And 72 percent say their board does not have a secure Internet location where they can access documents; of those, 56 percent say they do not even want one.
* Directors are not seeking more control over the board agenda; 90 percent say they are satisfied with the control they currently wield over what is scheduled for their board meetings.
* More than half the respondents (51 percent) say institutional investors influence their board the most, while 26 percent selected analysts, 15 percent report that ISS and rating agencies influence the board, and the remaining say it is the plaintiffs' bar and activist hedge funds (4 percent and 3 percent, respectively).
* Most directors are either "not at all concerned" (41 percent) or only "somewhat concerned" (40 percent) about the impact of hedge funds on their company. But 29 percent are "concerned" and 46 percent are "somewhat concerned" about the impact of hedge funds on capital markets more broadly.
* Fifty percent of respondents report that their board is "very effective" in standing up to management, while 38 percent claim they are "effective" and the remaining 11 percent say they are "somewhat effective" in standing up to management.
* Six out of ten boards (60 percent) would like to see their board spend more time discussing the competition.
* China is the most discussed emerging market by boards (according to 52 percent of respondents), followed by India (35 percent) and Brazil (21 percent). Twenty-two percent had traveled to China in the past year. However, more than half (52 percent) report that their companies do not compete or significantly invest in Chinese companies, or outsource or sell to China.

The fifth annual survey measures the opinions of over 1,300 directors serving on the boards of the top 2,000 publicly traded companies listed on the New York Stock Exchange, NASDAQ Stock Market and the American Stock Exchange.**1.21 CEO and directors' pay** Median total compensation for outside (non-employee) directors of US boards is higher than last year's median in all three major industry sectors covered in The Conference Board's annual study of outside director pay. CEO pay is also higher.The study, published on 19 October 2006, is based on a survey of the members of the Society of Corporate Secretaries and Governance Professionals and reports on directors' compensation and board practices in 402 companies. All figures are in US$.In manufacturing, median total compensation for outside directors is now $109,000, up from $91,250 in 2005. The service sector is $106,250 this year, up from $81,875 last year. Financial services increased from $64,500 in 2005 to $83,000. Total compensation includes fees, retainers, committee pay, and all forms of stock compensation.Median basic annual compensation (the mix of fees and retainers for board service plus committee pay) is up in all three industry sectors. Manufacturing increased from $59,150 to $65,000; financial services increased from $48,000 to $50,300; and services from $57,000 to $60,500.Median total compensation for US CEOs was higher in all industries in 2005, the latest year for which data is available.Median total CEO compensation (salary, bonus and long-term pay) was highest in the construction industry at $2,604,000. It was lowest in computer services at $848,000. Total current compensation (salary plus bonus) was again highest in construction at $1,936,000 and lowest in computer services at $805,000. The highest median salary, $700,000, was in communications; lowest was computer services, which paid $441,000.The report is based on data from 3,075 US companies in 14 major industries and reports the compensation paid to the five highest-paid executives.The report is available on the [Conference Board website](http://www.conference-board.org/publications/reports.cfm%22%20%5Ct%20%22_new).**1.22 Report on misuse of corporate vehicles** The Financial Action Task Force (FATF) has conducted an examination of the ways in which "corporate vehicles" (legal entities, including corporations, trusts, foundations and partnerships with limited liability) can be exploited for money laundering or terrorist financing purposes. The study of corporate vehicles found evidence of their misuse for money laundering/terrorist financing. The report identifies a number of risk factors and concludes that this misuse could be significantly reduced if governments have access to information about the beneficial owner, the source of assets, and the business objective of the company or trust.This report is one in a series of thematic studies carried out by the FATF to provide an in-depth look at money laundering and terrorist financing typologies. The report is available on the [FATF website](http://www.fatf-gafi.org/dataoecd/30/46/37627377.pdf%22%20%5Ct%20%22_new).**1.23 Study of foreign bribery** Overseas bribery by companies from the world's leading export countries is still common, despite the existence of international anti-bribery laws criminalising this practice, according to the Transparency International 2006 Bribe Payers Index (BPI) published on 4 October 2006.The BPI looks at the propensity of companies from 30 leading exporting countries to bribe abroad. Companies from the wealthiest countries generally rank in the top half of the Index, but still routinely pay bribes, particularly in developing economies. Companies from emerging export powers India, China and Russia rank among the worst. In the case of China and other emerging export powers, efforts to strengthen domestic anti-corruption activities have failed to extend abroad. Respondents from lower income countries in Africa, for example, identified French and Italian companies as among the worst perpetrators. The ten leading export countries with the least propensity to engage in overseas bribery are, in order:* Switzerland
* Sweden
* Australia
* Austria
* Canada
* UK
* Germany
* Netherlands
* Belgium
* US

India, China and Russia bring up the rear in TI's BPI ranking. India consistently scores worst across most regions and sub-groupings. China is the world's fourth largest exporter and ranks second to last in the Index.Further information on this report is available on the [Transparency International website](http://www.transparency.org/news_room/latest_news/press_releases/2006/en_2006_10_04_bpi_2006%22%20%5Ct%20%22_new).**1.24 Fraud risk management** KPMG has published a paper which provides an overview of fraud risk management fundamentals, identifies regulatory mandates from around the world, and spotlights critical practices that organisations have found to be effective when tailoring an anti-fraud program.Key sections include the following:* Understanding fraud and misconduct;
* Convergence of regulatory challenges;
* Key fraud risk management strategies including prevention, detection, and response; and
* An ongoing process for managing fraud and misconduct risk.

The paper is available on the [KMPG website](http://www.kpmg.com/NR/rdonlyres/D927BA81-95B6-46D4-B5B9-78F7261F7C46/0/FraudRiskManagement.pdf%22%20%5Ct%20%22_new). |
| **2. Recent ASIC Developments** |
| **2.1 ASIC consults on updating its organisational capacity policy for licensees**On 23 November 2006, the Australian Securities and Investments Commission (ASIC), released two consultation papers about the general obligations of Australian financial services (AFS) licensees under s912A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The consultation papers are part of ASIC's Better Regulation initiatives, which aim to achieve better and more transparent regulation.The consultation papers propose updating Policy Statement 164 Licensing: Organisational capacities [PS 164] and some of ASIC's other licensing related publications. [PS 164] outlines what ASIC looks for when it assesses an AFS licence application and checks the ongoing compliance of licensees with the general obligations.ASIC's two consultation papers are: * 'Updating [PS 164]: Meeting the general obligations' which sets out ASIC's general approach to the AFS licensee obligations under s912A(1) and ASIC's policy on particular s912A(1) obligations relating to compliance, risk management, representatives and resources; and
* 'Updating [PS 164]: Organisational competence' which relates to the organisational competence obligation under s912A(1)(e) and consolidates related policy on this obligation from Policy Statement 130 Managed investments: Licensing [PS 130] and other ASIC publications.

Each consultation paper outlines proposed amendments for comment and includes a draft version of the relevant updated policy statement as an attachment. The main proposals include: * improving the communication of ASIC's policy in [PS 164];
* applying consistent organisational competence requirements to all kinds of licensees and financial services businesses;
* clarifying that the category of people ASIC looks at for organisational competence purposes does not rely on these people being 'responsible officers' as defined under the Act; and
* referring to various international principles and Australian standards.

ASIC invites comments on the proposals in the consultation papers by 28 February 2007. After considering the comments, ASIC aims to issue the final policy statements by the end of May 2007.The consultation papers are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).**Background** AFS licensees have general obligations under s912A(1) of the Act that they must comply with from the time they are granted an AFS licence and on an ongoing basis. The general licensee obligations promote consumer confidence in financial services and the provision of efficient, honest and fair financial services by all licensees and their representatives. If ASIC has any reason to believe that licensees are not complying with their obligations, it may take administrative action, which could include suspending or cancelling a licence (under s915C(1)) or imposing additional licence conditions (under s914A(1)).[PS 164] helps licensees and licence applicants to understand what ASIC looks for when it assesses an application for an AFS licence and checks the ongoing compliance of licensees with the general obligations.[PS 130] includes additional guidance to help licensees and licence applicants who operate managed investment schemes to understand what ASIC looks for when considering their organisational competence.ASIC's AFS Licensing Kit is another key licensing-related publication that gives guidance on the licence application and licence variation processes and what applicants must do to demonstrate that they are able to meet their obligations as a licensee. The AFS Licensing Kit was revised in November 2005 and will also be updated next year to reflect the final changes made to [PS 164].**2.2 ASIC reports on monitoring superannuation fees and costs** On 16 November 2006, the Australian Securities and Investments Commission (ASIC), released 'Monitoring superannuation fees and costs: an ASIC report', its first report monitoring trends in superannuation fees and costs. When superannuation choice was introduced, the Government asked ASIC to monitor and report on trends in superannuation fees and costs in the five years following the introduction of Super Choice legislation.The report collects and analyses information provided to ASIC between 1 October 2005 and 30 June 2006 on fees and costs of 1270 superannuation products offered by 191 superannuation trustees, aggregated by type of fee and type of fund. The fund categories ASIC uses are based on those defined by the Australian Prudential Regulation Authority.When a superannuation trustee issues a new product disclosure statement (PDS), they lodge an 'in-use notice' with ASIC, summarising the information that the enhanced fee disclosure regulations (which commenced in mid-2005) say must be in a PDS.The regulations require up to five types of fees to be disclosed. To make comparison easier, contribution and management fees are based on an assumed contribution and fund balance of $5,000 and $50,000, respectively. The fee information from in-use notices is publicly available on ASIC's consumer website, FIDO ([www.fido.gov.au](http://www.fido.gov.au" \t "_new)).ASIC's report is based on the in-use notices received between October 2005 and June 2006, and the PDSs to which the notices refer. ASIC has added some information about retirement savings accounts, and about fees in the form of 'buy-sell spreads' (or margins) charged by some funds.Being the first report, it contains baseline information on selected fees and costs included by superannuation trustees in their Product Disclosure Statements (PDSs). Information on trends in fees and costs will be provided in future reports. The report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=Monitoring_Super_Fees_Report_Nov_06_pdf" \t "_new).**2.3 Rotation a focus of the next round of ASIC's audit inspections** On 8 November 2006, the Australian Securities and Investments Commission (ASIC) announced that its ongoing audit inspection process will pay particular attention to auditor rotation requirements.As well as continuing to focus on the effectiveness of the audit firms' systems to ensure independence and quality, the next round of inspections will also examine how firms are managing the practical application of the auditor rotation requirements, which became effective from 1 July 2006. ASIC will conduct follow-up inspections of all Big Four and Mid-Tier firms visited in 2005-2006. These inspections will assess the actions taken by the firm resulting from the previous inspection's findings. There will also be a focus on each firm's quality control systems to ensure these are still operating effectively. During 2005-2006, ASIC inspected the Big Four firms and a select number of Mid-Tier firms. The focus was broadened from previous inspections to also assess whether the firms had documented and implemented a quality control system that provided a reasonable assurance that audits would be conducted in accordance with legal requirements. In its report on the 2005-06 inspections, ASIC identified that: * the firms had generally responded positively to the new Australian legislative requirements but policies and systems were at varying levels of quality and maturity;
* there were variations in the levels of compliance with the firms’ policies and systems;
* results varied considerably between the Big Four firms and the Mid-Tier firms as the challenges faced by these respective groups of firms and the resources available to them are significantly different; and
* there was a need to further improve the quality of audit work being done on the financial statements by both the Big Four and the Mid-Tier firms.

Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC has responsibility for the surveillance, investigation and enforcement of the financial reporting requirements of the Act, including the enforcement of audit independence and audit quality requirements. These requirements were significantly enhanced with the enactment of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosures) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "Default) (CLERP 9) on 1 July 2004.The report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=FRC_Report_31_Aug_06_pdf" \t "_new).**2.4 ASIC Annual Report 2005-2006** On 31 October 206, the Australian Securities and Investments Commission (ASIC) published its 2005-2006 annual report. The Report, tabled in Parliament by the Parliamentary Secretary to the Treasurer, The Hon. Chris Pearce MP, highlights ASIC's priorities for the past year which included reducing risks associated with the introduction of superannuation choice and improving standards in the financial services sector for consumers and investors.During the year, ASIC: * Helped prevent widespread superannuation mis-selling through enforcement, compliance and education.
* Concluded enforcement proceedings against a record 352 people or companies, 94 per cent successfully. Investigations included HIH Insurance, the NAB currency traders, Westpoint, One.Tel, James Hardie, Offset Alpine Printing, Sons of Gwalia and the cross-agency tax-related investigation, Project Wickenby.
* Launched its Better Regulation initiatives, granted 2,565 approvals to help business transactions, and processed 45 million requests for business data, up 25 per cent.

Notable results according to ASIC included:* Eight years jail for Bradley Cooper for corrupting an HIH executive.
* Convictions (and subsequent jailing) of four NAB currency traders.
* 90 per cent increase in civil orders obtained to halt misconduct and preserve assets.
* 34 per cent increase in action against illegal investment schemes.
* 21 per cent increase in new criminal proceedings with 17 jail sentences handed down.

In the 2005/06 year, ASIC raised $543 million in revenue for the Commonwealth, against operating expenses of $218 million.The annual report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Annual%2Breports?openDocument" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 ASX Corporate Governance Council review of the Principles of Good Corporate Governance and Best Practice Recommendations** On 2 November 2006, the ASX Corporate Governance Council (the 'Council') released an Explanatory Paper for public comment on its proposed changes to the Principles of Good Corporate Governance and Best Practice Recommendations (the 'Principles') and an Exposure Draft of the Proposed Changes. The Council committed itself to an ongoing review of the Principles to ensure they remain relevant to the Australian business and investment communities. The review comes after two years of monitoring by ASX of company disclosures of corporate governance practices in annual reports. The proposed changes to the Principles are designed to: * Remove areas of regulatory overlap between the Principles and equivalent provisions in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and Accounting Standards;
* Promote understanding of the application of certain Principles by merging principles and recommendations that cover common areas of governance;
* Refine the Principles to take into account feedback from Council review groups and users of corporate governance information; and
* Clarify possible ambiguities in certain principles and ensure consistent terminology throughout the Principles.

The proposed changes include: * Reducing the number of Principles from 10 to 8. The number of Recommendations remains unchanged at 28;
* Amending the definition of 'independence' (Principle 2) to list a series of 'indicators of independence';
* Widening Principle 3 to cover all company codes of conduct and their content and disclosure;
* Clarifying the nature of risk management and risk management processes (Principle 7);
* Removing areas of regulatory overlap in relation to sign-off on financial statements, disclosure of remuneration policies and attendance by an external auditor at Annual General Meetings;
* Recommending that the hedging of unvested options be prohibited; and
* Replacing the term 'best practice' with 'good practice'.

A Consultation Paper (Part B of the Explanatory Paper) on the issue of corporate responsibility/sustainability has also been released. Stakeholder input is sought on whether the Principles should recommend the disclosure of corporate responsibility/sustainability risks that are material business (non-financial) risks. The Council was formed in August 2002 and brings together 21 businesses, shareholder and industry groups. This is the first complete review since the Council released its Principles of Good Corporate Governance and Best Practice Recommendations in March 2003. The Review of the Principles of Good Corporate Governance and Best Practice Recommendations Part A (Explanatory Paper) and Part B (Consultation Paper on corporate responsibility/sustainability) and the proposed changes to the Principles (the Exposure Draft) are available on the [ASX website](http://www.asx.com.au/supervision/governance/principles_good_corporate_governance.htm%22%20%5Ct%20%22_new). |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Takeovers Panel publishes report on performance**On 9 November 2006, the Takeovers Panel published a report on market assessment of the Panel's role and performance in the first six years of its operation. The report follows market research by the independent market research firm Chant Link & Associates.The Panel advised that it had commissioned ChantLink to conduct the research with a wide range of stakeholders in the takeovers markets in order to seek an independent assessment of the Panel's role and performance. ChantLink contacted and interviewed over thirty organisations and individuals for the report. The Panel commissioned the research as part of its ongoing interest in ensuring its relevance and performance for the takeovers market and for Australia's securities markets. The Panel considered that six years was a suitable period to base an assessment of its operations following amendments to its role and legislation in 2000.The report is available on the [Takeovers Panel website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).**4.2 Takeovers Panel publishes revised guidance note on correction of takeover documents** On 3 November 2006, The Takeovers Panel advised that it has published a revised version of its Guidance Note on Correction of Takeover Documents.A copy of the revised Guidance Note 16 is available on the [Takeovers Panel website](http://www.takeovers.gov.au/display.asp?ContentID=122" \t "_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 Discretion to reinstate a company** (By Adam Borowski, Blake Dawson Waldron)AMP General Insurance Ltd v Victorian WorkCover Authority [2006] VSCA 236, Supreme Court of Victoria, Court of Appeal, Maxwell P and Neave J, 2 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsca236.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsca236.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case considered the extent of the court's discretion under its power to order the reinstatement of registration of a company pursuant to section 601AH(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The question for the court was whether the appellant had shown that the primary judge's discretion had miscarried. The court held that the primary judge's discretion had not miscarried.**(b) Facts** The Victorian WorkCover Authority (Authority) paid statutory compensation to a construction worker who suffered injuries from an accident on 25 October 1989. The Authority alleged that the injury was caused by the negligence of Jara Constructions Pty Ltd (Jara). AMP General Insurance Limited (AMP) was the public liability insurer of the company. The Authority commenced proceedings in 1995 seeking an indemnity from Jara under section 138 of the [Accident Compensation Act 1985](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=212" \t "Default). On 1 July 1997, the Authority's proceeding against Jara lapsed as it had not been set down for trial. Jara was deregistered on 11 September 1998.In March 2005, the Authority commenced proceedings against AMP seeking recovery directly from the insurer under section 601AG of the (the Act). Upon being confronted with legal objections to that proceeding, the Authority applied to the court, under section 601AH(2) of the Act, to have the registration of Jara reinstated. The application before a Master of the Court on 5 July 2006 was not opposed by ASIC and the Master reinstated the company. AMP appealed the Master's decision despite not being a party to the initial application and on 24 August 2006, AMP's appeal was dismissed by the primary judge.AMP appealed to the Court of Appeal.**(c) Decision** The reinstatement power provides that a court may reinstate the registration of a company if an application is made by a person aggrieved or a liquidator, and the court is satisfied that it is just to do so. The power is discretionary but is conditional on the prerequisites being satisfied. In this case, the Court of Appeal considered the following questions:**(i) Does the court have a residual discretion to refuse reinstatement, even if the conditions are satisfied?**The court considered that it was not necessary to decide this question in this case, but the court stated that it was inclined to agree with the view of the primary judge that there must be a residual discretion.**(ii) Is the decision to reinstate purely discretionary?**The court followed the High Court case of Norbis v Norbis (1986) 161 CLR 513 and held that question of whether it is just to reinstate a company is purely discretionary as the decision depends on the application of a very general standard of what is "just". The court held that the question of what is "just" is a value judgment that allows for differences of opinion, none of which are uniquely right.As a result of adopting this approach, the court considered whether the primary judge's discretion had miscarried.AMP argued that the primary judge failed to give any or any sufficient, consideration to the question of prejudice. The basis of AMP's claim was the significant time that had elapsed since the accident in 1989 and the potential trial date in 2009 would prejudice AMP with a substantial risk that a fair trial may not take place. The court rejected this argument of discretionary error and noted that the primary judge considered the issue raised by AMP.A subsidiary argument of AMP was that the primary judge erred in treating the issue as one of abuse of process, rather than want of prosecution. AMP alleged that as a result, a more difficult test was applied that required it to show that no fair trial would be possible, rather than demonstrating that there was a risk of an unfair trial. The court rejected this distinction between the two tests.The court upheld the primary judge's ruling that the substantial lapse of time did not make it clear beyond argument that a fair trial was impossible. The court also agreed with the primary judge in stating that the assessment of the probability of a fair trial can only be undertaken at the proceeding itself, at which point the court can ascertain the precise issues in contest between the parties, the witnesses required, and the reliance that is to be placed on oral and documentary evidence. In conclusion, the court held that although an application for the reinstatement of a company involves the exercise of a discretionary power, the order is, in effect, purely administrative and is an inappropriate forum to investigate possible issues of prejudice and abuse of process.**5.2 Winding up unregistered managed investment schemes** (By Warwick Taylor, DLA Phillips Fox)Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd v GDK Financial Solutions Pty Ltd [2006] FCA 1415, Federal Court of Australia, Finkelstein J, 2 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1415.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1415.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case dealt with an application by the Australian Securities and Investments Commission ("ASIC") to wind up two unregistered managed investment schemes. ASIC sought to have a receiver appointed to the schemes with powers equivalent to those which a liquidator of a company is given under section 477 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act").The defendants opposed the application on the basis that the schemes had already been wound up by orders of the ACT Supreme Court.Finkelstein J held that the ACT orders did not necessarily wind up the schemes in their entirety, and so made further orders. However, he did not grant the receiver equivalent powers to those of a liquidator, questioning the need and legality of granting such powers to receivers.**(b) Facts**The facts of this case are relatively complex, but can be summarised as follows. The case concerns an action brought by ASIC to wind up two unregistered managed investment schemes. The two schemes in question are known as The Mews Retirement Village and The Rosedale Retirement Village. Both schemes involve investments in retirement villages. The purpose of The Mews Retirement Village scheme was to establish a new retirement village, and the purpose of The Rosedale Retirement Village was to construct new facilities at an existing retirement village.Both schemes were structured such that a nominee company was appointed to enter into contracts, and hold property, as trustee for a partnership ("head partnership") consisting of "Investor Partners". Those Investor Partners, in most cases, held their interest in turn for sub-partnerships of investors. A further company was appointed in respect of each scheme, to manage that scheme's business.At the time of the hearing, the schemes had stalled. Finkelstein J commented: "[t]o be blunt, things are in a mess and it will take a good deal of time and great expense to sort them out." Specifically:* None of the planned construction and development had been undertaken in respect of either scheme.
* The land to be transferred for the purposes of the schemes has not been registered in the name of the nominee companies.
* It appeared that either or both of the nominee companies may have been replaced as trustees (although the court did not have conclusive evidence of this), and there was a dispute on foot over the control of the nominee company for The Mews Retirement Village.
* In respect of The Mews Retirement Village, the company appointed to manage the head partnership had been wound up and the company appointed to manage the scheme's business may have been replaced (although, again, the court did not have conclusive evidence).
* In respect of The Rosedale Retirement Village, the nominee company (assuming it had not been replaced) was in receivership and the company appointed to manage the partnership's business was in liquidation.

The investors in the schemes had not received an explanation for any of this despite repeated requests for information.Further, neither scheme had been registered with ASIC. Under the Act, non-registration gives the court grounds to wind up a scheme. ASIC sought orders that the schemes be wound up, and that a receiver appointed by the court:* be given powers in relation to the schemes equivalent to those it would possess if it were a liquidator of a company; and
* be given the power to compulsorily acquire information from third parties to allow it to distribute the scheme property.

No party objected to the winding up per se. However, the defendants to the proceedings (who primarily comprised the management and nominee companies) objected to the Federal Court making an order to wind up the schemes on the grounds that, in their opinion, the schemes had already been wound up by orders of the ACT Supreme Court dissolving the head partnerships.**(c) Decision** For the reasons set out below, winding-up orders were ultimately made in respect of both schemes. The three points at issue in this case were as follows:* What was being wound up?
* The powers which a receiver can be given under a court order to wind up a managed investment scheme.
* Whether the orders of the ACT Supreme Court dissolving the head partnerships also dissolved the schemes.

**(i) What is being wound up?**Finkelstein J spent some time discussing the issue of exactly what should be wound up, having regard to the complex arrangements which made up the managed investment scheme. Finkelstein J favoured a minimalist approach to winding up, considering that it was only appropriate to wind up those parts of the arrangement by which property was held on trust by a trustee and managed by a manager. The agreements which made up that scheme were left in place, although Finkelstein J acknowledged that they may possibly be frustrated by the order. However, it was acknowledged that part of the reason for leaving these agreements on foot was that some parties which would be affected by the decision were not present at the hearing.**(ii) The powers which may be given to a receiver in respect of a managed investment scheme**Section 601EE(2) of the Act allows the court to make "any order it considers appropriate for the winding up of the scheme". ASIC argued that this section allowed the Federal Court to give a court-appointed receiver powers equivalent to those of a liquidator in respect of a company under section 477 of the Act. Under that section, a liquidator may, among other things:* exercise a power of sale;
* compromise claims; and
* inspect the books of the company in liquidation.

Finkelstein did not accept ASIC's contention that the receiver should be granted these powers, on three grounds.Firstly, Finkelstein J considered that a receiver would have appropriate powers without being given any of the powers granted to liquidators under section 477.Secondly, Finkelstein J refused to accept that a liquidator's powers in respect of a company should be granted to a receiver. Finkelstein J was particularly concerned about granting a receiver appointed to a scheme an unfettered power to compromise claims or sell property, especially considering that many of the relevant investors (as beneficial owners of the property) were not represented at the hearing. Finkelstein J instead considered that it was appropriate to allow the receiver to find a buyer for scheme property, but not to sell it without a further court order. Likewise, Finkelstein J considered that a receiver should not be given the power to compromise any claim without a specific court order in respect of that claim.Finally, Finkelstein J held that the power to inspect books could not be conferred on the receiver, as not only was it difficult to attribute any particular books to the scheme but, to be of any effect, the power would require the receiver to be able to compel third parties to furnish information. Finkelstein J considered that section 601EE(2) of the Act did not allow the court to grant such a power, and considered instead that the correct way to proceed was to grant an order for accounts. The order allowed the receiver to gather information necessary to perform its duties, but only after all relevant parties have been joined in the proceedings. **(iii) The effect of the ACT Supreme Court winding-up orders**The final major issue in the case was the effect of prior orders from the ACT Supreme Court. The order in respect of The Mews Retirement Village was made as follows:"The activities carried on by The Mews Village Partnership ("The Mews Village Scheme") be wound up as an unregistered managed investment scheme pursuant to s 601EE(1) of the Corporations Act 2001 (Cth)."The order in respect of the Rosedale scheme was similarly drafted, however the entity being wound up represented only 95% of the interests in the scheme. Finkelstein J considered that the drafting of these orders wound up only the relevant partnerships, not the related schemes. While, in the case of The Mews Retirement Village scheme, winding up the partnership would have the effect of bringing the scheme to an end, it was still considered appropriate to make an order winding up the scheme.Finkelstein J considered, at some length, the issue of whether or not the court had the power to make an order in relation to subject matter in respect of which the ACT Supreme Court had already given orders. He dealt with the issue by granting winding-up orders only in respect of such portion of the schemes as was not already dealt with under the ACT orders.**5.3 Considerations of whether the right of appeal is property capable of assignment** (By Jessica Huntington, Mallesons Stephen Jaques)Krishell Pty Ltd v Nilant [2006] WASCA 223, Supreme Court of Western Australia, Court of Appeal, Wheeler JA, McLure JA, Buss JA, 27 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca223.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca223.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The case considers an application to the Court of Appeal of the Supreme Court of Western Australia appealing a judgment assigning the right of appeal by a liquidator to an interested person. The purported assignment was also challenged on the basis that the assignment should not include the benefit of the judgment debt in question. The court analysed the nature of a right of appeal and its relationship to the definition of "property", including a chose in action in relevant statutes. On the basis of the analysis, the court held that a judgment debt is capable of assignment and brings with it the right to pursue an appeal.**(b) Facts**The appeal in question concerned the sale of Gardner Corporation Pty Ltd's ("Gardner") franchise to the appellant, Krishell Pty Ltd ("Krishell") and Zed Bears Pty Ltd ("Zed Bears"). Gardner commenced proceedings against Krishell and Zed Bears alleging that they had breached the terms of the franchise agreement. Both Krishell and Zed Bears filed counterclaims denying the allegations. In April 1999, Steytler J found that Krishell, Zed Bears and their directors were jointly and severally liable to Gardner for the outstanding monies owing under the franchise agreement. On the original defendants’ counterclaim under the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default), Steytler J found that Gardner had engaged in misleading and deceptive conduct entitling Krishell and its directors to damages. On 23 January 2003, Gardner and Mr Gardner (the company's managing director and second respondent) were ordered to pay Krishell in respect of the counterclaim. On 4 February 2003 Krishell and Zed Bears were ordered to pay Gardner the outstanding monies. Krishell and Mr and Mrs Myers (directors of Krishell) were entitled to set-off the sum in question awarded in favour of Krishell against the sum awarded to Gardner. Following the orders, Gardner lodged an appeal seeking the dismissal of Krishell's counterclaim. A subsequent order was made for Gardner to be wound up in insolvency and the first respondents, Mr Nilant and Mr Zohar were appointed as liquidators. Acting on legal advice, the liquidators wrote to Mr Gardner and Mr Myers in October 2003 informing the parties that continuing the appeal was not in the interests of the Gardner creditors and offering to sell Gardner’s rights to appeal. In November 2003, Mr Gardner submitted an offer of $5,000 for the right which was accepted within the month. The liquidators, on behalf of Gardner, entered into a "Deed of Confirmation" ratifying the agreement which was to become unconditional on the court granting Mr Gardner leave to proceed with the appeal in the name of Gardner. The Deed was later amended to enable Mr Gardner to further proceed with the appeal not only in the name of the company but also in his own name as assignee.Krishell objected to the liquidator's decision to sell and assign the appeal rights to Gardner and filed an application to have the transaction set aside. The appeal was dismissed and an application for leave was made seeking an extension of time as well as for the actions of the liquidators in purporting to sell the rights of appeal be set aside.The grounds of appeal fell broadly into three categories:* Grounds one and two asserted that the Master erred in law in deciding that the right of Gardner to appeal Steytler J's judgment delivered on 23 January 2003 was property of Gardner and therefore capable of assignment.
* Grounds three, four and five dealt with alleged errors of fact:
	+ ground three asserted that the Master erred in finding that the notice of appeal sought an order that the appellant pay Gardner $98,559.50; and
	+ grounds four and five asserted that the Master should have decided, as a matter of fact, that the appeal right "did not include" an entitlement to the benefit of the judgment.
* Ground six challenged why the Master failed to use his discretion and extend the time enabling Krishell to appeal.

**(i) Grounds one and two**Wheeler JA considered whether a bare right of appeal is property and accordingly, capable of assignment. His Honour cited Cummings v Claremont Petroleum NL as authority for the proposition that a bare right of appeal is not "property" within the meaning of section 5 of the [Bankruptcy Act 1966 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) while also noting that a right of litigation may be considered to be property if it can be characterised as a "chose in action." His Honour concluded that an assignment of a judgment debt brings with it the right to pursue the appeal on either basis (set out by the second respondents) including by reason of section 20(1)(b) of the [Property Law Act 1969 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15699" \t "Default) in which the assignment of the debt carries with it the right to attack the set off, or, alternatively, because of the mutuality of debts - in that what the liquidators effectively sold and assigned was the net balance as between the two opposing sets of judgment debts. Similarly, Buss JA held that the liquidators were empowered under section 477(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to assign the right to the net balance, as an assignable item of property, as between Gardner and Krishell in relation to the judgment debt in question. As contemplated by Wheeler JA, the net balance was a "thing in action" which could be assigned in equity, or, pursuant to section 20 of the Property Law Act. His Honour deemed those rights to be incidental to the "thing in action" which comprised the net balance (if any) as between Gardner and Krishell.In considering whether the right of appeal alone or in combination with the assignment of the judgment debt is property under section 9 of the Corporations Act, McLure JA's findings reflected the judgments preceding his. His Honour found that the liquidator's power to sell or assign the right of appeal is confined to "property" as defined in the Corporations Act which includes future property and "thing in action." His Honour emphasised the need to consider whether a right of appeal is a chose in action which in turn requires a consideration of other bare rights to litigate. With respect to the question of whether a right to appeal is a purely personal right, his Honour referred to section 58(1)(b) of the [Supreme Court Act 1935 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15947" \t "Default) which does not identify the persons to which the right is given, concluding that there is nothing in the Supreme Court Act, as it has been construed, to suggest that a right of appeal is purely personal. His Honour went on to debate whether or not a bare right to litigate is capable of assignment under the general law, asserting that a bare right of action that is itself incapable of being assigned can be assigned if it is annexed or ancillary to property. In this case, the right of appeal is closely connected with Mr Gardner's interest in (ownership of) the judgment debt that currently existed or would some time in the future if the appeal was successful. On the basis of this reasoning, his Honour held that the right of appeal is property capable of being assigned together with the judgment debt, by the liquidator.**(ii) Ground three - notices of appeal**Both Wheeler JA and Buss JA noted that there was a patent error in the notice of appeal. When read in its entirety, their Honours concluded that it was clear that the notice was intended to apply not only against the orders of January 2003 but also against those of February.**(iii) Grounds four and five**Wheeler JA considered both grounds to turn on the question of whether the offer of the appeal right should have been understood to include the entitlement to the judgment debt. His Honour found that Krishell understood that an entitlement to the benefit of the judgment debt was included in the 2003 offer by the liquidator.Buss JA came to the same finding by applying the general principles of construction of written contracts as set out in the judgment of Gibbs J in Australian Broadcasting Commission v Australasian Performing Right Association. In that case, the importance of considering the practical objects which the contract was intended to achieve were held out as important considerations in construing the document. His Honour held that while the language of both Deeds did not reflect a full understanding of the nature of an assignment by a liquidator, the documents did not obscure the plain intention of Gardner and Mr Gardner that Mr Gardner would be assigned the proprietary and personal rights and interests (whether present or future and whether vested or contingent) arising from the judgment debt.**(iv) Ground 6**Wheeler JA deemed the factual matters brought up in ground six to be matters to which the Master was entitled to exercise his discretion. In agreement with Wheeler JA, Buss JA maintained that the principles of law which regulate the circumstances in which an appellate court may review the exercise of a judicial discretion were not in doubt and applied to the Master’s decision to refuse leave to apply for an extension of time. His Honour was satisfied that the Master did not make any error which required the discretion to be set aside.**(c) Decision**Wheeler JA decided that none of the grounds of appeal were sufficiently arguable to justify a grant of leave. Buss JA held leave to appeal should be granted in relation to grounds one to five (not six) on the basis that the issues relating to the efficacy of the agreement made on 12 November 2003 and both incarnations of the Deed enabled the court to construe them and, in consideration of the rights of the parties it was necessary for the court to deal with them. However, in the final analysis, his Honour held that the appeal should be dismissed. While McLure JA stated his own reasons for grounds one and two, his Honour agreed with the reasons presented by Buss JA in relation to grounds three to six.The appeal was dismissed.**5.4 Drawing upon a letter of credit** (By Adam Borowski, Blake Dawson Waldron)Ideas Plus Investments Ltd v National Australia Bank Ltd [2006] WASCA 215, Supreme Court of Western Australia, Court of Appeal, Steyler P, McLure JA and Buss JA, 26 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca215.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca215.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**In this case, the Court of Appeal of the Supreme Court of Western Australia considered the nature of a letter of credit, the extent of obligations of beneficiaries when accessing the credit and whether the account party is entitled to restitution of money paid by the issuing bank if assertions in the beneficiary's certificate are untrue. **(b) Facts** Mr K H Wong and Mr Michael Wong were directors of the appellant, Ideas Plus Investments Ltd (Ideas Plus). Mr Michael Wong was also the managing director of Whittakers Ltd (Whittakers).Between April and September 1997, discussions arose between Mr K H Wong, Mr Michael Wong and National Australia Bank (NAB) in regards to switching Whitakers' banking to the NAB. NAB insisted on being provided with an irrevocable letter of credit in terms similar to that which existed between Whittakers and HSBC Australia. It was not stated in these discussions who the applicant for the letter of credit would be.During September 1997, Mr K H Wong, acting on behalf of Ideas Plus, signed an application for an irrevocable letter of credit, in an amount of $5 million with HSBC in Singapore in favour of NAB. On 23 September 1997, Ideas Plus and HSBC entered into a deed whereby Ideas Plus indemnified HSBC in respect of any loss arising from the issue of the letter of credit. On 25 September 1997, Whittakers entered into a debenture deed by which it granted a fixed and floating charge over its land and assets in favour of NAB.The letter of credit contained the following "Additional Conditions":"(a) The amount drawn hereunder represents and covers the unpaid indebtedness and interest thereon due to you arising out of your extending general banking facilities to Whittakers Ltd …(b) You have demanded payment of the amount owed by Whittakers Ltd and payment has not been made as demanded."On 9 September 1998, Ideas Plus made an application to HSBC to extend the expiry date of the letter of credit by 12 months and to replace conditions (a) and (b) with:"(a) You have taken necessary steps to enforce your rights under the debenture(s) executed by Whittakers Limited in your favour.(b) The amount drawn hereunder represents and covers the unpaid indebtedness due to you arising out of your extending general banking facilities to Whittakers Limited …(c) You have demanded payment of the amount owed by Whittakers Limited and the shortfall in payment after your claim on the debentures as stipulated above has not been made as demanded."HSBC proposed these amendments to NAB and NAB in turn accepted the changes. By March 1999 it was apparent to NAB that Whittakers was in financial difficulty and NAB issued demands for payment. On 21 May 1999 NAB issued a further demand for payment of $11,063,836.97 stating that NAB had taken steps to enforce its rights under its securities and that NAB had appointed receivers and managers to Whittakers. NAB had not realised the property of Whittakers prior to making the claim. Whittakers did not respond to this demand.On 28 May 1999 NAB issued a certificate to HSBC stating that the conditions of the letter of credit had been met and called upon HSBC to honour the letter. HSBC debited an account held by Ideas Plus for $5 million and forwarded this amount to NAB.Ideas Plus commenced proceedings in the Supreme Court of Western Australia seeking recovery, from NAB, of $5 million.**(c) Causes of action**Ideas Plus argued that an implied contract arose from the discussions in September 1997 to the effect that Ideas Plus, at the request of NAB, undertook to procure the letter of credit in consideration of NAB providing financial accommodation to Whittakers. Ideas Plus argued that this implied contract provided that NAB would not demand payment from HSBC unless any conditions stated in the letter of credit had been met and such a claim must be made in good faith. Ideas Plus contended that these terms had been breached as NAB had done no more than appoint receivers and managers. Further, it was argued that if NAB were acting reasonably it would have obtained the advice of a Queens Counsel as to interpreting the ambiguously drafted letter of credit.Ideas Plus also based its claim on a cause of action under section 52 of the [Trade Practices Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) and a cause of action based on NAB's alleged unconscionable conduct.At first instance, the court (Commissioner Siopos SC) held that none of these causes of action had been made out. Ideas Plus appealed.**(d) Decision** There were 5 grounds of appeal. **(i) Construction of terms of the letter of credit**The first two grounds considered by the court turned on the construction of terms of the letter of credit. The court upheld the Commissioner's decision and NAB's interpretation as it was said to maintain the commercial characteristics of the letter of credit as a readily realisable security. The court interpreted Additional Condition (a), according to the natural and ordinary meaning of the words "take necessary steps to enforce" requiring NAB to take only necessary steps to enforce its rights under the debenture without exhausting all of its rights of recovery before calling upon the letter of credit. The court considered Additional Condition (c) to do no more than to require that NAB must have demanded payment of the amount owed by Whittakers, and that after taking the necessary steps to enforce the debenture, issue a further demand in respect of the outstanding shortfall in payment. The court dismissed the first two grounds of appeal, which, in turn, rendered the other grounds of appeal inconsequential. Irrespective of this, the court considered Ideas Plus' other grounds of appeal.**(ii) The existence of a "support contract"**The third ground of appeal challenged the Commissioner's finding that there was no "support contract" between Ideas Plus and NAB that arose from the negotiations of the letter of credit or the fact that it would have been apparent to NAB that Ideas Plus was the applicant of the letter of credit from HSBC. The court agreed with the Commissioner and held that no contract of any kind existed between Ideas Plus and NAB. The court held that there is no authority to support the proposition that a contract arises, by implication, between the beneficiary and a third party applicant of the letter of credit, regardless of whether the beneficiary knows that the letter of credit has been procured by that third party. **(iii) NAB's representations**The fourth ground of appeal alleged that the representation was misleading and deceptive as NAB had not taken all steps necessary under the debenture to enforce its rights under the charge. However, given the court found there to be no support contract containing terms alleged by Ideas Plus, NAB was entitled to claim, pursuant to the terms of the letter of credit, so long as it had a bona fide belief that the conditions were satisfied. Given that there was no challenge to the Commissioner's findings that NAB had reasonable grounds for forming its belief, the court held that any claim of misleading or deceptive conduct must fail.**(iv) Unjust enrichment**The fifth contention of Ideas Plus on appeal was failure of consideration (or failure of basis) on the basis that NAB had been unjustly enriched at its expense for drawing down the letter of credit without actual compliance with its terms. The court, after a comprehensive analysis of the law of unjust enrichment, concluded that there was no basis for a restitutionary claim as no support contract existed between Ideas Plus and NAB and NAB had acted in good faith in making its claim. Additionally, HSBC had not challenged the payment or sought restitution from NAB and the payment made by Ideas Plus was to HSBC and not NAB. Justice McLure delivered a separate judgment dealing specifically with the restitutionary claim. McLure JA restated the established position that the issuing bank's concern is only with the form of the documents presented to it and not the truth of the facts stated therein. In this case, NAB was said to have honestly and reasonably believed in the truth of the statements made in the certificate. McLure JA also noted that, in general, the issue of whether NAB could retain the payment in the event that a subsequent determination ruled that a fact was wrongly (albeit honestly) certified to have occurred would depend on the wording and intention of the letter of credit. This issue was not relevant to this case.**5.5 Appeal from a decision setting aside a resolution carried at a meeting of creditors** (By Peter Mordue, DLA Phillips Fox)Ravenswood Resort Pty Ltd (in liq) v Kammal [2006] WASCAA 217, Supreme Court of Western Australia, Court of Appeal, Martin CJ, McLure JA and Buss JA, 26 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca217.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/october/2006wasca217.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case concerns an appeal against the trial Judge's decision to set aside a resolution regarding litigation funding carried at a meeting of the creditors of Ravenswood Resort Pty Ltd (In Liquidation) (the Company).The application to set aside the resolution was brought on the basis that it had or would be likely to cause unreasonable prejudice to Mr Kammal (the Respondent). Three matters were relied upon for the assertion of unreasonable prejudice:1. the fact that the proposed funding agreement would include a covenant by the liquidator not to sue Ms Sim (Sim), a director and shareholder of the Company and also a director of the litigation funder;2. the prospect of a conflict of interest and/or compromise to the integrity of the Court's function arising from the association between the funder and the directors of the Company; and3. the prospect of the funding agreement inhibiting the proper investigation of the Company's affairs or the prosecution of proceedings arising from such investigations.The trial Judge found that unreasonable prejudice was established and therefore set aside the resolution. Martin CJ, with McLure JA and Buss JA concurring, held that the evidence did not satisfy assertions relating to items 1 to 3 above and so allowed the appeal.**(b) Facts**The liquidator could only identify one litigation funder, Megacity Holdings Pty Ltd (Megacity), to fund an action brought by Rustic Haven SDN BHD (Rustic Haven) alleging it was a secured creditor and to pursue other actions including alleged insolvent trading and breaches of directors' duties. Dr Teo and Sim were both directors of Megacity and the Company.One of the terms of the funding proposal was that the Company and the liquidator would not sue Sim in respect of her role as a director of the Company.The resolution approving the litigation funding agreement proposed by Megacity was put and carried unanimously. The trial Judge held that all creditors voting for the resolution were related creditors as defined by section 600A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) and that if the Respondent had been permitted to vote, the votes would have been split equally.**(c) Decision**The appeal related to the trial Judge's conclusion that the passage of the relevant resolution had prejudiced, or was likely to prejudice, the interests of the Respondent as a creditor to an extent that was unreasonable. The unreasonableness was held to derive from three matters flowing from the approval of the litigation funding agreement and are set out at (ii)-(iv) below.**(i) Relevant legislation and application of legislation**Under section 600A of the Act the court can order the setting aside of a resolution of a meeting of creditors held in connection with winding up a company. The court must be satisfied that "the passing of the proposed resolution, or the failure to pass it, as the case requires:(i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or(ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:(a) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the proposed resolution, as the case may be;(b) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and(c) any other relevant matter."The court is required to identify the various consequences likely to flow from the passage of the resolution, then qualitatively evaluate those various consequences, for the purpose of arriving at a conclusion as to whether or not any prejudice that has been identified as flowing to the interests of the opposing creditor is properly characterised as unreasonable.**(ii) Covenant not to sue**Martin CJ held that the inclusion of a covenant not to sue Sim as a term of the funding agreement is at least a prospective source of prejudice to the Respondent, in his capacity as a creditor of the Company, because of the possibility that distributions to creditors in the liquidation might be reduced by reason of the Company's inability to sue Sim.Martin CJ then qualitatively evaluated the nature, extent and significance of that possible source of prejudice in order to assess whether it lead, either singly or in combination with other possible sources of prejudice, to the conclusion that the prejudice is unreasonable. His Honour found there was no material before the Court to enable a meaningful evaluation of the likelihood of the Respondent successfully pursuing such a claim for compensation against Sim. Even if there was a good action against Sim, that cause of action would also be available against each of Dr Teo, another director of the Company, Mr Adrian Lee, and the holding company of the Company. Martin CJ therefore held that before it was possible to evaluate the worth of the potential claim against Sim, it was necessary to evaluate the creditworthiness of the other prospective defendants, and evaluate the strength of the claims against them.**(iii) Conflict of interest/compromise of integrity**The identification of a conflict between the interests of Sim and the Company was due to the fact that it would be in the Company's interest to assert that it was trading whilst insolvent, but contrary to Sim's interest as a director. On the facts, however, such a conflict was held to be compounded by Sim's interests as a major creditor of the Company and as the holder of all but one of its shares, quite irrespective of her interest in the proposed funding agreement.Martin CJ therefore held that there was no actual prejudice or prejudice which was reasonably likely to flow to the Respondent from the alleged conflicts of interest arising from the proposed litigation funding agreement, nor could any such findings be made on the basis of the materials before the court.**(iv) Risk of a lack of proper investigation into the company's affairs**Martin CJ observed that the liquidator who is responsible for the investigation of the affairs of the company is an officer of the Court. There was no evidence that would support an inference that he would fail to discharge his responsibilities properly if adequately funded. Martin CJ held that in the absence of approval of the litigation funding agreement, there was unlikely to be any funding available for the pursuit of recovery action as a consequence of such investigations in any event.**(d) Conclusion**Martin CJ held that it was not possible to conclude that any particular or significant prejudice would flow to creditors including the Respondent, from the inclusion of the promise that neither the Company nor the liquidator would sue Sim in the litigation funding agreement. However, unless the litigation funding agreement was approved, it would be difficult for the Company to defend the proceedings which had been brought against it by Rustic Haven, and there was little or no prospect of any funds being available for the pursuit of recovery action by the Company in the interest of its creditors. When these considerations were weighed, on balance, Martin CJ found that it was not possible to conclude that any prejudice suffered or likely to be suffered by any creditor, including the Respondent, was unreasonable.The appeal was allowed and the order of the trial Judge was set aside and substituted with an order that the application be dismissed with costs.**5.6 Alinta's acquisition of APT units did not contravene Corporations Act but Takeovers Panel's declaration of unacceptable circumstances upheld** (By Susan Goodman, Freehills)Australian Pipeline Ltd v Alinta Ltd [2006] FCA 1378, Federal Court of Australia, Emmett J, 20 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/october/2006fca1378.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/october/2006fca1378.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The Takeovers Panel declared under section 657A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that the acquisitions by Alinta of 10 per cent of Australian Pipeline Trust ("the Acquisitions") constituted unacceptable circumstances, ordering (under section 657D) that the units acquired pursuant to the Acquisitions be vested in the Australian Securities and Investments Commission (ASIC) on trust for sale. Alinta sought a review of this decision. The Review Panel again made a declaration of unacceptable circumstances and ordered that the 10 per cent security holding be vested in ASIC to be sold. The Review Panel also found that the Acquisitions breached the 20 per cent rule in section 606. The Federal Court ("the Court") upheld the Panel's declaration of unacceptable circumstances having regard to the effect of the Acquisitions on control or potential control of Australian Pipeline Trust (APT), but disagreed with the Panel's finding that Alinta's acquisition of APT units contravened section 606.**(b) Facts** AGL initially held an approximate 30 per cent security holding in APT. Under the Merger Implementation Agreement (MIA) relating to the merger/asset swap between AGL and Alinta, this 30 per cent holding was to be acquired by Alinta.Alinta obtained ASIC relief under which it was deemed not to have acquired a relevant interest in AGL's 30 per cent security holding in APT (to avoid breaching section 606).The ACCC raised concerns about Alinta owning 30 per cent of APT and Alinta's interests in a number of other pipelines. The ACCC required Alinta to dispose of the 30 per cent security holding in APT it was to acquire under the transaction with AGL. Subsequently, Alinta acquired around 10 per cent of APT through on-market acquisitions.Alinta's intention seems to have been to acquire sufficient units in APT so that, following the transaction with AGL, it would be able to control APT without having to make a takeover bid.The court reviewed the circumstances surrounding the Acquisitions. **(c) Decision** The court:* disagreed with the Review Panel’s finding that Alinta's acquisition of the units in APT was in breach of the Corporations Act; and
* upheld the Panel's declaration of unacceptable circumstances in relation to the Acquisitions and the vesting order made by the Panel.

**(i) The acquisitions did not breach the Corporations Act**There was considerable argument concerning whether the instruments relating to the AGL–Alinta scheme/asset swap ("Transaction Instruments") gave Alinta a relevant interest in AGL's units in APT. In addition, there was argument as to whether the ASIC Declaration was effective to exempt that interest from being a contravention of section 606. The Review Panel found that the Acquisitions breached the 20 per cent rule in section 606, but the court did not agree. The court held that it was clear that, as at 22 June 2006, Alinta had a relevant interest in AGL's units in APT, pursuant to acceptances of its takeover offers, prior to entry in heads of agreement. Accordingly, even if, as APT contended, the effect of the MIA would have been that Alinta acquired a relevant interest in AGL's units in APT, there was no contravention of section 606 because Alinta already held (legally) that relevant interest.However, subsequent withdrawals in acceptances in relation to AGL's acceptances of takeover offers by Alinta, meant that Alinta ceased to have a legal relevant interest in 20 per cent of AGL's shares in APT. This meant that the court had to consider whether the ASIC Declaration could actually have the effect of exempting Alinta from having an interest in AGL's units in APT. In answering this question the court considered whether there was a contravention of section 606 by reason of AGL, Alinta, Merge Co, AGL Energy and Numar entering into the Transaction Instruments. After considering each Transaction Instrument and providing reasoning, the court held that no relevant interest was acquired because of the transactions, either by Alinta or by Merge Co and so there was no contravention of section 606.Emmett J considered two particular sub issues in answering the question regarding 'relevant interest': 1. whether Alinta had power to control the disposition of or had an enforceable right in respect of AGL's units (the answer was 'No'); and2. whether AGL is an associate of Alinta in relation to the units (the answer was 'No'). **(ii) Panel's declaration of unacceptable circumstances upheld**The Panel held that the Acquisitions gave rise to unacceptable circumstances on the basis that, having regard to the AGL-Alinta scheme/asset swap, the Acquisitions:* would increase the degree of control Alinta would have over APT if the AGL– Alinta scheme/asset swap was approved;
* this would affect the potential control of APT; and
* this would further deter rival bidders who may have considered bidding for APT.

Alinta challenged this finding of unacceptable circumstances by the Panel, but the court upheld the declaration.**(iii) Interdependence of the Panel's conclusions**The court held that although the Panel erred in finding that the Acquisitions contravened the Corporations Act, the Panel's conclusion that the Acquisitions gave rise to unacceptable circumstances was independently reached, and was not effected by this error. **(iv) Effect on control or potential control**The Panel's decision referred to the 'likely' effect (rather than the actual effect) of the Acquisitions on control of APT in assessing whether the circumstances were unacceptable having regard to their effect on control or potential control (section 657A(2)(a)). The court's attitude towards this type of "futuristic" assessment was as follows: * The use by the Panel of phrases such as 'likely to have an effect' should not be considered as if those phrases appeared in section 657A(2)(a), rather they must be construed in the context of the reasoning of the Panel, in order to determine whether the Panel misdirected itself as to the prerequisites for unacceptable circumstances.
* It requires a judgment.
* The Panel must direct its attention to some specific effect of the circumstances on either control or potential control.
* "Potential control" must signify some degree of futurity.
* The Panel must engage in speculation in so far as it is trying to determine what would have happened if the relevant circumstances did not exist/occur.
* The Panel's use of the phrases in question does not signify anything more than the degree of certainty with which it appeared to the Panel that the circumstances have the relevant effect.

**(v) Did the Panel identify adequate evidence?**Alinta argued that the Panel did not identify any evidence upon which it could base its findings as to the effect of the Acquisitions of APT units on the control or potential control of APT, or as to the existence of any potential rival bidders. The court found that there must be some probative material before the Panel upon which it can base a conclusion as to a particular effect (Glencore International v Takeovers Panel (2005) 220 ALR 495 at [99]).However, Emmett J held that the Panel satisfactorily identified the circumstances upon which it based its conclusions. Emmett J also held that as an expert tribunal, the Panel is entitled to make an evaluation based upon its experience and expertise as to the effect of particular circumstances on the control of a target company without going beyond the matters anticipated in section 657A(2)(a)(i).**(vi) Was Alinta unfairly prejudiced by the vesting of APT units?**Alinta contended that it would suffer unfair prejudice since the sale contemplated by the proposed orders would depress the price of units in APT and cause loss to Alinta (being unable to realise proper value for its units). However, the court held that although the Panel's order as to the vesting of the APT units may have depressed the price of the units and caused loss to Alinta, the order did not unfairly prejudice Alinta. Mere prejudice from an order is not sufficient. **(vii) Constitutional issue: Does the Panel exercise the judicial power of the Commonwealth?** The court held that the declaration of unacceptable circumstances by the Panel did not involve it exercising the judicial power of the Commonwealth.The declaration did not adjudicate a dispute about rights or obligations arising from past conduct, rather it constituted a basis for determining what rights and obligations should be created in the future.**5.7 Court has power to validate both substantive irregularities and procedural irregularities** (By Hayley Dunne, Clayton Utz)MLC Limited, in the matter of MLC Limited [2006] FCA 1357, Federal Court of Australia, Gyles J, 18 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1070.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/october/2006fca1357.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The court can make an order under section 1322(4)(a) of [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) validating a purported transaction which "contravenes" the Act. Before the court can make an order under section 1322(4)(a) of the Act, the conditions contained in section 1322(6) of the Act must be satisfied.One of the three conditions contained in section 1322(6)(a) of the Act is that the transaction requiring validation is "essentially of a procedural nature". In his decision, Gyles J found that the conditions in section 1322(6)(a) of the Act were not cumulative and consequently a purported transaction need not be "essentially of a procedural nature", provided one of the other conditions in the section was satisfied. Gyles J made orders validating a number of purported transactions that "contravened" section 259C of the Act, which he considered to be of a substantive and not a procedural nature. In doing so, Gyles J held that the court has the power under the Act to validate purported transactions which contravene the Act, both substantive and procedural in nature.**(b) Facts** One of the plaintiffs, National Australia Bank Limited (NAB), controlled five other companies each also plaintiffs to the proceedings. Those companies acquired ASX listed shares in the course of their funds management activities. Section 259C of the Act provides that, subject to certain exceptions, the issue or transfer of shares of a company to an entity it controls is void. Section 259E determines when a company is considered to "control" an entity.Under section 259C(2) of the Act, ASIC may exempt a company from the operation of the section and may impose conditions on any exemption granted. Though ASIC had exempted the plaintiffs from the operation of section 259C of the Act on 29 June 2000 (subject to the condition that the plaintiffs would not exercise, nor control or influence the exercise of, votes attached to the NAB shares), the exemption had expired on 29 June 2001 and was not renewed until 10 April 2003. The plaintiffs had:* acquired large volumes of NAB shares between 29 June 2001 and 10 April 2003 (the expired exemption period);
* exercised, or controlled or influenced the exercise of, votes attached to the NAB shares at NAB's Annual General Meeting (AGM) which was held on 30 January 2006 (essentially due to the operation of an automated proxy system); and
* acquired large volumes of NAB shares since 30 January 2006.

The plaintiffs applied for orders from the court under section 1322(4)(a) of the Act that certain transactions were not invalid by reason of contravention of section 259C. ASIC and the Australian Prudential Regulatory Authority were advised of the plaintiffs' application and did not object to the Court making the orders sought.**(c) Decision** **(i) Contravention of section 259C of the Act**Gyles J found that:* NAB "controlled" each of the other plaintiffs and the issue and/or transfer of NAB shares to the other plaintiffs during the expired exemption period "contravened" section 259C; and
* after the exemption was renewed, the plaintiffs breached the non-voting condition of the exemption at the AGM and the exemption ceased to operate from the AGM. As a result, the issue and/or transfer of NAB shares to the plaintiffs after the date of the AGM also "contravened" section 259C.

**(ii) Orders under section 1322(4)(a) of the Act**Given his finding that the plaintiffs had "contravened" section 259C of the Act, Gyles J thought it appropriate to make orders under section 1322(4)(a) of the Act validating the issue and/or transfer of NAB shares, subject to satisfaction of the conditions in section 1322(6) of the Act. **(iii) The conditions in section 1322(6)(a) of the Act**Section 1322(6) of the Act provides (extracted as relevant):'(6) The court must not make an order under this section unless it is satisfied:(a) in the case of an order referred to in paragraph (4)(a):(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or(iii) that it is just and equitable that the order be made; and…(c) in every case - that no substantial injustice has been or is likely to be caused to any person.'Gyles J found that the plaintiffs' contravention was inadvertent, they had acted honestly, it was just and equitable to make the orders and no substantial injustice had or was likely to be caused.However, Gyles J noted that he "would require persuasion" that the purported transactions were "essentially of a procedural nature", requiring him to then consider whether the conditions in section 1322(6)(a) of the Act were cumulative or independent.In finding that the conditions in section 1322(6)(a) of the Act were not cumulative, Gyles J:* did not follow what he considered to be the obiter of the court in Commissioner of Taxation v Comcorp Australia Ltd (1996) 70 FCR 356 that only procedural irregularities could be cured by section 1322 of the Act;
* followed the decision of Emmett J in Re Westpac Banking Corporation (2004) 53 ACSR 288 in which Emmett said that the syntax in section 1322(6)(a) of the Act was "quite clear" that only one of the conditions in section 1322(6)(a) of the Act needs to be satisfied to authorise the making of an order (though Gyles J noted that the syntax was not as clear to him as it was to Emmett J); and
* noted that judges in the Supreme Courts of New South Wales and Victoria had taken a similar view to Emmett J and that consistency in decisions in this area was desirable.

As the conditions in section 1322(6) of the Act were satisfied (on a non-cumulative basis in relation to section 1322(6)(a) of the Act), Gyles J made orders validating the purported transactions, which he considered to be substantive in nature.**(iv) Conclusion**Gyles J's decision confirms that the Court has the power under the Act to make orders validating purported transactions which contravene the Act and which are of a substantive not a procedural nature, provided that one of the conditions in section 1322(6)(a)(ii) and (iii) of the Act is satisfied. As a result, the Court has the power under the Act to validate both substantive and procedural irregularities.**5.8 Rules of construction for corporate constitutions** (By Prasana, Freehills)Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] FCAFC 144, Federal Court of Australia, Full Court, Weinberg, Kenny & Lander JJ, 16 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/october/2006fcafc144.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/october/2006fcafc144.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case considers the appropriate rules of construction that apply to corporate constitutions.**(b) Facts** The appeal relates to an attempt by Coopers Brewery Ltd (Coopers), an unlisted public company, to engage in a share buy-back under the provisions of Part 2J.1 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). The appellant Lion Nathan Australia Pty Ltd (Lion Nathan) sought to challenge Coopers' right to undertake the share buy-back without first offering any shares that other shareholders of Coopers might be willing to sell under the share buy-back to Lion Nathan, in accordance with a three tiered pre-emptive rights process set out in Coopers’ Articles of Association (Articles).The issue of contention between Coopers and Lion Nation was the proper construction of Article 38 (which precedes a series of articles that establish the pre-emptive rights regime) to ascertain if it applies to a share buy-back. The article is set out as follows:"Notwithstanding the provision of any other Article including Article 54, the Directors must register any transfer of shares which requires registration and which is expressly permitted by Articles 40-53 or which is made in compliance with such Articles. No member may make any transfer of shares and the Directors must not register any transfer of shares without complying with Articles 40-53."Articles 47-53 inclusive provide a regime whereby the directors are obligated to find a member of the respective classes of shares willing to purchase any shares being offered by a shareholder holding shares of the same class. An existing shareholder is not entitled to transfer or deal with any share except in accordance with that pre-emptive regime.In September 2003, the Chairman of Coopers wrote to Coopers' shareholders advising that the directors had decided to implement a share buy-back of up to 10% of the issued capital of the company at a buy-back price of $45.01 per share. Sixteen members accepted the offer. The 16 members are the second to seventeenth respondents in the proceedings between Lion Nathan and Coopers.At no time during the buy-back process did Coopers comply with the pre-emptive regime set out in its Articles. Lion Nathan alleged that Coopers was in breach of its own Articles as the buy-back triggered the pre-emptive rights regime. In its application, Lion Nathan sought injunctive relief against Coopers directing it to comply with and enforce the pre-emptive rights regime. The primary judge, Justice Finn, held that the expression "any transfer of shares" in Article 38 did not include a share buy-back but meant a transfer to a third party only. It was his conclusion that the pre-emptive rights regime was created by members to cause impediments to the introduction of new members into the company when the possibility of a change in membership resulted from death or the voluntary transfer of shares in Coopers. Hence, compliance with the pre-emptive rights regime was not a pre-requisite to preclude the share buy-back by Coopers. Lion Nathan submitted that Justice Finn was in error, arguing that the primary judge had effectively redrafted Article 38 to prevent a share transfer that did not comply with the pre-emptive rights regime to any person other than Coopers and challenged the rules of construction applicable to corporate constitutions.In its appeal, Lion Nathan also sought a declaration that it should be entitled to be registered as the owner of the 2003 buy-back shares as the buy back acceptances executed by the second to seventeenth respondents should be treated as Transfer Notices under the pre-emptive rights regime. On this argument, the other categories of potential purchasers with priority should be considered as having received and rejected the Transfer Notice offers, thereby entitling Lion Nation to be offered the shares at the buy-back price.**(c) Decision** **(i) Rules of construction applicable to corporate constitutions**The appeal centred on the determination of the proper rules of construction applicable for corporate constitution. Section 140(1) of the Corporations Act provides that a company's constitution has effect as a contract between the company and each member, the company and each director, and between a member and each other member. The primary judge noted that despite its status as a statutory contract, for construction purposes, a corporate constitution should not be equated with contracts in general. His Honour had regard to the substantial body of case law in Australia which endorsed the well-accepted approach to the interpretation of corporate constitutions set out by Jenkins LJ in Holmes v Keyes [1959] CH 199. This approach notes that corporate constitutions should be regarded as a business document and construed to give them reasonable business efficiency where such construction is available. Finn J also noted that traditionally, when construing the memorandum and articles of association of a company, the courts are reluctant to imply terms or to permit intrinsic evidence as these instruments may be relied on by a third party and outside investors should be entitled to assume that a company's constituent documents contained the full and complete bargain between the company and its members.Finn J affirmed the principles governing the interpretation of ordinary contracts set out in Pacific Carriers Ltd v BNP Paribus (2004) 218 CLR 451. In Pacific Carriers, the High Court held that the construction of contracts required an understanding of what a reasonable person would have understood the contract to mean. This requires the consideration of not only the text of the documents, but also the "surrounding circumstances" known to the parties, as well as the "purpose and object" of the transaction.Finn J noted that the decision in Pacific Carriers clarifies the position in Codelfa Construction Proprietary Ltd v State Rail Authority (1982) 149 CLR 337 regarding the admissibility of evidence of surrounding circumstances when construing ordinary contracts. Pacific Carriers supports the proposition that regard of surrounding evidence may be considered regardless of any ambiguity in the original document. In essence, ambiguity is not a precondition to taking into account matters of context to aid interpretation of commercial contracts.Lion Nathan contended that the primary judged had erred when he construed the Coopers' Articles by reference to extrinsic circumstances. Evidence of extrinsic matters was inadmissible unless to resolve an obvious ambiguity. Further, it was Lion Nathan's submission that the principles of construction applicable to ordinary commercial contracts does not apply with the same force to corporate constitutions because corporate constitutions are a special kind of contract. Lion Nathan argued that the High Court's more flexible approach of commercial contracts has no application to the construction of corporate constitutions. Coopers on the hand, proposed that the principles of construction are identical in each case as follows:* a company's constitution should be construed according to the general principles of construction for ordinary commercial contracts;
* the meaning of commercial contracts is to be construed objectively by reference to what it conveyed to a reasonable person; and
* this requires consideration not only of the text of the document but also the surrounding circumstances known to the parties.

The Full Court upheld the analysis of the rules of construction applicable to corporate constitutions set out by Finn J. The traditional view that surrounding circumstances are never to be taken into account in construing a company's constitition can no longer be sustained. However, the Full Court considered if the primary judge had applied the appropriate constraints on the use of "surrounding circumstances" as an aid in interpreting the Coopers' Articles.Justice Finn had regard to four types of "surrounding circumstances" when construing Article 38, including the form of the transfer provisions before and after the 1995 amendments to the Articles and the explanatory note prepared for the meeting of members of Coopers who approved the alterations to the Coopers Articles in 1995 leading to the current pre-emptive rights regime. Justice Weinberg disagreed with the use of the explanatory note as extrinsic evidence. In his opinion, a third party would not have been aware of the terms and background of the Coopers Share Agreement which gave rise to the creation of the pre-emptive rights regime in the Coopers Articles in 1995. Nevertheless, Justice Weinberg did not disagree with the conclusion of the primary judge. The Full Court upheld his finding that Article 38 did not encompass share buy-backs and further agreed that this conclusion could not have been reached without resort to any extrinsic material or surrounding circumstances.**(ii) Lion Nation not the registered owner of the buy-back shares**The Full Court also dismissed the additional declaration sought by Lion Nation that it should be registered as the owner of the 2003 buy-back shares. The Full Court held that such a declaration would adversely affect the interests of those members entitled to be offered the shares under the pre-emptive rights regime. Consequently, those parties would be entitled to be party to any proceedings where a declaration is sought that could adversely affect their interests. Further, the Full Court noted that Lion Nathan was never entitled to the declaration sought at trial or an order that the 2003 buy-back shares vest in it.The appeal was dismissed.**5.9 What action is sufficient to effect a 'pooling' arrangement amongst creditors?** (By Justin Fox and Paul Martin, Corrs Chambers Westgarth)Whittingham re Hunter Valley Gravel Supplies Ltd [2006] NSWSC 1070, Supreme Court of New South Wales (Equity Division), Barrett J, 13 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1070.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1070.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**A liquidator approached the court seeking approval of a 'pooling' proposal amongst creditors of three companies, whose affairs were so intertwined as to be inseparable. The proposal had been fully and properly explained by the liquidator to the creditors, who approved it by resolution at creditors' meetings for each respective company. The sole member of one of the companies had also approved the proposal on behalf of that company, but no member approval had been given by the other two companies. Barrett J noted there existed six means by which a pooling proposal could effected. Five of these were statutory, while the sixth applied where the consent of all creditors involved in the winding up had been secured. The basis for this latter means is in the unanimous assent principle which Barrett J found equally applicable to creditors as to members.On the facts, Barrett J found none of the statutory means satisfied. Given the active and unanimous assent at the creditor level within each company however, and the non-existence of interests at the member level (given the lack of a surplus), except in the case of the company where member approval existed, Barrett J concluded that the requirements of the sixth, non-statutory means, had been satisfied. As such, Barrett J made orders giving effect to the pooling proposal.**(b) Facts**Whittingham was the liquidator of each of Hunter Valley Gravel Supplies Pty Ltd, Stemming Supplies Pty Ltd ('Stemming') and Collins Crushing Pty Ltd, appointed pursuant to a creditors' voluntary winding up. The affairs of the companies were so intertwined that separate positions of each were not readily ascertainable. The liquidator had attempted to bring into effect a 'pooling' proposal whereby the assets of the companies would be 'pooled' and applied towards satisfaction of the claims of the companies' creditors, who were to be treated as a single group. If the pooling proposal was to be adopted, there would be no surplus available to the shareholders of any of the companies. The proposal had been raised with and explained to creditors, who unanimously approved the proposal at creditors' meetings of each company. The sole member of Stemming had further approved the proposal on behalf of that company.Following receipt of creditor consent to the proposal, the liquidator sought the approval of the court.**(c) Decision**Barrett J cited five means under the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') by which a pooling arrangement could validly be effected, including (a) a compromise under section 477(1)(c) and (b) an arrangement under section 510 between a company in the course of winding up and its creditors. Barrett J declined to find the pooling proposal authorised by section 477(1)(c) of the Act, finding that the conduct of the creditors in approving the proposal was not of a type that caused the formation of a contractual-type relationship with the liquidator.Barrett J then considered whether the pooling proposal had been validly authorised in accordance with section 510 of the Act. That section provides that an arrangement between a company and its creditors is (a) binding on the company if sanctioned by a special resolution and (b) binding on the creditors if sanctioned by a resolution of the creditors. Barrett J found the proposal was an 'arrangement entered into between a company … and its creditors' and had been 'sanctioned by a resolution of the creditors'. However, his Honour found that the requirement for a special resolution to be passed so as to bind the company to the arrangement had not been satisfied, except in the case of Stemming.Notwithstanding the failure to comply with the requirements of section 510, Barrett J concluded the pooling proposal was validly authorised by a sixth, non-statutory means – where the assent of all creditors involved in the winding up had been secured. The principle behind this sixth method lies in the unanimous assent principle, namely, that the unanimous approval of all members overrides the need for particular procedures to be followed, which Barrett J found to be equally applicable to members and to creditors.Barrett J was satisfied the full implications of the pooling proposal had been made known to the creditors, and that they had made fully and properly informed decisions in approving the proposal, stating that there had been 'within each company, a clear and unambiguous acceptance of the sufficiently articulated pooling proposal by every person who ought properly to be regarded as having any conceivable interest in the winding up and whose position and rights are a matter for any concern of the court'. Given the active and unanimous assent of the proposal at the creditor level within each company and the non-existence of interests at the member level (given the lack of a surplus), except in the case of Stemming where member approval existed, Barrett J held that the proposal had been validly authorised, and made orders giving effect to the pooling proposal.**5.10 Fundraising without adequate disclosure will result in penalties and disqualification from managing corporations** (By Kate Clennett, Mallesons Stephen Jaques)ASIC v Maxwell [2006] NSWSC 1052, Supreme Court of New South Wales, Brereton J, 10 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1052.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1052.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The plaintiff Australian Securities and Investments Commission ("ASIC") alleged that the defendants, who comprised two groups of companies ("ProCorp Group" and "Central Development Group"), officers of those companies, and a consultant and an accountant to them, had committed or been involved in contraventions of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") in the course of the promotion and conduct of schemes by which each group raised funds from the public for the purchase and development of real estate ("ProCorp Scheme" and "Central Development Scheme"). The companies that comprised the two Groups were in liquidation before the date of Brereton J's judgment. Mr Nahed was a director of various companies in the ProCorp Group and the allegations against him related to this involvement in the ProCorp Scheme. Brereton J found that Mr Nahed was a director of ProCorp, a body corporate that had on multiple occasions contravened the Corporations Act ss 717 and 734, while he was an officer, for the purposes of s 206E(1)(a)(i) (disqualification from managing corporations due to repeated contraventions of the Corporations Act). Mr Nahed was found to be liable to be disqualified pursuant to s 206D (disqualification due to insolvency). Agreements had been reached between ASIC and the remaining defendants as to the orders that the Court should be asked to make. Brereton J decided to make the majority of consent orders, declined to make others on the ground that they were inappropriate, in one case considered an additional restraint necessary, and in two cases considered that the disqualifications applied for by ASIC were too severe. **(b) Facts****(i) Parties**The First defendant, Mr Maxwell, acted as a consultant to both both the ProCorp Group and the Central Development Group and was responsible for most of the fundraising under both schemes. The defendants Mr Malcolm Fortune, Mr Troy Fortune, Mr John William Bennet and Mr George Nahed were officers of various companies in the ProCorp Group. The defendants Mr Jim Kolios, Mr Jaul Jammal and Mr Roy Skaf were officers of various companies in the Central Development Group. The Defendants Mr Coakley and his company Coakley Associates Pty Ltd (together "Coakleys") were accountants who purported to provide certificates of advice in connection with the Pro Corp Scheme, which if properly given, might have afforded an exemption from the requirements of the fundraising provisions of the Corporations Act pursuant to s. 708(10).**(ii) The ProCorp Scheme**The ProCorp Scheme involved the raising of funds for the purchase and development of real estate identified by Oceanwalk Pty Ltd (the company of which Mr Malcolm Fortune and his son Mr Troy Fortune were directors), including in particular properties at Homebush, Liverpool, Gosford, Five Dock, Newport, Soldiers Point and Ettalong ("ProCorp Projects").As well as obtaining finance through conventional sources from lending institutions, the ProCorp Group solicited members of the public to invest in the ProCorp Projects. On 24 September 2001, Oceanwalk retained Mr Maxwell and his company "BEST" to solicit lenders in order to raise funds for the ProCorp Projects. Mr Maxwell placed advertisements in the Sydney Morning Herald and the Parramatta Sun as well as approaching potential investors. The advertisements were to the following effect:Watch your MONEY GROW30% per annum and NO FEESIt's secured & it's guaranteedIdeal for investors, superannuates and self funded retireesPotential investors who responded were provided with a promotional brochure, an Offer document, and an Information Memorandum. The Promotional brochure re-iterated the statements made in the advertisements and guaranteed a return of 30% per annum. The Offer document contained an offer by ProCorp to enter into a loan agreement with the potential investor. The Information Memorandum ("IM") was prepared by Coakleys and stated:(a) that it was an 'excluded offer' made by ProCorp through a financial services licensee, Coakley Associates Pty Ltd ("FSL");(b) that as an excluded offer no prospectus or disclosure document was required for the offer or invitation for the securities by the Corporations Act;(c) that pursuant to section 708(10) of the Corporations Act, the financial services licensee must be satisfied on reasonable grounds that the investor has previous experience in investing in securities which allows the investor to assess: the merits and risks of the offer; the value of the securities being offered; the risks involved in accepting the offer; information needs in respect of the offer; and the adequacy of information given by the person making the offer. Approximately 120 investors entered into the loan agreements with ProCorp or one of the specific ProCorp project companies as borrower, and Oceanwalk as guarantor, by which a total of approximately $9.79 million was lent for the ProCorp Projects ("Pro Corp Group Loans"). Of them, approximately 94 investors entered into loan agreements with ProCorp, guaranteed with Oceanwalk, pursuant to which those investors lent a total of $8.11 million to ProCorp for the ProCorp Projects ("ProCorp Loans").By 9 September 2003, approximately half of the ProCorp Loans were "technically overdue". In October 2003 fundraising appears to have been achieved by using specific project companies as borrowers. Between 3 October 2003 and 10 October 2003 deposits from four investors were made into the accounts of specific Project Companies, involving a total of about $500,000.**(iii) Initial ASIC proceedings**ASIC commenced proceedings, initially against the first nineteen defendants, which include all the ProCorp Group companies, on 15 October 2003. On this date orders were made ex parte restraining the defendants from dealing with or disposing of any money received from or held on behalf of, or real estate purchased with money received from, any client/investor introduced by Mr Maxwell, BEST, Oceanwalk, ProCorp, Central Developments, Malcolm Fortune or Coakley Associates and from encumbering, dealing with or removing from Australia, any of their assets. On 20 October 2003, those orders were continued, and the defendants were restrained from carrying on a financial services business and/or from providing a financial service on behalf of another person or entity that carries on a financial business. In addition, a Mareva disclosure order was made. The orders were not complied with and the defendants continued to use investor funds in respect of the ProCorp Projects. **(iv) The case against Mr Nahed**Mr Nahed was a director of various companies in the ProCorp Group and the allegations against him related to his involvement in the ProCorp Scheme. Mr Nahed remained a director of the ProCorp Group companies, and was their sole director, when they went into liquidation. Mr Nahed had notice of the proceedings from an early stage but despite initially filing a notice of intention to defend, there was no appearance by Mr Nahed when the case against him commenced on 20 February 2006. Brereton J was satisfied that Mr Nahed had notice of the hearing and did not appear. Brereton J decided to proceed in his absence. **(c) ASIC's submission - Fundraising without a disclosure document**ASIC's primary contention was that the ProCorp Scheme contravened the fundraising provisions of the Corporations Act, by reason of the absence of disclosure in accordance with the following requirements of Chapter 6D. Section 727(1) provides that a person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged. Section 706 provides that an offer of "securities" needs disclosure under Part 6D.2 unless s 708 says otherwise. Section 734(1) provides that a person must not advertise or publish a statement that directly or indirectly refers to an offer, or intended offer, of securities that would need disclosure but for subsection 708(1). Section 724(2) provides that if an offer, or intended offer, of securities needs a disclosure document, a person must not advertise the offer or intended offer or publish a statement that:(i) directly or indirectly refers to the offer or intended offer; or(ii) is reasonably likely to induce people to apply for the securities. The ProCorp Scheme was originally apparently intended to operate under the 20 investor/$2 million ceiling exemption afforded by s 708(1), but subsequently under the exemption afforded by s 708(10) where the offer of securities is made to sophisticated investors through a financial services licensee (Coakleys). ASIC submitted that of the 119 loan agreements identified there were no valid "Statement of Reasons" issued by Coakleys in respect of 67 loan agreements and in 43 cases, such statements that were issued post-dated the relevant loan agreement so that in those 110 cases the exemption under s 708(1) was not available. Further the "Statement of Reasons" that Coakleys did issue did not comply with the requirements of s 708(10) as Coakleys did not meet most of the investors, nor investigate their financial circumstances, and had no reasonable basis for being satisfied that those investors had previous experience sufficient to allow them to assess the merits and risks of the offer. **(i) ASIC's submission - Carrying on a financial services business without holding an Australian Financial Services Licence**ASIC alleged that during the period November 2001 to July 2002 Pro Corp carried on a financial services business in Australia without holding an Australian Financial Services Licence in contravention of s 911A of the Corporations Act. ASIC alleged that none of the defendants held an Australian Financial Services Licence. (Coakleys had a Securities Dealers Licence pursuant to the former Corporations Law but not a Financial Services Licence under the Corporations Act).**(ii) ASIC's submission - Misleading and deceptive conduct**ASIC alleged that ProCorp engaged in conduct, in relation to financial products and/or financial services, that was misleading or deceptive or likely to mislead or deceive, contrary to the [Australian Securities and Investments Commission Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) ("ASIC Act"), s 12DA(1) and/or the Corporations Act, s. 1041H(1).**(iii) ASIC's submission - Breach of director/officer duties**ASIC submitted that Mr Nahed breached his duties as a director of the ProCorp Companies, in particular, those duties referred to in sections 180(1), 181(1) and 182(2) of the Corporations Act.**(iv) ASIC's submission - Section 206D disqualification**ASIC submitted that Mr Nahed should be disqualified from managing corporations. Section 206D provides that on application by ASIC, the Court may disqualify a person from managing corporations for up to 20 years if:(a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and(b) the court is satisfied that the manner in which the corporation was managed was wholly or partly responsible for the corporation failing and the disqualification is justified.**(v) The case against the remaining defendants and the Central Development Scheme**As between ASIC and the other remaining defendants, the parties agreed on statements of fact and proposed consent orders to be made. The Central Development Scheme operated in much the same manner as the ProCorp Scheme using Mr Maxwell to solicit investments from the public. As a consequence of the fundraising activities, approximately 30 investors entered into loan agreements with Central Development Group companies, and lent a total of $3.045 million. The investors have for all practical purposes lost their capital. ASIC sought various penalties and banning orders pursuant to the Corporations Act. **(d) Decision****(i) Conclusions as to Mr Nahed****(a) Fundraising without a disclosure document**By making each of the offers that resulted in a ProCorp Loan, ProCorp contravened s 727(1), on at least 94 occasions. Each publication of an advertisement, information memorandum or brochure was a contravention by ProCorp of s 734(2), or, insofar as any s 708(1) exemption might have been available, of s 734(1). (Brereton J was satisfied, in any event, that the conditions of the operation of the s 708(1) exemption were not satisfied). Brereton J was not satisfied that Mr Nahed himself made, or published a statement which referred to an offer of securities and therefore his Honour concluded that the accessorial liability provisions of s 79 were not available in respect of ss 727 and 734. However, Breton J found that Mr Nahed was a director of ProCorp, a body corporate that had on multiple occasions contravened the Corporations Act ss 717 and 734, while he was an officer, for the purposes of s. 206E(1)(a)(i).**(b) Carrying on a financial services business without an Australian Financial Services Licence**Mr Nahed was not himself in the business of providing a financial service, and did not personally contravene s 911A. Nor did he provide a financial service on behalf of ProCorp, so as to contravene s 911B. The accessorial liability provisions of s 79 were not available in respect of s 911A (or s 911B). However, as a director of ProCorp and various ProCorp Group companies during the period November 2001 to July 2003, Mr Nahed was an officer of a body corporate that contravened the Corporations Act while he was an officer, for the purposes of s. 206E(1)(a)(i).**(c) Misleading and deceptive conduct**ProCorp issued advertisements, the promotional brochure, the Information Memorandum and the Offer document in trade or commerce, and in relation to a financial product and/or financial services, namely the issue of debentures constituted by the resultant loan agreements. Each of them was, in one or more respects, misleading or deceptive or likely to mislead of deceive. ProCorp thereby engaged in conduct in contravention of the ASIC Act, s. 12DA(1) and/or the Corporations Act, s. 1041H(1). However, Brereton J concluded that Mr Nahed had not been shown to be knowingly concerned in any of those contraventions. **(d) Breach of director/officer duties**His Honour found that Mr Nahed was not in breach of his duty of care and diligence as a director of the Project Companies. Further, his Honour concluded, Mr Nahed was not shown to have breached his duty of good faith: in the circumstances of his position in these companies Mr Nahed’s duty to exercise his powers and discharge his duties in good faith in the best interests of the corporations and for a proper purpose, did not require him to do more than he did to ascertain whether the scheme was not compliant. Brereton J concluded that he was not satisfied that Mr Nahed had been in breach of his duties as a director.**(e) Section 206D disqualification**Brereton J found that Mr Nahed was a director of the various ProCorp companies when they were wound up in insolvency and the manner in which those companies were managed was at least partly responsible for their being wound up, and thus for their failure. Mr Nahed was found to be liable to be disqualified pursuant to s 206D. Brereton J agreed to hear counsel as to whether disqualification was justified. **(ii) The consent orders**As between ASIC and the other remaining defendants, the parties agreed on statements of fact and proposed consent orders to be made. Brereton J noted that when a court is asked to take into account the agreement between the parties it must still exercise its own discretion as to penality (Barrett J in ASIC v Elm Financial Services Pty Ltd (2005) 55 ACSR 411). Upon analysis of the consent orders Brereton J considered some of the orders inappropriate and declined to make them. In the majority of instances Brereton J made the orders that were requested. In one case he considered an additional restraint necessary and in two cases he considered that the disqualifications were too severe. The orders made against the defendants other than Mr Nahed varied depending upon the particular cicumstances of each defendant's case but were combinations of the following:(a) Injunctions permanently restraining defendants from offering securities without a current disclosure document, in contravention of s 727;(b) Injunctions permanently restraining defendants from advertising or publishing statements that directly or indirectly refer to an offer or intended offer of securities, in contravention of s 734;(c) Orders disqualifying defendants from managing corporations for a period of between 3 and 20 years and in the case of Mr Maxwell a permanent disqualification pursuant to s 206E; and(d) Various compensation orders, with this compensation to be paid to liquidators of the various failed ProCorp Group companies.**5.11 Invalid appointment of director invalidates administrator's appointment** (By Kristy Zander, Senior Associate, Clayton Utz)Cheerine Group (International) Pty Limited v Yeung, [2006] NSWSC 1047, Supreme Court of New South Wales, Young CJ in Eq, 26 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1047.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1047.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**One director of a two-director Company was not able to use his power of attorney from the other director to appoint an alternate director in order to resolve to appoint Voluntary Administrators. The director's attempt to do so, and his subsequent pressing of the point in court, was "hopeless" and "almost beyond belief". The Voluntary Administrators' appointment was invalid and could not be saved.**(b) Facts**This was an application by the Voluntary Administrators of the Company for an order that their appointment was valid.The validity of their appointment was in doubt because it was made at a meeting of directors attended by only one of the two directors of the Company. In order to surmount this hurdle, the present director (Mr Yeung) hastily appointed a third party, Mr Solferini, as the alternate of the absent director (Mr Wong), pursuant to a general power of attorney held by Mr Yeung from Mr Wong. Mr Yeung and Mr Solferini then purported to resolve to appoint the Voluntary Administrators.In light of the ensuing dispute, the Voluntary Administrators applied to the court for declarations that Mr Solferini (and thus they) had been validly appointed.**(c) Decision**The court found that the appointment of Mr Solferini as an alternate director, and thus the subsequent resolution to appoint the Voluntary Administrators, was obviously invalid. The Court considered the application "hopeless" and "almost beyond belief".The court held that a power of attorney given to a director confers no authority whatsoever for the attorney to be or appoint an alternate director or exercise the functions of another director, regardless of the terms of the power of attorney (following the decisions of Mancini v Mancini (1999) 17 ACLC 1570; Saad v Doumeny Holdings Pty Limited [2005] NSWSC 893; and Permanent Trustee Co Limited v Bernera Holdings Pty Limited (2004) 11 BPR 21,505).The invalid appointments of Mr Solferini and thus the Voluntary Administrators were not considered procedural irregularities for which the court ought to grant relief pursuant to section 1322 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The court reached this conclusion on two grounds:* a deliberate choice to convene an invalid meeting in contravention of the Act is not a "procedural irregularity"; and
* the appointment of the Voluntary Administrators in this case caused "substantial injustice", not least because of the Company's subsequent "liability for a large amount of professional fees".

Section 198D of the Corporations Act did not apply to this case, because, in the court's view, the section authorises only the Board of directors (not an individual director) to delegate their powers to a director.The court held that the evidence did not establish that Mr Wong's absence was "without the consent of the directors", such as to vacate his office in accordance with the Company's Articles. Mr Yeung was held to have still considered Mr Wong a director because he had attempted to contact Mr Wong to convene directors' meetings. It is unclear whether the court was suggesting that Mr Wong's office as director would have become vacant, and Mr Yeung may have achieved the result he wanted, if he had simply made no attempt to contact Mr Wong.The court considered that the case was so hopeless that it ordered Mr Yeung to pay Mr Wong's costs on an indemnity basis. If Mr Yeung defaulted in payment, the Voluntary Administrators were ordered to pay those costs, because their application for an order confirming the validity of their appointment was bound to fail.**5.12 Applying for leave to manage corporations under section 206G** (By Mark Cessario, Corrs Chambers Westgarth)Cash Converters International Ltd; ex parte Cooke [2006] WASC 203, Supreme Court of Western Australia, Master Newnes, 20 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc203.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc203.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**In this case Mr Cooke, a bankrupt, made an application, pursuant to section 206G(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to act as a director and take part in the management of Cash Converters International Ltd ("Cash Converters") and its subsidiary companies. The application was opposed by the Australian Securities and Investments Commission.Evidence was given that Mr Cooke was an integral part of Cash Converters management and would be difficult to replace.Master Newnes took into account that the legislative intent in disqualifying undischarged bankrupts from managing corporations was the protection of the public, and that Cash Converters was a large business that involved providing personal financial products to customers. Master Newnes therefore refused the application.**(b) Facts**On 24 May 2006 Mr Cooke became bankrupt on his own petition. On the same day he resigned as a director of Cash Converters.He became bankrupt as a result of taxation assessments by the Australian Taxation Office ("ATO"). The total amount claimed by the ATO was $5,615,246.65. Apart from the ATO, the only other unpaid creditor of Mr Cooke was a company associated with Mr Cummins, the other executive director of Cash Converters, to which he owed a debt of $3,801,758.Following his bankruptcy, the Legal Practice Board (Western Australia) issued Mr Cooke with a new practicing certificate subject to specific requirements.Cash Converters is an Australian company listed on both the London and Australian Stock Exchanges. Its primary business is the international franchise of retail stores. The Board of Cash Converters consisted of Mr Cooke, Mr Cummins and non-executive directors.Mr Cummins gave evidence that indicated that Mr Cooke had extensive experience in relation to the day-to-day commercial decisions required to keep Cash Converters' franchises functioning harmoniously and Mr Cooke was the only executive director present in Australia during Mr Cummins' frequent overseas trips. Further, Mr Cummins said that Mr Cooke's knowledge and expertise were essential to Cash Converters.Mr Cummins also considered that if Mr Cooke had to be replaced, it would be impossible to find anyone in Australia with skills comparable to Mr Cooke and that an international search would take considerable time. Similar evidence was also given by the Chairman of Cash Converters.**(c) Decision**Master Newnes indicated that the relevant principles in determining applications under section 206G could be found in the decision of Lindgren J in Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68, and were as follows:1. The applicant bears the onus of establishing that the Court should make an exception to the legislative policy underlying the prohibition on certain persons managing corporations.2. That legislative policy is one of protecting the public, not one of punishing the offender.3. Another objective is to deter others from engaging in conduct of the particular kind in question.4. A further objective is the more general one of deterring others from abusing the corporate structure to the disadvantage of investors, shareholders and others dealing with a company.5. The prohibition itself contemplates that there will be hardship to the offender. Therefore hardship to the offender alone is not a persuasive ground for the granting of leave.6. The court in exercising its discretion will have regard to the nature of the offence of which the applicant has been convicted, the nature of his involvement, and the general character of the applicant, including his conduct in the intervening period since he was removed from the board and from management. Where the applicant seeks leave to become a director and to take part in the management of particular companies the court will consider the structure of those companies, the nature of their businesses and the interests of their shareholders, creditors and employees. One matter to be considered will be the assessment of any risks to those persons or to the public which may appear to be involved in the applicant assuming positions on the board or in management.The Master noted that Mr Cooke had an unblemished record as a solicitor and as a director of Cash Converters, except for his bankruptcy. However, an important consideration was that Cash Converters was a publicly listed company with operating revenues of more than $18 million in the 2005 financial year and its franchised retail stores provide personal financial products to customers. Further, given Mr Cummins' frequent overseas trips, Mr Cooke would often be the only executive director in Australia.Master Newnes distinguished Re Australian Limousin Breeders Society Ltd (1989) 7 ACLC 426 because, in that case, the applicant was seeking to be a director of a company limited by guarantee and the public was unlikely to be exposed to any financial risk by that company's activities.Re Etick Ltd; Ex parte Mansell [2006] WASC 111 was also distinguished because, in that case, the loss of the applicant's management services would have had a detrimental effect on the company's economic fortunes as none of the other directors had the requisite knowledge to carry on the business.Master Newnes was not satisfied that Cash Converters could not operate successfully without Mr Cooke acting as a director and the difficulty in replacing him was only a consideration to be weighed in the balance. Further, considerable significance was to be given to the nature and size of Cash Converters' business and that Mr Cooke's bankruptcy left a large sum of money owing to two creditors.Master Newnes therefore refused the application. |
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