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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Insolvency law reform proposals – Government response to James Hardie Commission of Inquiry**  On 22 March 2005 the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced that the Government would address corporate law issues raised by the James Hardie Special Commission of Inquiry in the context of developing an integrated set of proposals to improve the operation of Australia’s insolvency laws.  Mr Pearce said that the paper presented by the Commonwealth Government at the meeting on 22 March of the Ministerial Council on Corporations (MINCO) emphasised the significance and complexity of the issues identified in the inquiry.  The integrated reform package will include the Government’s response to other reports which cover similar issues.   These are:          the report by the Parliamentary Joint Committee on Corporations and Financial Services entitled ‘Insolvency Laws: a Stocktake’; and           the reports by the Companies and Markets Advisory Committee (CAMAC) on corporate voluntary administration and corporate groups.    The Government expects to release proposals for consultation with stakeholders by the end of 2005.  Mr Pearce also announced that he would ask the Companies and Markets Advisory Committee (CAMAC) to examine the issue of directors’ duties and to consider whether or not the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) should be amended to require directors to take account of the interests of groups other than shareholders when making corporate decisions.  CAMAC is a statutory advisory committee that was established to provide advice to the Australian Government on issues that arise from time to time in corporations and financial markets law and practice. It is the Government’s principal source of external advice on corporate law matters.  These new developments follow on from the following initiatives that have already taken by the Commonwealth Government in relation to the James Hardie Commission of Inquiry:          the passage of legislation to provide certainty for the Australian Securities and Investments Commission (ASIC) in relation to the use of Commission documents passed to ASIC;          the provision of additional special funding for a full scale ASIC investigation into the conduct of James Hardie and its advisers; and          the preparation of a paper on corporate law refinements for MINCO.  The findings of the James Hardie Commission of Inquiry are discussed in Corporate Law Bulletin No 85 (September 2004).  **1.2 Executive and board remuneration report 2005**    On 18 March 2005, Ernst & Young published the 2005 Remuneration Report. The report provides an analysis of senior executive and NED remuneration practices of the major listed companies in Australia and a snapshot of how these practices have changed and developed over the last year. The analysis is based on information disclosed in the annual reports of the ASX 200 companies listed on the Australian Stock Exchange as at 31 October 2004 with financial years ending between 1 November 2003 and 31 October 2004. Some information was also obtained from notices of annual general meeting for the relevant financial year.  The report reveals that the changing executive remuneration environment has had an impact on a number of executive remuneration practices, most significantly:          disclosure of remuneration policies, particularly in relation to short term incentives (STI) and long term incentives (LTI), has improved;          variable remuneration continues to be a significant component of executive remuneration;          incorporating a deferral component into STI plans has increased, particularly for larger companies;          share options continue to be the most common LTI plan type and total shareholder return (TSR) remains the most common measure in plans  overall;           there has been a large reduction in the number of companies providing retirement benefits to NEDs. However, the prevalence of equity plans for NEDs increased significantly; and           maximum NED fee pools have increased, as have individual NED fees.  **(a) Short-term incentives**    The incidence of STI payments was higher in larger companies across all positions analysed – 82% of companies with market capitalisations less than $550 million reported STIs for any executive position, compared to nearly all positions in companies with market capitalisations of greater than $6 billion.  Nineteen percent (19%) of companies operated an STI plan with a deferral component in FY04. This is an increase from FY04 (12%). The incidence of STI deferral was highest in larger companies - 45% of companies with market capitalisations of greater than $6 billion.  There was increased disclosure of STI performance measures in FY04, 78% of companies provided a high level description of the performance measures.    **(b) Long-term incentives**    Of those companies that operated an executive LTI plan, approximately 78% made grants to at least one executive during the year.  Share option plans remained the most prevalent type of executive LTI plan (73% of companies) with performance rights plans the second most common (20% of companies) and increasing in prevalence. Share option plans were the most common vehicle from which grants were made to executives in FY04.  Performance measures used in executive LTI plans varied according to company size. Total Shareholder Return (‘TSR’) was the most common measure in plans overall, but particularly in larger companies. Smaller companies were more likely to use share price as a measure in their executive LTI plan slightly less than one-quarter of plans operated by companies with market capitalisations of less than $550 million used share price as a performance measure.  Slightly more than one quarter of executive LTI plans did not incorporate a performance measure for vesting purposes.  Performance re-testing was observed in a minority of LTI plans overall (28%), but was most common for companies with a market capitalisation of greater than $6 billion (48%).    **(c) Non-executive directors**    As with executive remuneration, the level of fees paid to NEDs increased with company size.  The median fee pool ($1.5 million) for companies with market capitalisations greater than $6 billion was more than three times the median pool for companies with market capitalisations less than $550 million.  A large number of companies requested an increase in the NED fee pool (34%) during FY04. Forty percent (40%) of all companies operate an equity plan for NEDs. This is a significant increase since FY03 (14%).    For all companies, the median number of NEDs on the board (including the non-executive chairman) was six.    There were very few companies (9%) providing retirement benefits to NEDs in FY04. This is a significant decrease since FY03 (65%).    **(d) Reward for performance**    Based on analysis of 50 companies in the ASX 200, statistically there was very little evidence of an alignment between accrued STI payments (that is, awards earned during the financial year) and performance outcomes (using EPS growth and ROIC) over the same time period.    It is stated in the report that due to this, companies and boards have an increasing responsibility to demonstrate the relationship between remuneration and company performance and should consider how they will explain this to shareholders. The level of shareholder interest in executive remuneration is likely to increase as shareholders become more informed as a result of increased disclosure. Shareholders may also become wary of ‘generalised’ corporate governance statements and seek further information and clarity through open consultation and the AGM forum. As a result, companies will need to be well prepared to respond to shareholders and articulate the business rationale for remuneration decisions.    It is also stated in the report that the implementation of new accounting rules under AASB 2 will increasingly result in companies using market purchased shares to satisfy equity grants, allowing a tax deduction and eliminating dilution (although there is a cash cost), given that newly issued shares and market purchased shares now have the same accounting expense.  **1.3 New Zealand Securities Commission releases practice note on historical information in offer documents**    On 17 March 2005 the New Zealand Securities Commission released a practice note on historical information in offer documents prepared in accordance with the New Zealand equivalent to international financial reporting standards.    The practice note addresses certain issues relating to summary historical financial information in offer documents required under the Securities Act 1978 and the Securities Regulations 1983. These issues are expected to arise for an issuer the first time it adopts New Zealand equivalents to international financial reporting standards in historical financial statements. The practice note clarifies the Securities Commission's view on the application of the Act and the Regulations in this context. It is intended for people who prepare and examine summary historical financial information in offer documents.    The practice note is available at: [http://sec-com.govt.nz/publications/documents/practice-note-170305.shtml](http://sec-com.govt.nz/publications/documents/practice-note-170305.shtml" \t "_new)  **1.4 Draft UK Company Law Reform Bill**  On 17 March 2005 the UK Trade and Industry Secretary Patricia Hewitt, released for public comment a draft Company Law Reform Bill.  The proposals relating to small companies include:           restructuring those parts of company law most relevant to small businesses making it easier for them to understand what they need to do;          simpler rules for forming a company;          abolition of the need for a company secretary;          making AGM opt in rather than opt out; and          new model articles.  For all companies the proposed reforms include:          greater clarity on directors’ duties, including making clear that directors have to act in the interests of shareholders, but can pay regard to the long as well as the short term, taking due account of the interests of employees, suppliers, consumers and the environment;          greater use of e-communications and removing the need for hard copy share certificates; and           an option for all directors 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 draft package also includes proposals on auditor liability and audit quality including:          allowing shareholders to agree to limit the auditor’s liability to the company, so the financial liability of the auditor relates to the auditor’s responsibility for the loss;           greater rights for shareholders to question auditors and named partners for audit reports;           audit reports to give the name of the individual lead auditor, as well as the audit firm; and           more significant penalties for reckless statements by auditors including custodial sentences.  The Bill would also be used to implement the European Union Takeover Directive, placing the work of the UK Takeover Panel on a statutory footing.  The consultation is open until 10 June and the aim is to introduce a Bill as soon as Parliamentary time allows.  A separate consultation document, also issued on 17 March 2005, covers a further recommendation of the Company Law Review–the extension of the option to prepare and distribute summary financial statements to all companies. This consultation also includes proposals for allowing companies that prepare their accounts using international accounting standards to continue to take advantage of the summary financial arrangements.  The draft bill and accompanying White Pager are available on the UK Department of Trade and Industry website at: [http://dti.gov.uk/cld/review.htm](http://www.dti.gov.uk/cld/review.htm" \t "_new)  **1.5 Termination payments for executives**    On 17 March 2005 the Australian Council of Superannuation Investors (ACSI) called upon company directors and regulators to re-think the current approach to providing termination benefits for executives of publicly listed companies and published a report by Proxy Australia examining current Australian practices.  ACSI called upon company directors and regulators to:          Stop payments for failure - The report found executive service contracts routinely stipulate lengthy notice periods or pre-determined large payouts even where dismissal occurs as a result of poor performance;          Excise bonuses from just termination - The research identified some termination benefits also included ‘bonuses’ that executives departing for poor performance otherwise had no entitlement to collect;          Reduce the incidence of lump sum payouts - Australian companies have been slow to embrace the international trend of monthly termination payments which cease or reduce if the departing executive finds another position;          Make more termination arrangements subject to shareholder approval - The existing threshold for shareholder approval of termination benefits (up to seven times annual salary) was too high to be meaningful in Australia;          Review the merits of one year ‘rolling’ contracts for executives - The report found such contracts that, whilst on foot, always have a maximum of one year to run, are becoming commonplace in the UK; and          Bring disclosure of executive service contracts into line with other jurisdictions - The US and the UK now compel detailed contemporaneous filings on termination benefits. The latitude in Australia’s continuous disclosure regime has meant that the key details often emerge only when an annual report is published.    **1.6 US Business Roundtable CEO survey on corporate governance and the costs of Sarbanes-Oxley implementation**    On 16 March 2005, the US Business Roundtable, an association of CEOs of 160 leading US companies, released its third annual survey of corporate governance practices among its members.  The latest results reveal that Roundtable member companies have made continued progress in implementing corporate governance measures which meet – and in some instances exceed the listing standards of the NYSE and NASDAQ. These efforts have resulted in increased board independence and director involvement, and improved shareholder communication.  The survey also reflects a steep increase in the reported costs of implementing the Sarbanes-Oxley law and new stock exchange listing standards. The number of companies reporting estimated costs of more than $10 million nearly doubled, jumping to 47% from 22% reported in 2004. And close to one-third of respondents reported costs in the range of US$6-10 million.  Other key findings include:          Nearly 82% of the companies say their boards are at least 80% independent, and 96% of the companies report that their boards are at least 60% independent. This level exceeds the new NYSE and NASDAQ listing requirements, which call for a simple majority of the board to be made up of independent directors;          A vast majority, 93%, of responding companies have adopted standards of board independence that either meet or exceed market standards;          More than four out of five companies (83%) have an independent chairman, lead director or presiding director – a 12% increase from a year ago;          Every responding company expects outside directors to meet in executive session in 2005, with 71% expecting executive sessions at every board meeting;          More than 92% of companies report increased director participation in the past two years;          90% of companies have established procedures for shareholder communications with directors, up from 87% last year;           85% of nominating committees reported they are willing to consider shareholder recommendations for Board nominees;           95% of companies have seen an increase in the number or length of meetings of the Audit Committee, or have otherwise seen more involvement by committee members in the past two years; and          65% of companies encourage their directors to participate in an orientation/education program, while 43% make the participation of new directors a requirement.  The survey was completed by 106 of the Roundtable’s 160 member companies.    Following is additional information on the survey.    **(a) Board independence**    The survey results continue a strong trend toward independence in corporate governance:          Nearly 82% of the companies say their boards are at least 80% independent, and 96% of the companies report that their boards are at least 60% independent. This level exceeds the new NYSE and NASDAQ listing requirements, which call for a simple majority of the board to be made up of independent directors;          93% of responding companies have adopted standards of board independence that either meet or exceed market standards;           More than four out of five companies (83%) have an independent chairman, lead director or presiding director – a 12% increase from a year ago; and           The percentage of companies with an independent chairman has doubled in the past year (from 4% last year to 9% in the current survey).    **(b) Executive session**    Every company (100%) expects outside directors to meet in executive session in 2005, with 71% expecting executive sessions at every board meeting. In 2004, 68% of companies responding indicated that their independent directors met in executive session at every board meeting, a significant increase over the 55% that met in executive session at every board meeting in 2003.    **(c) Director involvement**    More than 92% report more director participation in the past two years.    **(d) Committee meetings and involvement**    Audit Committee:          95% of companies have seen an increase in the number or length of their Audit Committee meetings, or have otherwise seen more committee  member involvement in the past two years.  Nominating/Governance Committee:          87% of companies observed an increase in the number or length of their nominating/governance committee meetings, or have otherwise seen more committee member involvement in the past two years.   Compensation Committee:           79% of companies have observed an increase in the number or length of their compensation committee meetings, or have otherwise seen more committee member involvement in the past two years.  **(e) Director education**  65% of companies encourage all their directors to participate in an orientation/education program; 43% make the participation of new directors a requirement.    **(f) Shareholder communication**    90% of companies have established a procedure for shareholder communications (e.g. providing a phone number or a form on the company website) with directors, up from 87% last year.    **(g) Director nomination procedures**    Companies continue to improve the procedures for nominating directors:           87% of nominating committees have established qualifications or criteria for directors, and another 3% are considering them;           85% of nominating committees reported they are willing to consider shareholder recommendations for Board nominees; and           78% of nominating committees have a process for responding to shareholder nominations of board candidates, up from 75% a year ago.  **(h) Costs of Sarbanes-Oxley Implementation**    Asked about the costs incurred in connection with the Sarbanes-Oxley law and new NYSE/NASDAQ listing requirements, responding companies gave these projections:          47% estimated costs of more than US$10 million (up from 22% in 2004);           29% estimated costs in between US$6 million and US$10 million; and           23% estimated costs between US$1 million and US$5 million range.  **1.7 Review of administrative burdens on UK companies**  On 16 March 2005 the UK Treasury published a report by Philip Hampton titled ‘Reducing administrative burdens: effective inspection and enforcement'. The report considers how to reduce administrative burdens on UK business without compromising regulatory outcomes.  The report finds that there is much good practice in UK regulation, but also that the system, as a whole, is complicated and good practice is not uniform. Overlaps in regulators' activities mean there are too many forms, too many duplicate information requests and multiple inspections imposed on businesses.  The report proposes entrenching the principle of risk assessment throughout the regulatory system, so that the burden of enforcement falls most on highest-risk businesses and least on those with the best records of compliance. At present, not only are unnecessary inspections carried out, but necessary inspections are not carried out. Under the proposals in the report, inspection rates would be reduced where risks are low, but enhanced where necessary.  The report estimates, based on regulators' past experience, that comprehensive risk assessment in a streamlined structure could:           reduce the need for inspections by up to a third, which means around one million fewer inspections; and          reduce the number of forms regulators send out by perhaps 25 per cent.    In addition, the report recommends:           making much more use of advice, again applying the principle of risk assessment;          substantially reducing the need for form-filling - in practice, most businesses' most frequent and direct experience of regulatory enforcement - and other regulatory information requirements;           applying tougher and more consistent penalties where these are deserved;           reducing the number of regulators that businesses have to deal with, by merging 31 national regulators into 7;           entrenching reform by requiring all new policies and regulations to consider enforcement, and use existing structures wherever possible; and           creating a new business-led body at the centre of Government to drive implementation of the recommendations and challenge departments on their regulatory performance.  The report can be downloaded on the UK Treasury's website at: [http://www.hm-treasury.gov.uk/hampton](http://www.hm-treasury.gov.uk/hampton" \t "_new).  **1.8 Report on shareholder voting processes**  On 14 March 2005, Paul Myners published his progress report to the Shareholder Voting Working Group on his review of the impediments to voting UK shares, one year after his initial report.  The original report, in February 2004, outlined a program to remove impediments to the process by which UK institutions vote their shares in UK companies. He concluded that electronic voting was the key to a more efficient voting system.  One year on, there is a high degree of confidence that the barrier has been broken.  Every FTSE 100 company now allows electronic voting or is taking steps to do so. At the end of 2004, 88 of companies in the FTSE 100 facilitated CREST’s electronic voting service, compared with 47 in 2003, and the remaining 12 have indicated that they will be taking the necessary steps to do so in 2005. Myners expects this increase to cascade rapidly into the next tier of companies by market capitalisation. There has also been more use of electronic voting facilities by institutional investors over the year, although take up is still not universal and not all institutional votes are cast electronically.  A new issue requiring attention is the increase in stocklending and the impact this has on voting practices. When shares are lent, the voting rights transfer from lender to borrower. Myners believes this is something to which participants need to be alerted in order to ensure that economic interest and voting activity are aligned rather than subverted.  Beneficial owners have an important role in driving the standards in the voting process. The expansion of reports under FRAG21/94 on fund managers’ and custodians’ internal controls to cover the voting process and the communication of stock positions and stock lent, should make a significant difference in involving owners. The ICAEW’s steps to redraft FRA21/94 in this respect are welcomed in the report.  **1.9 FSA calls for contributions to enforcement process review**  On 11 March 2005 the UK Financial Services Authority (FSA) invited interested parties to help shape views on its Enforcement Process Review. An issues paper published on 11 March outlines the legislation under which the FSA must operate, including the warning notice, decision notice and tribunal framework, and makes clear that the FSA is not contemplating any changes to primary legislation as a result of the Review.  It does, however, note that within the constraints of the legislation there is considerable scope for flexibility in the process and the current model is not the only possible one.  The paper sets out the objectives for the decision-making process, which were established through consultation before the FSA formally gained its powers in 2001.  These are, broadly, that the process be fair and seen to be fair and be efficient and effective.  The paper seeks views on whether these objectives remain valid.  The recent 150% increase in the number of regulated firms highlights the importance of the FSA having decision-making processes that work effectively for small firms (which now comprise over 97% of total regulated firms) and individuals, as well as for large firms.  The paper also considers the accountability of decision-makers to the FSA Board and asks what additional information could be published about the operation of its decision-making process which would enable commentators to make a better informed assessment as to whether the process is operating fairly and effectively.  The paper is available on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  **1.10 Canadian securities regulators issue harmonized rules for continuous disclosure by investment funds**  On 11 March 2005 the Canadian Securities Administrators (CSA) released a nationally harmonized set of continuous disclosure (CD) requirements for investment funds. The instrument harmonizes CD requirements for investment funds among Canadian jurisdictions and replaces most existing local CD requirements.  It sets out the obligations of investment funds with respect to financial statements, management reports of fund performance, delivery obligations, proxy voting disclosure, annual information forms for investment funds that do not have a current prospectus, material change reporting, information circulars, proxies and proxy solicitation, and certain other CD-related matters.  The instrument prescribes the form which sets out the contents of the management reports of fund performance. The CSA also published a companion policy to assist users in understanding and applying the instrument and to provide views on the interpretation of certain provisions.  The CSA, the council of the securities regulators of Canada’s provinces and territories, coordinates and harmonizes regulation for the Canadian capital markets.  Further information about the new requirements is available on the [Ontario Securities Commission website](http://www.osc.gov.on.ca/" \t "_new).  **1.11 Government response to the PJC report on the CLERP 9 Bill**    On 10 March 2005, the Australian government announced its response to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) report on the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default).  The PJC tabled its report in Parliament in two parts – part 1 was tabled on 4 June 2004. Some recommendations contained in part 1 were agreed to by the Government and moved as amendments during the Bill’s passage through the Parliament. Part 2 of the PJC report was tabled on 15 June 2004. In light of the timetable for debate of the Bill in the Parliament, there was insufficient time for detailed consideration of the recommendations in part 2 of the report. As a result, during the Senate debate on the CLERP 9 Bill, the Government undertook to consider the recommendations of the PJC and to provide a written response following commencement of the [CLERP 9 Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default).  The PJC recommendations cover a broad range of matters included in the CLERP 9 Bill, such as whistleblower protection, financial reporting and audit reform.  Also on 10 March 2005, the Government announced its response to the 2002 report of the Parliamentary Joint Committee on Public Accounts and Audit on Review of Independent Auditing by Registered Auditors (Report No 391).  The Government response to both of these reports is contained in the Senate Hansard for 10 March 2005 (page 63 of the Senate Hansard for the response to the Parliamentary Joint Committee of Public Accounts and Audit report and page 67 of the Senate Hansard for the response to the PJC report).  The Senate Hansard for 10 March 2005 is available at: [http://www.aph.gov.au/hansard/senate/dailys/ds100305.pdf](http://www.aph.gov.au/hansard/senate/dailys/ds100305.pdf" \t "_new)  **1.12 The impact of Sarbanes-Oxley on private and non-profit companies**    On 10 March 2005, Foley & Lardner published a study showing that the Sarbanes-Oxley Act continues to have a significant impact on private organizations as 87% of survey respondents felt that SOX or other corporate governance reform requirements have impacted their organizations compared to 77% in 2004.    The impact of corporate governance reform on non-profit organizations was even more apparent as 97% of non-profits responding to the survey felt that corporate governance reform had impacted their organizations compared to 80% of for-profit organizations.  More than three-quarters (78%) of the private organizations surveyed have self-imposed corporate governance reforms, compared to 60% of respondents in 2004.    When the Sarbanes-Oxley Act was adopted, the Congressional record indicated that it was not intended to apply to any organization other than public companies. At that time, many claimed that regardless of the intent of Congress, these guidelines would eventually permeate all businesses under the guise of best practices. Although an unintended consequence, the responses reported in the study indicate this is in fact happening.  Many of the aspects of corporate governance reform currently being adopted by private organisations include CEO/CFO financial statement certification, appointment of independent directors, adopting a corporate ethical code, establishing whistle blower procedures, and approval of non-audit services by the board.    However, it remains to be seen whether Section 404 audits of internal financial controls are adopted by these organizations as a best practice, as these audits are generally expensive and time-consuming to implement.    The private organizations responding to the survey generally believe in the principles guiding corporate governance regulation and in many areas are increasingly adopting corporate governance reforms as best practices. However, the smaller organizations responding to the survey (those with under US$300M in revenue or annual budget) are more likely to choose not to adopt the higher-cost elements of corporate governance reform.  **1.13 Audit Quality Forum issues policy proposals**  On 9 March 2005, the Audit Quality Forum, which is a UK organisation made up of representatives of the audit profession, investors, businesses and regulators, issued policy documents on four topics (1) questions to the auditor, (2) auditor engagement - disclosure of contractual terms, (3) identifying the audit partner, and (4) auditor resignation statements.  The Forum proposes that shareholders should be given a statutory right to put questions in writing to the auditor, via the company, in advance of the AGM; that statutory audit engagement letters should be publicly disclosed; and that when auditors cease to hold office, they should report the circumstances as a matter of routine, rather than (as now) only when they consider that those circumstances should be brought to the attention of members or creditors.   The policy proposal papers are available on the Institute of Chartered Accountants in England and Wales website at [www.icaew.co.uk/index.cfm?AUB=TB2I\_75839,MNXI\_75839](http://www.icaew.co.uk/index.cfm?AUB=TB2I_75839,MNXI_75839" \t "_new)  **1.14 Superannuation choice regulations published**  On 1 March 2005, the Federal Assistant Treasurer, Mr Mal Brough MP, released the superannuation choice regulations, the standard choice form to be provided to employers and details of forthcoming amendments to the legislation.  Among other things, the superannuation choice regulations, developed in consultation with industry and stakeholders, outline the minimum insurance requirements for default funds under choice. Retirement Savings Accounts (RSAs) have been exempted from the minimum insurance requirement. Most RSAs are opened by employers with a high turn over of casual staff and also tend to have low account balances, and hence are most likely to be eroded by insurance premiums.  The Minister also released the standard choice form to be provided by employers to their eligible employees. Employers will receive copies of the form in a mailout from the Australian Taxation Office in April, along with a comprehensive information booklet to help them meet their choice obligations. A call centre and website will also provide assistance to employers. Legislative amendments will be introduced to clarify the operation of the choice legislation. It will also clarify how businesses that already provide choice to their employees will be exempted from having to select a default fund.  The choice of fund legislation as it currently stands does not apply to employees covered by a state award. The Government will be introducing an amendment to the choice legislation to allow the Commonwealth to override state awards in respect of superannuation from 1 July 2006.  **(a) The superannuation choice regulations:**The [Superannuation Guarantee (Administration) Amendment Regulations 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83682" \t "default) and the [Superannuation (Industry) Supervision Amendment Regulations 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83683" \t "default) prescribe the:           Minimum level of insurance to be offered by the default fund. As a result of the consultation the draft regulations were changed so that a fund can meet the requirement either by offering insurance at a premium of at least $0.50 per week or according to an age based benefit scale. On the age based benefit scale a fund would meet the requirement where an employee aged 23 would be covered for $50,000 upon their death.           Exemptions from the insurance requirement;           Information an employee must give their employer if they want to choose a fund;           A mechanism for prescribing the content of the standard choice form, and           Narrow exemptions to the “kick back rule”. The exemptions in the regulations are designed to allow for common practices which are not detrimental to an employee but would have otherwise been prohibited under the legislation. Eg, a trustee will be able to offer or provide an employer with a clearing house service. A clearing house is a service that will distribute contributions to an employee’s chosen fund on behalf of the employer.  **(b) The standard choice form for employees:** (available on the [ATO website](http://www.ato.gov.au/content/55739.htm" \t "_new))           It also includes the standard choice form that employers will provide to their employees after 1 July.           The form has been kept to two pages (one sheet of paper).  **(c) The enhanced fee disclosure regulations:**  The [Corporations Amendment Regulations 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "default):          Are designed to set out a standard approach for superannuation and managed investment products to disclose their fees to consumers. This will promote consistency and comparability.           This important measure is designed to make sure consumers can easily identify the fees and charges that apply.  **(d) Minor amendments to the choice legislation** Businesses already offering choice:          Some people have already had choice of fund as a condition of their employment. In these cases, the employer has never had to choose a ‘default fund’. Under these amendments, an employer in this situation will not have to nominate a default fund on 1 July. The employer will also not be required to hand over a standard choice form.          This is expected to benefit smaller businesses that employ a few people during peak work periods. This exclusion does not exempt an employer from having to meet their Superannuation Guarantee obligations.           If an employee has already chosen a fund before 1 July 2005, this choice will be treated as meeting the choice of fund rules. In other words, employers who already meet their obligations will not have to hand out the standard choice form to these employees.  Bringing choice to more Australian workers:          Employees on state awards are not covered by the choice legislation.           The Government has sought the co-operation of the states to allow state award employees to choose their own super fund. The states have not committed to come on board with a national choice scheme as yet.           The Government intends to amend the choice legislation to override state laws to give choice to employees on state awards from 1 July 2006.           The Australian Taxation Office (ATO) is working closely with the Department of Employment and Workplace Relations (DEWR) to make it easier for employers and employees to determine if they are covered by the choice of fund legislation.  The Superannuation Holding Accounts Special Account (SHASA):          This system was established to receive small superannuation amounts from employers who cannot find a superannuation fund. This facility is no longer needed, as Retirement Savings Accounts (RSAs) offer similar low-cost benefits for employers.           Under the current law, employer contributions into SHASA will not meet the employer’s choice of fund obligations.           The Government will amend the law to provide employers with a 12 month transitional period. If an employee does not make a choice, employer contributions made into SHASA will comply with the choice of fund legislation until 30 June 2006. SHASA will then be closed to new employer deposits.  **1.15 Australian High Court clarifies test for transmission of business and employee entitlements**    (by Bella Stagoll, Romy Klein and Graham Smith, Clayton Utz, Melbourne)  On 9 March 2005 the High Court handed down its decision in the much publicised Gribbles Radiology Case, setting aside the order of the Full Court of the Federal Court of Australia made on 28 March 2003. This decision will lead to greater commercial certainty in business acquisitions, transfers, contracting and outsourcing. -  The same day, the court also handed down an important decision on employees' rights to redundancy pay following a corporate restructure and a change of employer.    **(a) Gribbles: the facts**  The facts in Gribbles (Clayton Utz acted for Gribbles) were:          Region Dell operated health clinics in which Southern Radiology provided radiography services. In the Moorabbin clinic, Southern Radiology employed four radiographers. When Southern Radiology stopped providing these services, the employees were employed by MDIG. Their employment was governed by an award which named both MDIG and Southern Radiology as parties. Gribbles were not a party to that award.           When MDIG stopped providing radiography services, Gribbles got the contract. It utilised some of the same equipment previously used by MDIG and hired the four radiographers in permanent part-time positions. Some months later, Gribbles closed the facility at the Moorabbin clinic and terminated their employment, but did not provide the severance pay specified in the award.           The union commenced proceedings in the Federal Court against Gribbles for payment of the severance pay and argued that Gribbles was a successor to MDIG and, consequently, bound by the award.    **(b) Decision of the High Court: No transmission of business**    Under section 149(1)(d) of the [Workplace Relations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6125" \t "default), an award binds not only a named employer, but also a "successor, assignee or transmittee to or of the business or part of the business of an employer".  The High Court has clarified that in order to be a "successor" to the business or part of the business of a former employer (and therefore, to inherit the awards/certified agreements of that employer), the new employer must carry on some part of the "business" of the former employer. This will require examination of whether what the new employer has taken over can be described as a part of the former employer's business, and it will not suffice to show that the new employer pursues the same kind of business activity.  In the present case, it could not be said that Gribbles was a successor to or of any part of the business of MDIG because, while it pursued the same business activity as MDIG in the same place, using the same equipment and the same employees, it did so without taking over any part of the tangible or intangible assets of MDIG's business. The clinic did not belong to either Gribbles or MDIG, the equipment belonged to Region Dell, and Gribbles occupied a part of the clinic premises under a new licence from Region Dell after MDIG's licence had come to an end. There was no transaction between MDIG and Gribbles. Therefore, Gribbles was not a successor to or of any part of MDIG's business and was not bound by the award that governed the employment of the relevant employees.    **(c) What does this mean for employers?**    The High Court's decision has clarified the test for establishing whether a transmission of business has occurred and narrowed the circumstances in which a business will inherit the awards and certified agreements of its predecessors. In order to establish that a party is the successor to the business of the other, it will be necessary to show that the combination of activities and assets that together constitute the former employer's "business" have continued in the hands of the successor, largely unaffected by what has happened. In most cases, this will require the existence of some commercial transaction between the parties.    **(d) Amcor decision overturned**    The High Court also handed down on 9 March 2005 a decision overturning the Full Federal Court in Amcor Limited v Construction, Forestry, Mining and Energy Union regarding the entitlement to redundancy pay following a corporate restructure that resulted in a change of employer.    The High Court has unanimously held that the relevant clause in the certified agreement did not provide an entitlement for employees to be paid redundancy pay in circumstances where the employees worked in the same jobs, under the same terms and conditions but, as a result of a corporate restructure, their employer changed.    **(e) Background**    Amcor conducted a packaging and a paper business. The paper business, consisting of four paper mills, was sold by Amcor to a wholly owned subsidiary, Paper Australia, however the employees working at the mills continued to be employed by Amcor. The terms and conditions of employment were set out in the Australian Paper/ Amcor Fibre Packaging Agreement 1997 ("the Agreement"). Amcor subsequently decided to separate the packaging and paper business, and to sell the paper business to a third party. As a result, the employees working for the paper business were transferred to Paper Australia. This involved Amcor terminating their employment and Paper Australia engaging them in the same positions, on the same terms and conditions and with recognition of prior service and accrued entitlements.    The CFMEU claimed that Amcor was in breach of clause 55.1.1 of the Agreement, arguing that the employees were entitled to redundancy pay under the terms of the Agreement. Clause 55.1.1 of the Agreement relevantly provided that "should a position become redundant and an employee subsequently be retrenched, the employee shall be entitled" to various entitlements, including redundancy pay.    Justice Finkelstein and subsequently a Full Court of the Federal Court of Australia upheld the CFMEU's claim, holding that the transfer of employees to Paper Australia did not affect the employees' right to a redundancy package under the Agreement. The High Court has now overturned this decision.    **(f) No redundancy in circumstances where "position in business" unchanged**    The key question for the High Court was whether the positions of the employees became redundant and the employees were retrenched under clause 55.1.1 of the Agreement. The CFMEU argued that redundancy of an employee's "position" meant their "position in the employment of Amcor", so that a change in the identity of the employer meant that the positions became redundant. Amcor argued that the correct interpretation of clause 55.1.1 is that it would apply where a position in the business became redundant, and that the identity of the employer of the person occupying the position was irrelevant.    In four separate judgments, the High Court unanimously preferred the interpretation argued by Amcor. That is, the High Court held that under clause 55.1.1 "position" refers to a position in the business. There was no redundancy because the positions performed by the employees did not cease to exist, but rather continued in exactly the same way, with the only change being the legal entity of the employer.  The crux of the High Court's reasoning is that: "neither the sale of assets by Amcor nor the later termination of employment by Amcor meant that the work then being undertaken by the employees was no longer required by the company which conducted the business in which the positions existed. The "job" of no employee was redundant."  The High Court's decision is to a certain extent limited to the unusual facts of the case and the wording of the relevant clause in the Agreement. Importantly, in their joint judgment, Justices Gummow, Hayne and Heydon point out that if there had been some change in the terms and conditions offered by the new employer, or a change in the tasks required to be performed by the employees, there may have been some question about whether the "position" continued.   The High Court also took into account the approach to redundancy taken by the Australian Industrial Relations Commission in the Termination, Change and Redundancy case. While the wording of clause 55.1.1 was different from the model clauses which the Commission adopted, the emphasis in the TCR case upon a "job" becoming redundant rather than a worker becoming redundant was considered relevant.    **(g) What does this mean for employers?**    The High Court's decision should provide some comfort to employers in transmission of business situations because it has clarified that an employer will not necessarily be liable to make redundancy or severance payments in circumstances where a corporate restructure or sale of a business results in a change of employer. However, each situation will turn on its own facts, in particular the wording of the relevant certified agreement and the terms and conditions of employment to be offered to employees who will transfer to a new employing entity. The best way for employers to minimise exposure to claims for redundancy pay is to:          include in certified agreements and contracts of employment a clause that provides that employees will not be entitled to redundancy pay if there is a transmission of business to another employer; and           carefully manage employees and employment documentation as part of any sale or restructuring process.    **1.16 UK Government consults on EU company law and corporate governance**  On 10 March 2005 a consultation document to promote competitiveness and enterprise was published by the UK Department of Trade and Industry. The EU proposals are all part of the European Commission's Company Law and Corporate Governance Action Plan.  The Action Plan aims to modernise the EU's corporate governance framework to help improve investor confidence and encourage competition within the single market.  The main aim of the proposals is to:          enhance existing EU company reporting (introducing a requirement for an annual corporate governance statement for publicly traded companies and tightening disclosure requirements);          streamline the complex capital maintenance rules that apply to public companies affecting the size, structure and ownership of capital; and          create a legislative framework for EU companies to transfer their registered office from one Member State to another.  The first two of these proposals have already been published by the Commission, the third proposal is expected be published shortly.  A copy of the consultation document "Directive proposals on Company Reporting, Capital Maintenance and Transfer of the registered Office of a Company - a Consultative Document" is available at: [http://www.dti.gov.uk/cld/current.htm](http://www.dti.gov.uk/cld/current.htm" \t "_new) The consultation closes on 3 June 2005.  The European Commission published its Action Plan on 21 May 2003, entitled "Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward".   It is available at [http://www.europa.eu.int/eur-lex/en/com/cnc/2003/com2003\_0284en01.pdf](http://www.europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0284en01.pdf" \t "_new)  The proposal to amend the 4th/ 7th Company Law Directive aims to enhance confidence in the financial statements and annual reports published by European companies. To meet this objective the Commission has proposed amendments covering three key issues, namely to:          clarify board members' responsibility for financial and non-financial statements;          extend disclosure requirements regarding off-balance sheet arrangements and related party transactions; and          require companies whose securities are traded on a regulated market to include a new corporate governance statement in their annual reports.  The proposal is available at: [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004\_0725en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0725en01.pdf" \t "_new)  The proposal to amend the 2nd Company Law Directive aims to simplify some of the rules governing the capital maintenance regime. It proposes six changes to existing rules:          relaxation of the requirements concerning the valuation of non-cash consideration for the allocation of shares;          relaxation of the requirements concerning acquisition of its own shares by a company (buy-backs);          relaxing the prohibition on financial assistance;          relaxing the procedures governing the waiving of pre-emption rights;          enhancing standardised creditor protection in all Member States for reductions of capital; and          introduction of "squeeze-out" and "sell-out" rights of majority shareholders and minority shareholders respectively.  The proposal is available at: [http://europa.eu.int/comm/internal\_market/company/docs/capital/2004-proposal/proposal\_en.pdf](http://europa.eu.int/comm/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf" \t "_new)  A proposal for a new 14th Company Law Directive that would establish a legal framework for European companies to transfer their registered office from one Member State to another has not been published yet. However, the Commission carried out an open consultation outlining its proposed approach.  The Commission's consultation document is available at: [http://www.europa.eu.int/comm/internal\_market/company/seat-transfer/2004-consult\_en.htm#frame](http://www.europa.eu.int/comm/internal_market/company/seat-transfer/2004-consult_en.htm" \l "frame" \t "_new)  **1.17 GMI releases new global governance ratings**  On 6 March 2005, Governance Metrics International (GMI), the corporate governance research and ratings agency, announced new ratings on 3,220 global companies. Thirty four companies, twenty seven American, three Canadian, three British and one Australian received scores of 10.0, GMI’s highest rating. As a group, these companies outperformed the S&P 500 Index as measured by total returns for each of the last one, three and five year periods by 11.13%, 9.9% and 15.93%, respectively, as of 28 February 2005.  The current ratings include for the first time the constituent companies of the US S&P SmallCap 600 Index. Gavin Anderson, GMI President and CEO, said that the “S&P 600 companies as a group have governance profiles that are weaker than their large cap brethren. Their average ratings are almost twenty percent lower than the S&P 500 companies, they have the largest number of “red flags” that we issue for governance concerns, and proportionally they represent a greater number of low scoring companies. Their inclusion in our coverage has resulted in a decline of the average score of all US companies from 7.23 last September to 7.03 . This is not to say that all small cap companies have poor governance characteristics we found exceptions to the rule nor that there are no problem areas at larger companies, where we also found problems, but it does seem to confirm the conventional wisdom that there is a market cap difference in governance characteristics at corporations”.  This market cap difference is borne out elsewhere. GMI looked at small cap companies in the United Kingdom and Japan where it covers in excess of 350 companies in each and found similar results. In the United Kingdom, the 50 lowest market cap companies had an average score of 6.70 versus the average of 7.40, and in Japan a similar number of companies had an average score of 3.10 versus the country average of 3.50. The average market cap of these 100 companies was $644 million.  Interestingly, in the United States, the Securities and Exchange Commission has just established a new advisory panel (the Committee on Smaller Public Companies) to study the impact of the Sarbanes-Oxley Act on smaller companies but it is not known what market cap cut off this panel has decided upon.    **(a) Director independence and professionalism**  The number of directors that GMI considers independent has risen from 52 percent of the total universe in 2003 to 55 percent today. This trend is not confined to the US but is evidenced in just about every one of the 23 countries GMI examines. Furthermore, considering that GMI monitors more than 33,000 individual directors, a three per cent improvement equates to a significant number.    At the same time there are fewer companies with combined chairman and CEO roles. In July 2003 47 percent of the companies GMI covered had a combined chairman and CEO whereas today the number is 39 percent. Also of interest is the degree to which boards are now undertaking self evaluations. While not conclusive, it does provide an indication of a more professional approach to the role of a board and may be a measure of increased sense of responsibility on the part of directors. During the two research periods covered from August 2004 to February 2005, GMI rated a total of 2,538 global companies at least once in each cycle. For each period, GMI looked at board performance evaluation on three different levels:          Whether or not the board or a committee of the board periodically evaluated board performance.          Whether or not board members were subject to individual evaluation, performed periodic individual self-evaluations or evaluated other board members.          Whether or not at least one board committee performed periodic committee self-evaluations.  From a global perspective, GMI saw an aggregate increase in all three measures within its universe of rated companies.  Among the larger markets covered by GMI, the UK showed the most notable improvement. Across all three metrics, UK companies respectively recorded period-to-period increases of between 15 and 80%. Australia was not far behind, with respective increases of between 10 and 32%. Though not as eye-catching, the US nonetheless registered modest improvement of between 2 and 15%, and Canada 1 to 3% across all three metrics. In the US, the lower rate of change is probably due in part to the already phased in adoption of governance reforms by most companies.  In Canada, many companies have already been following the recommended governance practices as set forth by the TSX. Interestingly, Japanese companies exhibit little inclination towards change in this area. Of the 354 Japanese companies rated in both research periods, only three periodically evaluated board performance. There were no others that either evaluated directors individually or undertook committee self-evaluation.  Most of the smaller markets covered by GMI exhibited nominal increases across all measures. Most European markets had little change from one period to the next. Canada, Australia and the U.S. have the strongest practices with regard to board evaluation. For the companies covered in the February 2005 research period, 98% of Canadian boards evaluated their own performance, 68% performed some sort of individual director evaluation, and 73% had at least one committee that undertook a self-evaluation. For Australia these numbers were respectively 92%, 78% and 48% and for the US, 91%, 27% and 9%. Most striking was that 497 companies undertook all three measures of evaluation.    **(b) Red Flags – remuneration in the US and anti-takeover provisions in Europe**    As part of its service, GMI assigns red flags to companies where an important governance issue has been identified. Red flags are issued for a number of matters but include such things as: unequal voting rights; regulatory and criminal investigations; large potential options dilution and significant related party transactions involving amounts greater than one percent of revenues of the company. Thirty-six percent of the GMI universe or 1,163 companies received red flags in this ratings release with 202 receiving two or more.  The GMI category that received the largest number of red flags was Remuneration; this was also the most frequent category for US companies. It accounted for 31 percent of US red flags versus only 6 percent in Europe and 5 percent in the Asia Pacific nations. The second most frequent category for red flags was GMI’s Market for Control section, which screens for ownership concerns and anti-takeover provisions. Here European companies were responsible for the vast majority of flags, accounting for 15 percent of the total versus 6 percent in the US and only one percent in Asia.    **(c) Noteworthy country ratings**  On a national level, UK companies had the highest overall average rating (7.39), followed by Canada (7.14), United States (7.03) and Australia (6.99). At the other end of the scale, Greek companies had the lowest overall average rating (2.37), followed by Japan (3.49). In Europe, companies from Belgium (3.93), France (4.05) and Portugal (4.35) had the lowest overall average ratings. Thirty-two companies received GMI’s lowest global rating of 1.0. Thirteen of the 32 are located in Japan, 7 in Greece, 5 in Belgium, 4 in France and 1 each in Denmark, Hong Kong and the United States. In the last GMI release the US had the highest overall average score but this declined partly because of the inclusion of small cap companies.  In the two years that GMI has been conducting global ratings the countries that repeatedly have had the highest average scores have been the UK, US, Canada and Australia. These are all known for strong legal systems with property right enforcement mechanisms, high levels of disclosure and large and sophisticated institutional investment communities. However, compared to GMI’s first global ratings in July 2003 the country with the most significant change has been The Netherlands, where the average company score rose from 4.20 in July 2003 to 6.45 . Last year the Dutch legislature provided a statutory basis for the voluntary Tabaksblat Code which was first published in December 2003.  From the 2004 financial year onwards, Dutch listed companies have to include in their annual report a section on their corporate governance and compliance with the Code and have to explain any non-compliance. Key provisions of the Code are term limits for management and board members; the requirement that they disclose conflicts of interest; and the requirement that the supervisory board meet on an annual basis without management to discuss strategy and review the performance of the individual board members. Only one supervisory board member may be deemed not independent and at least one member must be designated as a financial expert.  Shareholders have the responsibility for approving option and stock plans at the AGM and companies must disclose an overview of their remuneration policy. Departing management board members cannot receive more than one year’s salary in the event of dismissal and loans can no longer be granted to management board members. Additionally, companies are now required to develop a publicly disclosed “whistle blowing” policy and to disclose biographical details of supervisory board members. Finally, the outside auditor must be assessed every four years and this assessment must be communicated to the company’s shareholders.  **1.18 IOSCO action plan to strengthen capital markets against financial fraud**    On 1 March 2005, the Technical Committee of the International Organization of Securities Commissions (IOSCO) released its report on ‘Strengthening Capital Markets Against Financial Fraud’. The report is the result of an in-depth study of recent financial scandals involving large, global companies and represents a review of securities market regulation aimed at identifying possible weaknesses to the international financial system and how these weaknesses can be addressed.  The Report sets out two overarching operational priorities for IOSCO’s future:          promoting implementation of existing international standards and principles; and           improving the abilities of securities regulators to cooperate with each other in enforcing existing securities laws and regulations.  The Report notes that, in many cases, there already exist international standards and principles designed to address the weaknesses identified in the Report. However, absent thorough implementation and enforcement by all securities regulators, these weaknesses will remain. Consequently, by emphasizing implementation and enforcement cooperation, the Technical Committee believes it can significantly enhance the effectiveness of the international infrastructure supporting securities markets.  The Report notes that the Technical Committee is adopting three policies to help achieve these goals:          emphasizing implementation of all existing IOSCO standards and principles by assessing IOSCO members on their implementation, setting implementation benchmarks, and making implementation a cornerstone of IOSCO’s program to provide technical assistance and advice to securities regulators in developing markets;          confirming that the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information is the benchmark for enforcement co-operation among IOSCO members, with the goal of eventually making the ability to sign on to the Multilateral MOU a primary benchmark for continued membership in IOSCO; and          prioritizing those historically under-regulated and uncooperative jurisdictions posing the most significant threat to global financial system and engaging these jurisdictions in a dialogue on how they can improve their regulatory oversight and abilities to cooperate with foreign counterparts.  Further details of the IOSCO Action Plan and this project can be found in the report located on the [IOSCO website](http://www.iosco.org/" \t "_new).  **1.19 Shift in auditor fee income**  Large accountancy firms in the UK are earning nearly half their fees from non-audit clients, according to the UK Professional Oversight Board for Accountancy (POBA).  The POBA's report, ‘Key Facts and Trends in the Accountancy Profession’, shows that the proportion of fees from non-audit services to audit clients fell from 35% in 2001-02 to 25% in 2003-04. However, the big four accountancy firms have increased the proportion of their income from non-audit clients from 38% in 2001-02 to 46% in 2003-04.  The POBA took this as a reflection of post-Enron legislation designed to restrict the number of services audit firms can supply to a listed audit client. It noted that the Auditing Practices Board has recently published ethical guidelines for auditors, including guidance on non-audit services; and the Combined Code contains new guidance on the role of audit committees in listed companies, including in relation to the purchase of non-audit services from a company’s auditors.  The report is available at [http://www.frc.org.uk/images/uploaded/documents/ACF1571.pdf](http://www.frc.org.uk/images/uploaded/documents/ACF1571.pdf" \t "_new)  **1.20 International regulators and related organisations announce the Public Interest Oversight Board for the international accountancy profession**    On 28 February 2005 the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors (IAIS), the World Bank and the Financial Stability Forum announced formal establishment of the Public Interest Oversight Board (PIOB) to oversee the public interest activities of the International Federation of Accountants (IFAC).  The PIOB will oversee IFAC’s international standard setting activities in the areas of audit performance standards, independence and other ethical standards for auditors, audit quality control and assurance standards, and education standards. It will also oversee IFAC’s Member Body Compliance Program.  The establishment of the PIOB is the result of a collaborative effort by the international financial regulatory community, working with IFAC, to ensure that the auditing standards set by IFAC and its committees are set in the public interest. Establishment of higher quality standards, coupled with strengthened auditor oversight nationally are part of the substantive reforms that regulators have identified as necessary to achieve a step-up in the quality of external audits of individual companies around the world. The PIOB will strengthen international auditing standards by injecting informed oversight in the public interest into IFAC’s standard-setting activities, and by enhancing the transparency and consultative processes of these activities.  **1.21 Report on Australian businesses preparing to report under AIFRS**  Those businesses that fail to communicate effectively the impact of Australian equivalents of International Financial Reporting Standards (AIFRS) on their financial statements risk seeing their business performance misinterpreted and penalised by the markets according to the results of a recent KPMG commissioned survey dated 28 February 2005.  In late 2004 KPMG commissioned a survey of financial analysts in Melbourne and Sydney to assess the readiness of the Australian capital markets for the introduction of reporting under AIFRS. The results released in the KPMG report, ‘Perceptions and Realities’ identifies a number of emerging challenges for listed companies as they prepare to report under AIFRS.  As companies need to prepare financial reports which must comply with AIFRS for financial years commencing on or after 1 January 2005 it was important to determine the level of understanding the financial analyst community has around AIFRS, said Geoff Wilson, National Managing Partner of KPMG’s Audit and Risk Advisory Services.  The significant message from the survey is that companies face a real risk that their financial performance as reported under AIFRS will be misunderstood or misinterpreted by the market. None of the surveyed analysts felt very confident about their ability to distinguish between changes in a company reported results due to changes in underlying business performance and those that directly relate to the adoption of AIFRS, confirmed Mr Wilson.  The majority (62 percent) of surveyed analysts responded that they are likely to mark down a company shares if they do not understand why its results look different under AFIRS. Furthermore the survey results revealed that 40 percent of analysts believe that there are valuation issues with reporting under AIFRS and that the market has not yet factored in these issues to share prices. In addition, one third of the analysts surveyed responded they did not understand the impact of AIFRS on key areas such as, presentation of the income statement, share options, financial instruments, pensions and mergers and acquisitions.  It is also important to note that two thirds of the surveyed analysts believe the prime responsibility for educating the markets about AIFRS lies with the companies they track. Yet most have so far received little or no information about AIFRS-related matters from these companies.  At the moment analysts feel sceptical about the benefits of AIFRS and 43 percent feel there will be no benefit from the move to AIFRS, or simply don’t know. The findings also reported that more than half (56 percent) felt that current confusion and uncertainty was also one of the most significant disadvantages of moving to AIFRS.  The KPMG report*, ‘*Perceptions and Realities’ is available on the [KPMG website](http://www.kpmg.com.au/" \t "_new).  **1.22 US Class Action Fairness Act of 2005**    On 18 February 2005, US President George Bush signed into law the Class Action Fairness Act of 2005. The stated purposes of the Act are to ensure that cases of national importance are heard in federal courts, to promote fair and fast resolution of legitimate claims, and to lower consumer prices while encouraging innovation in settlement.  The Act is a response to the perceived inequity of forcing businesses to litigate consumer and mass tort class actions in state courts selected by plaintiffs for their reputedly lenient class certification procedures and large verdicts.  The Act, which applies to civil actions commenced after its enactment, creates federal jurisdiction over class actions with 100 or more class members seeking in the aggregate over US$5 million where at least one member of the class is from a different state (or country) than at least one defendant. Such class actions, if commenced in state court, generally can now be removed by a defendant to federal district court. Notably, however, many actions involving corporate and securities questions are exempt from the Act’s broad grant of federal jurisdiction.  These include actions relating to the internal affairs or governance of a corporation or other entity and actions that concern rights, duties (including fiduciary duties) and obligations relating to or created by any security. In addition, the Act provides for federal jurisdiction to be declined in certain instances in which a substantial number of class members are citizens of the forum state. |
| **2. Recent ASIC Developments** |
| **2.1 ASIC seeks better disclosure for shareholders in related party transactions**  On 18 March 2005 the Australian Securities and Investments Commission (ASIC) commended Australian public companies for improving the quality of disclosures about related party benefits in disclosure documents, but warned that a number of common defects continue to regularly recur.  The findings arose from ASIC's campaign to identify areas where companies were failing to provide shareholders with all the information they needed in deciding whether it was in the company's interests to grant a financial benefit to a related party (Refer to ASIC Media Release ASIC cracks down on related party disclosure [MR 04-257])*.*  Shareholder approval is required when a public company provides financial benefits to a person or group that are not at 'arm's length' from the company.  **(a)** **Overview of the campaign**    The campaign targeted eight areas of disclosure where the quality of information in related party documents sent to shareholders continues to be defective. These areas of disclosure include:          the valuation of the financial benefit;           the disclosure of the total remuneration package of the related party;          the description of the related party;           the details of the financial benefit including reasons for giving the type and quantity of the benefit;           the disclosure of the related party's existing interests in the company;          the disclosure of the dilution effect of the transaction on existing members' interests;           the disclosure of the trading history of the relevant equity, including highest, lowest and most recent closing price; and           the disclosure of each director's recommendation and interest in the outcome of related party transactions.    As outlined in MR 04/257, ASIC no longer permits companies to amend documents after it has identified defects. Under the current campaign, identification of a common defect will trigger a comment letter, issued by ASIC to the company, under section 220 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). If a comment letter is issued, it must be circulated to shareholders along with the related party documents.   Prior to the issue of a comment letter, however, the company will be given the opportunity to withdraw the documents and re-lodge them once the common defect has been rectified.   **(b) Results**    During the three-month period September 2004 to November 2004, ASIC reviewed a total of 223 notices of meeting and accompanying documents, including re-lodged notices of meeting. 58 notices of meeting were found to have common defects. As a result:          50 notices were withdrawn and subsequently re-lodged once the common defects had been rectified;           five notices were withdrawn and not re-lodged;           three required further regulatory action;           one comment letter was issued; and           in one case where the company had already sent the related party documents to shareholders prior to the lapse of the statutory 14-day period, ASIC obtained an undertaking from the company that it would withdraw the relevant resolution from shareholder consideration.  **(c) Background** Under the Corporations Act 2001, for shareholders to be able to vote on a related party transaction, the company must provide shareholders with a notice of meeting and explanatory statement that sets out certain information. At least 14 days before the public company intends to send the related party documents to shareholders, the documents must be signed by a director or company secretary and lodged with ASIC. ASIC then has 14 days in which to review the related party documents.  If ASIC considers that the documents do not provide adequate disclosure to shareholders, it can issue a comment letter that the company is required to distribute to shareholders, along with the related party documents.  **(d) Recurring common defects identified in the course of the related party campaign  (i) Inadequate disclosure of each director's recommendation and interest in the outcome of the related party transaction**  In relation to each proposed related party resolution, each director of the company must either:          make a recommendation about the resolution andstate their reasons for it; or          if they do not make a recommendation, state why they do not.    If, for some reason, a director is not available to make either of these statements, they must also state why this is the case.  Importantly, where a director makes a recommendation, they must provide a reason for doing so. It is not enough simply for a director to state that they approve of the resolution.  Interest in outcome:           each director must state whether or not they have an interest in the outcome of the proposed resolution. If a director does have an interest in the outcome they must state what that interest is.  **(ii) Inadequate valuation of the financial benefit**  A failure to adequately value the financial benefit continues to be one of the most commonly occurring defects in related party documents lodged with ASIC. This is the case where the financial benefit is the issue of shares, options or convertible notes, or where it involves the sale or purchase of an asset, such as a mining tenement or an existing business.  ASIC considers that an adequate valuation requires the basis of the valuation, and the principal assumptions behind the valuation, to be disclosed. In some circumstances, it may also be necessary to provide a valuation by an independent expert. This will be particularly important where there is a possibility of directors having a conflict of interest in the transaction.  In relation to options, ASIC has released guidelines on valuation. These guidelines were published as an attachment to Media Release [MR 04-206] Valuing options for directors and executives.  Where a company is purchasing an asset from, or selling an asset to, a related party it will be necessary to include a valuation. It may be necessary where a company is purchasing an asset from a related party in exchange for shares, to include both a valuation of the asset and a valuation of the shares. Where relevant, the valuation methodology should be consistent with that required to be adopted in the financial reports of the company.  **(iii) Inadequate details of the financial benefit being given including reasons for giving the type and quantity of the benefit**  Complete details of the financial benefit to be given to the related party must be provided to the shareholders. This includes not only details of what the benefit is (both as to nature and quantity), but also the reason for giving the benefit and the basis for giving the particular benefit.  For example, if options are to be granted to a director, ASIC expects the following information to be disclosed:          the number of options to be granted to the director;          the terms of the options;           an explanation as to why the options are to be granted, particularly where alternative forms of remuneration or incentive may be required to be expensed by the company in future years; and           an explanation as to why the specified number of options is to be granted.  The effect of this is that if, for example, a company proposes to give 1 million options to a director, it is necessary to state both the reason why the options are being given and why that amount and value of the options was chosen.  **(iv) Inadequate disclosure of a relevant director's total remuneration package**  Where the financial benefit to be conferred on a related party is a benefit conferred by way of remuneration or incentive, the amount of the total remuneration package must be disclosed to the shareholders. For example, if options are to be granted to a director, the company must provide a proper valuation of those options as well as give shareholders details of other remuneration the director will receive.  Shareholders must be able to assess the value of the overall remuneration package the director will receive when taking into account the financial benefit to be conferred. It is not usually sufficient to only include past remuneration of directors. It may be sufficient, however, if the remuneration a director will receive is not known but is anticipated to be similar to that received in the previous year, to include the previous year's remuneration and a statement to that effect.  **2.2 ASIC seeks industry comment on market stabilisation**  On 11 March 2005 the Australian Securities and Investments Commission (ASIC) released a policy proposal paper on market stabilisation.  Market stabilisation is the purchase of, or the offer to purchase, securities for the purpose of preventing or slowing any fall in the market price of those securities following an offer of securities. An offer of securities may lead to a fall in the price of those securities because of the sudden increase in supply or imperfections in the pricing and allocation process. To counter this effect, the underwriter of an offer may attempt to stabilise the price of the securities by purchasing, or offering to purchase, the securities for a limited period following the issue or sale of the securities.  ASIC's current policy position in relation to market stabilisation is outlined in Information Release 00-31: ASIC interim guidance on market stabilisation, issued in September 2000. ASIC's policy proposals are based on [IR 00-31] together with some proposed modifications to that interim policy. Following consultation on our policy proposals, ASIC will release a new policy statement on market stabilisation that will replace the interim policy in [IR 00-31].  The policy proposal paper sets out how ASIC plans to regulate market stabilisation on an on-going basis by discussing:           ASIC's proposed approach to market stabilisation, including the use of no-action letters;           the circumstances in which ASIC will provide a no-action letter for market stabilisation;           the conditions ASIC will impose on market stabilisation; and          how to apply for a no-action letter.  ASIC plans to issue its final policy on the regulation of market stabilisation around August 2005.  Further information is available on the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.3 ASIC'S position on off-market share buy-backs incorporating fully franked dividends**  On 3 March 2005 the Australian Securities and Investments Commission rejected the view that off-market share buy-backs, where part of the price is treated as a franked dividend, were a breach of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).   **(a)** **Buy-back price is not a dividend**  In ASIC's view, no part of the amount paid by a company to buy-back a share is a dividend for Corporations Act purposes, even though it might be taxed as a dividend.   The fact that part of the buy-back price is:           attributable to retained earnings;           deemed to be a dividend for tax purposes; or           franked under the dividend imputation system, does not make it a dividend for company law purposes.   ASIC also believes that the provision in the Act (s254W of the Corporations Act 2001) that says each share in a class has the same dividend rights does not apply to a payment made to buy back a share. A dividend, for the purpose of that provision, is a distribution of profits as a reward to shareholders as the ongoing equity owners. In a buy-back, on the other hand, participating shareholders agree to give up ownership in return for a lump sum payment. The timing, composition and calculation of that payment do not derive from rights in the constitution, but from the buy-back agreement made with the company. The fact that some or all of the funds used might otherwise have been available for paying dividends does not make the payment a dividend. The dividend and buy-back regimes operate quite separately.  **(b) 'Discriminatory' features of off-market buy-backs**    There has been a clear and public enunciation of the negative implications of off-market buy-backs for 'retail' shareholders. An off-market buy-back at below prevailing market prices is unattractive to a 'retail' shareholder on a normal tax rate. This means that they generally do not participate, but see lower tax-paying shareholders receiving very large distributions of franking credits, as well as a capital loss against which other capital gains can be offset. This is regarded by opponents of such buy-backs as inequitable and discriminatory, particularly when there are other ways that excess share capital can be returned.   On the other hand, the company can benefit from off-market buy-backs because the greater the tax advantages to certain shareholders, the more likely it is that the company can buy back shares at below prevailing market prices. This is not achievable in an on-market buy-back. Also, it must be assumed that the success of recent off-market buy-backs means that many shareholders are not opposed to them.   It must also be remembered that shareholders are generally not treated equally from a taxation perspective. For example, a special dividend (another way of returning excess capital) is taxed at different rates in the hands of shareholders (i.e. from zero for charities and shareholders with tax losses, up to 48.5 per cent for an individual on the top marginal rate). Off-market buy-backs illustrate this inequality, but do not create it.   **(c) Directors' duties**    The question whether it is appropriate for a company to return excess share capital by way of an off-market buy-back, as opposed to some other mechanism, is a matter for the careful consideration of the directors.   ASIC would consider intervening in cases where it believed directors were in breach of their duties (e.g. by only having regard to the interests of low-tax paying shareholders) or, for example, where the information given to shareholders about the buy-back was misleading or otherwise defective. ASIC would also consider intervention if it formed the view that a buy-back were conducted for an improper purpose (e.g. to increase the value of executive options or to concentrate voting power in non-participating shareholders).   **(d) Complexity**    The decision whether or not to accept an off-market buy-back can be a complex one for a 'retail' shareholder. It involves an understanding of capital gains (and losses) and dividend imputation, as well as share price/value considerations. Shareholders also typically have to participate in the Dutch auction tender system to ensure that their shares are actually acquired. 'Retail' shareholders are often at a disadvantage in this process. Further uncertainty is created by the fact that the 'market value' of each share for tax purposes cannot be finally determined until after the close of the buy-back period.   These are all matter for the directors in determining whether it is in the best interests of the company to proceed with an off-market buy-back. In light of those complexities, companies need to strive to structure their buy-backs to work as equitably and simply as possible and to see that their communications with shareholders are clear, concise and effective.   **(e) Clearer articulation of reason for choosing off-market buy-back**  Given that there is a debate about the fairness of off-market buy-backs, ASIC believes that directors should be prepared to articulate their reasoning for choosing to undertake them. They should address why they have not chosen other ways of returning excess capital, explain the level of franking credits to be expended and provide any other information that shareholders would reasonably expect to have.   **(f)** **ASIC's facilitation role**    ASIC currently facilitates off-market buy-backs by granting the following relief:    **(i) 'Dutch auction' tender**    Allowing companies to invite shareholders to tender some or all of their shares using a 'Dutch auction' system. This enables companies to accept the lowest bids up to the number of shares sought to be bought back, rather than requiring them to make offers at a fixed price. The relief enables companies to treat these buy-backs as 'equal access' so long as each shareholder has the same opportunity to participate, even though there is no guarantee that all or even some of an individual shareholder's shares will be bought back.    **(ii) Scale-back**    Allowing companies to scale back the number of shares to be acquired where there are more shares tendered at the buy-back price than were sought to be bought back.    **(iii)** **Priority allocation/priority tender**    Allowing 'priority allocation' and 'priority tender' arrangements designed to reduce the chances of small holders being left with unmarketable parcels of shares and protecting them from excessive scale back.  **2.4 ASIC seeks comment on policy for better experts' reports**  The Australian Securities and Investments Commission (ASIC) is seeking industry comment on a new policy proposal paper (PPP) to promote better experts' reports according to a media release dated 24 February 2005.    ASIC has released the PPP to:          address a continuing public perception that experts' reports might not be sufficiently independent;           promote higher quality experts' reports that are clear, concise and effective; and           update its expert's report policies for legislative developments.   Companies include experts' reports in bidders' or targets' statements, prospectuses and notices of meeting.   The [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) requires an expert's report to protect investors by giving them an independent professional opinion in circumstances where an objective assessment is less likely to be available. For example, in a takeover a target's statement must include an expert's report where the bidder's voting power in the target is 30% or more (s640 of the Act).  The PPP includes discussion of the expert's new obligation as a licensee to have adequate arrangements to manage conflicts of interest. This obligation was introduced by the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9) from 1 January 2005. Conflicts management reinforces the existing independence requirement for experts.  ASIC proposes to replace its four existing policies (eg Practice Note 42 Independence of experts' reports) with two new policies, one on independence and the other on quality and content of experts' reports.  Copies of the PPP are available from the [ASIC website](http://www.asic.gov.au/" \t "_new) or by calling the ASIC Infoline on 1300 300 630. |
| **3. Recent ASX Developments** |
| **3.1 Changes to the ASX website**    The entire [ASX website](http://www.asx.com.au/" \t "_new) is currently being redesigned. The purpose of the redesign initiative is to improve the site'susability for both investors and professionals. The outcome of this will be an improved web service to assist and increase trading activity.  For more information please visit: [http://www.asx.com.au/site\_redesign.htm](http://www.asx.com.au/site_redesign.htm" \t "_new)  **3.2 ASX Market Rules**  **(i) Amendments to specifications for ASX Wool Futures Contracts**  Amendments have been made to the specification for ASX Wool Futures in the ASX Market Rules to increase the vegetable matter (“VM”) tolerance for deliverable wool from 1.5% to 1.8%, subject to a discount to be applied where the VM exceeds 1%.  **(ii) ASX Market Rules exposure draft of proposed miscellaneous amendments**  As of 8 March 2005 the Exposure Draft contains draft miscellaneous amendments to the ASX Market Rules and a discussion of the proposed amendments. Submissions on the Exposure Draft are invited until 5 April 2005 as discussed further in the Exposure Draft.  Further information is available on the [ASX website](http://www.asx.com.au/" \t "_new).  **3.3** **ASX share ownership study – 2004 findings**    Share ownership in Australia continues to evolve and broaden, according to the 2004 ASX Share Ownership Study released on 24 February 2005.  The Study, the latest in an ASX series stretching back to 1991, showed that 55 percent of adult Australians (8 million people) now include shares as an asset class in their investment portfolio, up from 51 percent last year (7.4 million people).  Carried out in November 2004 among a sample of 2,402 adult Australians randomly selected from across the country, the Study provided a detailed snapshot of the nation’s shareholding ranks, measuring their numbers, circumstances, behaviour and attitudes.  The overall share ownership level measures three categories of shareowner:          Direct share ownership only - 23 percent. Direct share ownership includes shares in a company listed on a stock exchange (not part of a fund), or other listed investments such as a listed property trusts, options, warrants or futures. This is up from 22 percent last year.          Indirect share ownership only – 11 percent. This includes an investment in a managed fund that is not part of a superannuation fund, or a personal superannuation fund. Indirect ownership has declined slightly from 12 percent in 2003.          Both direct and indirect – 21 percent. Investors that have a combination of the two styles of investment, up from 17 percent.  Those holding the shares directly (i.e. direct share ownership only, plus a combination of direct and indirect), amount to 44 percent of the population, up from 39 percent in 2003. ASX believes that this is the highest reported level of retail share ownership in the world.  The growth has been evident across all recorded demographics including gender, age, level of education and income brackets. Additionally, this year for the first time regional investors have been as numerous as those in cities. Growth was also stronger from those earning less than $50,000 per year, and those with a trade certificate or Year 12 level of education as their highest level.  Western Australia had the highest reported increase in the level of share ownership (eight percentage points). The sample size from Western Australia was small and the figures therefore need to be viewed in the context of year on year growth in the area, rather than a direct comparison with ownership levels in other states.  There is also an increase of new investors in the market with five percent acquiring shares for the first time in the past two years. This figure was at four percent in 2003 and just two percent in 2002.  Trading activity has increased slightly with the average investor trading seven times per year compared with six and five in 2003 and 2002 respectively. Average value of trades increased around five percent to $11,150 from $10,650 in the previous survey. The value of the average portfolio is $41,400, an increase of around one percent. Both of these probably reflect the entry of new investors, reducing the extent of the average increase. Newspapers, financial advisors along with family and friends are the sources of information that most influence share trading decisions.  As part of the 2004 Study, ASX also commissioned qualitative research, conducted in September. Respondents in the qualitative stage expressed the view that shares have ‘come good’ in the last 12 months or so. They understood that the market goes in peaks and troughs, with property being seen to have had its day for now. Many said that shares have taken over as the stronger performer. A strong economy and good company profits were cited as factors behind the performance of shares.  According to ASX data, retail investors accounted for around 55 percent of all trades on ASX for 2004, but only around 22 percent of the total value traded on ASX. According to the Australian Bureau of Statistics, Australian households own around 22 percent of all Australian equities. Pension, or superannuation funds, international investors and corporations own the remainder.  For more information you can visit the ASX media room at: [http://www.asx.com.au/about/Media\_AA2.shtm](http://www.asx.com.au/about/Media_AA2.shtm" \t "_new) |
| **4. Recent Corporate Law Decisions** |
| **4.1 Directors ability to claim legal costs under a provision in company's constitution**    (By Michelle Burton, Phillips Fox)  Craddock v Sweeney [2005] QSC 37, Queensland Supreme Court , Douglas J, 2 March 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/march/2005qsc037.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/march/2005qsc037.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    A director of Bluegum International Marketing Pty Ltd ("BIM") lodged a proof of debt with the company's liquidator for legal costs incurred in performance of his duties as a director. A clause in the company's Constitution indemnified the company's directors, secretaries and executive officers against liabilities incurred by them by virtue of holding office and acting in their capacity as director, secretary or executive officer.  The liquidator rejected the proof of debt. His Honour Justice Douglas upheld the liquidator's decision on the grounds that the costs incurred were not authorised by the company or the liquidator and therefore could not have been incurred by the applicant by virtue of his holding office in BIM and acting in his capacity as director or secretary.    **(b) Facts**    The applicant, Christopher John Craddock ("Craddock"), was a director of Bluegum International Marketing Pty Ltd ("BIM"), a company now in liquidation. The respondent, Paul Desmond Sweeney, was appointed as its liquidator. On 25 August 2004 Craddock lodged a proof of debt with the liquidator for $133,698.33, said to be legal costs he had incurred for   "Performance of duties as director and secretary of company under article 24 of the constitution between dates of 1 June 2004 and 4 August 2004". Article 24.1 of BIM’s Constitution provided an indemnity to each director, secretary and executive officer against any "Liability incurred by them by virtue of their holding office as, and acting in the capacity of director, secretary or executive officer of the company”.  The definition of "Liability" in the Constitution includes "cost or expense". In addition, article 24.2 provided:  "The company shall indemnify each director, secretary and executive officer to the maximum extent permitted by law, against any Liability for legal costs incurred by them in respect of a Liability incurred by them by virtue of their holding office as, and acting in the capacity of, director, secretary or executive officer of the Company ..."  The legal fees incurred by Craddock in the period of 1 June 2004 to 4 August 2004 dealt with a variety of matters, including the winding up of BIM, possible oppression proceedings in respect of its operations, disputes with the other director of BIM and an entity called SV Partners. The solicitors’ retainer was said to be to act for Craddock in relation to the affairs of BIM and another company, Robinson Craddock & Associates Pty Ltd ("Robinson Craddock"), "which may include preparing and conducting Court applications to wind up one or both of the aforementioned companies".  Craddock was also a director of BIM’s sole shareholder, Robinson Craddock. He was also the sole shareholder of Stepha Investments Pty Ltd, a 50% shareholder of Robinson Craddock. Craddock’s co-director of BIM and Robinson Craddock was Mr Robinson. Mr Robinson and his wife held all the shares in the other 50% shareholder of Robinson Craddock. There was a conflict between Craddock on the one hand and Robinson and another director or purported director in respect of the management of BIM. This led to a deadlock and the appointment of a provisional liquidator on 7 July 2004. The liquidation was instigated by a creditor and supported by the directors, other than Craddock, because of the internal management deadlock of BIM and its alleged insolvency.  The proof of debt was rejected by the liquidator for the reason that Article 24 of the Constitution of the company when read in its entirety contemplates the directors being indemnified in respect of actions being brought against them by external parties as a result of their conduct or actions as directors. In relation to the claim for costs brought by Craddock the liquidator found that:            the applicant incurred significant legal costs in his own self interest;           there was no authority of the board for the incurring of the legal costs, nor any prior consent of the provisional liquidator after 7 July 2004; and           admitting the proof would unfairly prejudice creditors.  **(c) Decision** A portion of the costs claimed were incurred after Craddock consented to the appointment of a provisional liquidator on 7 July 2004. The provisional liquidator did not consent to the company incurring these costs. Section 471A(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) prevents a person from exercising a function or power as an officer of a company while a provisional liquidator is acting, hence that portion of the costs cannot be said to have been incurred while acting in his capacity as a director and cannot be claimed.  In regard to the remainder of the costs claimed, Justice Douglas noted that the question in issue was whether the legal costs incurred by Craddock were a cost or expense incurred by him by virtue of his "holding office as, and acting in the capacity of" a director of BIM. It was necessary that both of those conditions be met.  His Honour held that although the costs were incurred partly because Craddock's responsibilities as a director led him to seek advice, he was not authorised by the company to act in that capacity when he sought advice. The fact that the company’s management was deadlocked prevented it from authorising him to act for it as a director in seeking advice. The other directors were seeking their own advice elsewhere.  His Honour held that Craddock was actually acting in the capacity of a shareholder of a company that itself held shares in BIM’s only shareholder, and as a minority director of BIM. BIM did not authorise him to incur these costs by any necessary implication, so he cannot be said to have incurred them while acting in his capacity as one of its directors.  His Honour held that the costs were therefore not incurred by Craddock in respect of a liability incurred by him by virtue of his holding office in BIM and acting in the capacity of its director or secretary. Liabilities incurred had also not been authorised by BIM’s board or the provisional liquidator, and no order had been sought before a judge in a previous hearing in circumstances where it was open to argue that they might be paid. His Honour held, therefore, that the liquidator’s decision was correct and the application was dismissed.  **4.2** **Foreign companies can sue and be sued in Australian courts regardless of registration as a foreign company**    (By Peter Hulbert, Blake Dawson Waldron)  McIntyre v Eastern Prosperity Investments Pte Ltd (No 6) [2005] FCA 155, Federal Court of Australia, French J, 1 March 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/march/2005fca155.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/march/2005fca155.htm" \o "http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/march/2005fca155.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    In dismissing an application to set aside a writ of fi fa issued by a previously deregistered foreign company, French J has restated the principle that a foreign company can sue and be sued in Australia whether or not registered here as a foreign company. The power of the Federal Court of Australia to award costs under the [Federal Court of Australia Act 1976 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default) is not affected by the deregistration of a foreign company in Australia. French J has suggested that the controls on the registration and re-registration of foreign companies may require some consideration.    **(b) Facts**    The name of Eastern Prosperity Investments Pte Ltd (EPI) with ARBN 065 747 006, a company formed in Singapore and registered in Australia as a foreign company, was removed from the foreign companies register in February 2001 on the basis that it had ceased to carry on business in Australia. Notwithstanding its deregistration, EPI continued to exist in Singapore and did not lose its registration there. A company with the same name and directors was subsequently registered in Australia in August 2001 and was issued the new ARBN 097 952 193.  An interlocutory costs order in the amount of $4,700 was made in favour of EPI in September 2002 in relation to the proceedings, the details of which are not relevant here. On 17 March 2003 EPI was wound up and a liquidator was appointed. The application against EPI was wholly dismissed on 25 March 2003 and an application for leave to appeal against that decision is still pending. After the application was dismissed EPI issued a writ of fi fa to recover the $4,700 in costs owed to it.    **(i) One company, two ARBNs**    The identity of EPI by reference to the two ARBNs was in question and the following facts were considered by French J in determining this issue:          in January and February 2002 appointments were made of a receiver and manager of EPI, and in each case the appointment referred to "Eastern Prosperity Pte Ltd ARBN 097 952 193 (previously ARBN 065 747 006)";          the directors of EPI (ARBN 065 747 006) as at its deregistration were the same as the current directors of EPI (ARBN 097 952 193), although the dates of their appointment as directors did not coincide; and          the company or companies distinguished by the two ARBNs show the same registered addresses in both Singapore and Australia.  **(ii) The argument** In response to the writ of fi fa, the applicant argued that EPI could not recover costs because the removal of its name from the register of foreign companies in February 2001 meant that the company "ceased to exist" at that time, by virtue of section 601AD(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act). The applicant contended that the costs order in favour of EPI should be set aside accordingly.  **(iii) Statutory framework**  Division 2 of Part 5B.2 of the Act deals with foreign companies. It provides, in section 601CD, as follows: A foreign company must not carry on business in this jurisdiction unless:             it is registered under this Division; or          it has applied to be so registered and the application has not been dealt with.  Section 601CL provides for removal of the name of a registered foreign company from the register on the grounds that:           ASIC has received notice from its local agent that it has been dissolved or deregistered (section 601CL(2)); or          it does not carry on business in the jurisdiction (section 601CL(3)).  The effect of removing EPI’s name from the register pursuant to these provisions is that it ceases to be registered under Div 2.   Section 601AD(1), which deals with deregistration generally, provides that ‘... a company ceases to exist on deregistration’. That, however, has no application to a foreign corporation which owes its existence to the laws of another country.  **(c) Decision**    **(i) One company**    French J found that, on the balance of probabilities, EPI is one company that was deregistered in February 2001 and registered afresh in August 2001, albeit with a new ARBN. This finding alone would have been enough to dismiss the motion to set aside the writ of fi fa to recover costs, on the basis that EPI continued to exist despite having been deregistered in February 2001.    **(ii) Legal capacity regardless of registration**    French J identified the fundamental issue not as being whether EPI was one company with different former and current ARBNs, but that a company may sue and be sued in Australian courts (and recover incidental costs) regardless of registration as a foreign company.  French J pointed out that the existence of EPI as a legal entity derives from its incorporation under the laws of Singapore, not under its registration as a foreign company which conducts business in Australia. As a matter of comity its existence as a legal entity by reason of Singapore law entitles it to recognition as a legal entity in Australia.    French J referred to the authority of Lord Wrenbury in Russian Commercial and Industrial Bank v Comptoir D'Escompte de Muhouse [1925] AC 112 at 148-149:  "There is no question but that according to private international law and according to the comity of nations a foreign corporation is for many purposes recognized as a corporation here. It may sue and be sued here in its corporate name."  More relevantly, French J referred to the authority of Feng v GMS Fulfilment Services Ltd (2004) 50 ACSR 527, a case where a plaintiff sought re-registration of a New Zealand company so that he could sue it. Barrett J dismissed the application, stating:  "... it is simply not the case that the plaintiff’s ability to proceed against the defendant for damages is precluded or prejudiced by the absence of the defendant’s name from the register of foreign corporations kept under Div 2 of Pt 5B.2 of the Corporations Act. The defendant is a “legal entity in its own right” according to the law of New Zealand ... Such a corporate entity may be made a defendant in our courts whether or not registered under Australian statutory provisions with respect to foreign companies."  On the basis of these authorities, French J concluded that EPI was able to be sued in the Federal Court notwithstanding its deregistration, and that it was entitled to representation and to defend itself and to the ordinary incidents of representation, including the capacity to apply for a costs order in its favour. Accordingly, French J dismissed the application to set aside the writ of fi fa, and ordered further costs against the applicant.  **(iii) Avoiding future confusion** French J suggested that the confusion surrounding the re-registration of foreign companies with a new ARBN could be avoided by a requirement for a company which seeks registration to disclose whether it has had a former ARBN in Australia.  **4.3 Conduct before 15 July 2001: can it amount to an offence under the Corporations Act 2001?**  (By Sally Gibson and Mark McFarlane, Mallesons Stephen Jaques)  Regina v Frawley [2005] NSWCCA 66, New South Wales Court of Criminal Appeal, Spigelman CJ, Mason P and Santow JA, 23 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/february/2005nswcca66.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/february/2005nswcca66.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The NSW Court of Criminal Appeal in Frawley had cause to consider the validity of the transitional provisions in Chapter 10 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Current Legislation”). This case note is primarily focused on the reasoning of the Court in that decision. However, central to an understanding of the operation of the transitional provisions, and how conduct prior to 15 July 2001 (the commencement date of the Current Legislation) may amount to an offence under the Current Legislation, is a consideration of two further judgments that have dealt with these matters, namely the recent decisions of the Full Federal Court in Kennedy v ASIC [2005] FCAFC 32 (10 March 2005) (“Kennedy”) and the Queensland Court of Appeal in Regina v Corbett [2004] 1 Qd R 146 (“Corbett”).  All three courts were called upon to determine whether sections 1400 (in Frawley and Kennedy) and 1401 (in Corbett) of the Current Legislation operate retrospectively to create an offence.    **(b) Facts**    In Frawley, the Commonwealth Director of Public Prosecutions had presented an indictment alleging that the Applicant committed insider-trading offences in violation of section 1002G(2) of the current Legislation on numerous occasions in 1998. The Applicant alleged in the alternative that:           the Director did not have standing to institute the prosecution; and          the indictment should be quashed on the basis it disclosed no offence known to the law.  The matter that was of primary significance to the Court’s decision - and it is a matter common to the fact situations arising in Frawley, Kennedy and Corbett - was that the conduct alleged to have amounted to a contravention of the Current Legislation was conduct that occurred prior to 15 July 2001. Essentially, the charges in the indictment presented by the Director were based on legislation that came into being subsequent to the conduct that was said to give rise to an offence: see paragraph 5 of Frawley.    **(c) Decision**  **(i) Moving to the Current Legislation**  In response to the High Court decisions of Re Wakim; Ex parte McNally (1999) 198 CLR 511 and R v Hughes (2000) 202 CLR 535, by agreement between the States and the Commonwealth, the legislative framework supporting the corporations law of each of the States was dismantled. Prior to the enactment of the Current Legislation, what was described in Kennedy as a “cooperative regime” was in place, whereby each State enacted legislation (being the [Corporations (New South Wales) Act 1990](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3886" \t "default) in New South Wales) which adopted the [Corporations Act 1989 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6668" \t "default) as the law of the State (“Previous Legislation”).  Following Re Wakim and R v Hughes, each of the States introduced legislation (being the [Corporations (Commonwealth Powers) Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=54678" \t "default) in New South Wales) to refer to the Federal Parliament, pursuant to section 51(xxxvii) of the Commonwealth Constitution, certain matters relating to corporations for the purpose of enabling the Federal Parliament to enact the Current Legislation.  Chapter 10 of the Current Legislation was drafted with the aim of providing for a “smooth transition from the regime provided for in the [Previous Legislation] to the regime provided for in the [Current Legislation]” so that all persons are, to the greatest extent possible, put in the same position immediately after the commencement as they would have been if the Current Legislation was simply a continuation of the Previous Legislation: see section 1370 of the Current Legislation and paragraph 40 of Kennedy. This aim is to be kept in mind when resolving any ambiguity as to the meaning of the transitional provisions contained in Chapter 10 of the Current Legislation: section 1370(2).  **(ii) Relevant transitional provisions**  The interpretation of section 1400 of the Current Legislation was pivotal to the judgment of Spigelman CJ (with whom President Mason and Justice Santow concurred) in Frawley. Of particular importance was the meaning attributable to sub-section (2), which provided:  “On commencement, the person acquires, accrues or incurs a right or liability (the substituted right or liability), equivalent to the pre-commencement right or liability, under the corresponding provision of the [Current Legislation] (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).” (emphasis added)  It is relevant to note that section 7(2) of the [Corporations (Ancillary Provisions) Act 2001 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56219" \t "default) (there is equivalent legislation in each of the States) provides that, if by force of Chapter 10 of the Current Legislation a person acquires, accrues or incurs a right or liability in substitution for a pre-commencement right or liability, the pre-commencement right or liability is cancelled at the relevant time and ceases at that time to be a right or liability under a law of the State.  **(iii) Invalidity of section 1400 of the Current Legislation?**  The Applicant argued that on the commencement of the Current Legislation he did not incur a liability equivalent to his pre-commencement liability. It was agreed between the parties and accepted by the Court that a pre-commencement liability arose under sections 1002G and 1311 of the Previous Legislation and that there were relevant corresponding provisions (being sections 1002G and 1311) in the Current Legislation. However, the Applicant submitted that the “equivalence” requirement of section 1400(2) could not be fulfilled by virtue of the fact that the liability under the Current Legislation (being a liability arising under Commonwealth law) could not be classified as being equivalent to the liability that existed under the Previous Legislation (being a liability arising under a State law): see paragraph 11 of Frawley.  This argument was rejected by Spigelman CJ in the following terms:  “Of course the new law does not have the quality of a State law. That was the point…The word ‘equivalent’ does not mean ‘identical’.”  The second drafting issue raised by the Applicant was also based on section 1400(2) and focused on the words in parentheses, beginning with “as if”. The interpretation to be given to the phrase “as if” was also raised as an issue by Mr Kennedy in Kennedy. Arguments were advanced in both cases that the phrase was ambiguous and could, in summary, be interpreted in one of the two following ways:           the phrase could represent some form of “deeming”, meaning that the Current Legislation would not operate retrospectively: see paragraph 13 of Frawley. In other words, “as if” serves to indicate to the reader to proceed on the basis that a real state of affairs is connoted: see paragraph 67 of Kennedy; or          the substituted liability arose directly under the Current Legislation, giving the Current Legislation a retrospective effect: see paragraph 13 of Frawley. In other words, “as if” is designed to connote to the reader to proceed on a hypothesis that is different from the actual fact: see paragraph 67 of Kennedy.  While not explicitly recorded in Spigelman CJ’s judgment in Frawley, presumably the Applicant was seeking to show (as Mr Kennedy was in Kennedy) that criminal liability will not be created by retrospective legislation without words of clear intention and, in the case of the phrase “as if”, its ambiguity evidences the lack of requisite intent: paragraph 68 of Kennedy.  Both the Court of Criminal Appeal and the Full Federal Court found that section 1400 does not operate retrospectively. For Spigelman CJ, the Applicant’s focus on “as if” was plainly “misconceived”, with the phrase having the effect of qualifying or explicating the words of the subsection designed to have the primary operative effect, being the phrase “acquires, accrues or incurs”: paragraph 14 of Frawley.  Support for Chief Justice Spigelman’s reasoning can be found in the decision of the High Court in Re Macks; Ex parte Saint (2000) 204 CLR 158, where the Court was called upon to determine the validity of legislation, enacted to deal with the invalidity of Federal Court judgments in light of Re Wakim, containing the following formula:  “rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been the same as if … each ineffective judgment of…the Federal Court of Australia…had been a valid judgment of the Supreme Court”.  The “formula” was challenged on the basis that it purported to validate ineffective judgments of the Federal Court: see paragraphs 18-21 of Frawley. The majority of the Court (Kirby J in dissent) upheld the validity of the legislation on the basis, in summary, that the legislation did not seek to alter, impair or detract from the operation of any order made by the Federal Court but created separate rights and liabilities using the order of the Federal Court only as a point of historical reference: page 159 of Re Macks.  The effect of section 1400(2) of the Current Legislation is to create criminal liability as and from the commencement of the Current Legislation. The transitional provisions create present liabilities by reference to a historical fact, being the liability existing under the Previous Legislation: see paragraphs 22 of Frawley and 71 of Kennedy.  The same conclusion was reached by the Full Federal Court in Kennedy. The judgment of the Court included an example to emphasise that section 1400 does not operate retrospectively. On 14 July 2001, Mr Kennedy was liable to be prosecuted for a contravention of s1309 of the Previous Legislation. Section 1309 is a carried over provision under the transitional provisions of the Current Legislation. As such, on 15 July 2001, Mr Kennedy’s liability to be prosecuted under section 1309 of the Previous Legislation was transformed by section 1400 of the Current Legislation into a liability to be prosecuted under section 1309 of the Current Legislation: see paragraph 69 of Kennedy.  In Corbett, the Court considered the same issues in respect of section 1401 of the Current Legislation, which is, relevantly, in identical terms to section 1400, and found that the provision does not operate retrospectively or enable the Commonwealth to prosecute what is in effect a State offence: paragraphs 24-26 of Corbett.  **(iv) Impact of the decisions in Frawley, Kennedy and Corbett**  The following examples provided in the Explanatory Memorandum to the [Corporations Bill 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=54734" \t "default) as to substituted rights and liabilities under section 1400 are validated by the Frawley decision:           if a corporation had a liability immediately before the commencement of the Current Legislation under section 588W of the Previous Legislation it has an equivalent liability under section 588W of the Current Legislation;          if a person did an act before commencement that rendered the person liable to be prosecuted for an offence against a provision of the Previous Legislation before commencement, the person has an equivalent liability to be prosecuted after commencement; and          if a person had an obligation immediately before commencement under section 1314 of the Previous Legislation to do an act, the person has an equivalent obligation to do the act under section 1314 of the Current Legislation.  The reasoning in the three decisions appears to establish the validity of not only sections 1400 and 1401 of the Current Legislation, but the transitional provisions in Chapter 10 generally. In light of the decisions it would be difficult to argue the invalidity, for example, of sections 1383 and 1384, which deal with proceedings commenced, but not concluded, before the commencement of the Current Legislation in respect of proceedings other than federal corporations’ proceedings and federal corporations proceedings respectively.  On 25 June 2003, the High Court refused special leave to appeal from the decision in Corbett, so the prospects of a successful leave application in either Frawley or Kennedy must be considered remote given the similarity of issues addressed in all three decisions.  The reasoning and the ultimate conclusions reached by the NSW Court of Criminal Appeal, the Queensland Court of Appeal and the Full Federal Court exemplify the effectiveness of Chapter 10 in ensuring a truly “smooth transition” from the regime provided for in the Previous Legislation to the regime provided for in the Current Legislation.  **4.4 Application alleging a voidable transaction under section 588FF of the Corporations Act**    (By Joel Cox, Phillips Fox)  Tolcher (as liquidator of Lloyd Scott Enterprises Pty Ltd (in Liq)) v Capital Finance Australia Ltd [2005] FCA 108, Federal Court of Australia, New South Wales, Tamberlin J, 18 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca108.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca108.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    The liquidator of Lloyd Scott Enterprises Pty Ltd ('the Company') sought interlocutory relief to support an application under section 588FF(1) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act'). The liquidator alleged the first respondent ('Capital Finance') had received money by way of insolvent transactions from the Company and brought an application for repayment under section 588FF(1) of the Act on 22 June 2004.  In the same application the liquidator also sought an order pursuant to section 588FF(3)(b) of the Act to extend the time within which any application in respect of any voidable transaction could be made. Capital Finance resisted an extension of time on the basis that the application under section 588FF(3)(b) could not be so general and required the transactions to which it related to be specified.  The liquidator also sought to join the second respondent ('Capital Corporate') to these proceedings and to extend the time limit to make an application under section 588FF(3)(b) in relation to Capital Corporate.  His Honour Justice Tamberlin found that section 588FF(3)(b) of the Act permitted an extension of time in these instances and that the joinder of Capital Corporate was appropriate. His Honour said that an application for an extension of time under section 588FF(3)(b) of the Act did not require relevant voidable transactions to be specified.    **(b) Facts**    **(i) The relevant legislative provisions**    Section 588FF(1) of the Act provides that where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE of the Act, the court may make an order directing payment of an amount paid under the voidable transaction. Section 588FE of the Act is concerned inter alia with insolvent transactions.  Section 588FF(3) provides that an application may only be made under subsection (1):           within three years after the relation back day; or          within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years.  The 'relation back day' is defined by the Act and is essentially the day on which a company is taken to be wound up.    **(ii) Extension of time under section 588FF(3)(b) of the Act**    The Company was a dealer in photo-copiers and related products in New South Wales. It entered into leasing transactions with its customers as an undisclosed agent for various financiers, including Capital Finance and Capital Corporate. The Company was put into liquidation and the liquidator formed the view that various preference payments made to Capital Finance under the lease agreements were insolvent transactions of the Company under section 588FC of the Act.  On 22 June 2004, the liquidator filed an application seeking an order directing Capital Finance to pay to the Company an amount under section 588FF(1) of the Act and this application listed various transactions. A further order sought that the period prescribed by section 588FF(3)(b) of the Act, within which any application in respect of any voidable transaction could be made, be extended.  Capital Finance resisted the application on the basis that the Court did not have power to, nor should it as a matter of discretion, grant an extension of time under section 588FF(3)(b) of the Act because the application for an extension of time was made in a general form in relation to a class of transactions and therefore lacked sufficient specificity required by the Act.    **(iii) Joinder of Capital Corporation**    Capital Finance alleged in its defence to the original accusations that certain relevant payments were made to Capital Corporate. Capital Corporate had been deregistered as from 18 January 2004, however, upon becoming aware of these payments, the solicitors for the liquidator indicated that they would be seeking reinstatement of this company under section 601AH of the Act and the consequent joinder of Capital Corporate to the proceedings. Capital Corporate was subsequently reinstated and the liquidator sought an order that it be joined to these proceedings.  Capital Finance resisted this on the basis that at the date of the commencement of the proceedings, so far as concerns Capital Corporate, the joinder would fall outside the three year limitation period contemplated by section 588FF(3) of the Act and any joinder would therefore be futile.    **(c) Decision**    **(i) Extension of time under section 588FF(3)(b) of the Act**    His Honour Justice Tamberlin rejected the respondent's contention that an application for an extension of time under section 588FF(3)(b) of the Act needed to specify the transactions to which it related. He said:  'There is nothing in the language of section 588FF(3)(b) that expressly requires any application for an extension to specify a particular transaction as opposed to a class or category of transactions.'  His Honour referred to the judgment of Spigelman CJ (with whom Mason P and Handley JA agreed) in BP Australia Ltd v Brown (2003) 58 NSWLR 322, at 168, who said:  “The power to extend the time limit for commencing proceedings is intended for the circumstance in which a liquidator is not in a position to commence proceedings within three years of the relation-back day, for whatever reason, subject to the assessment of the Court of all relevant circumstances, including the liquidator's conduct…The power should be broad enough to allow, in those circumstances, for an order granting an extension of time in general terms.”  His Honour found that the weight of authority and legal reasoning, together with the literal meaning of the Act and practical commercial considerations supported his conclusions.  His Honour referred to Greig & Duff v Australian Building Industries Pty Ltd (2004) 2 Qd R 17 (Greig & Duff), where the Queensland Court of Appeal reached a different conclusion. In that case, Jerrard  JA said at 111:  “I agree with the view expressed by Williams JA that s 588FF(3) does not, as a general rule, authorise blanket applications made ex parte and without any identification in the application (or order made) of any person or persons against whom an application may ultimately be made for any one of the variety of orders provided for in s 588FF. These are all orders requiring carefully prepared applications, and it seems incongruous that s 588FF(3) should be construed as allowing a (necessarily very specific) ‘application under subsection (1)’ to be made within such extended period as the court orders, on an application brought ex parte in the broadest possible terms.”  However, Justice Tamberlin said that other courts had expressed the view that some circumstance could take the case out of the general rule expressed above. His Honour found that the present circumstances were such.  **(ii) Joinder of Capital Corporation**    His Honour held that the effect of an order made pursuant to section 588FF(3) of the Act, which extends time, is that the proceeding may be commenced by making the application under section 588FF(1) of the Act. His Honour said that the provision is not directed to an amendment of an existing claim, but rather with the bringing of a new claim. Therefore Capital Corporation could be joined and the liquidator could make an application under section 588F(1) of the Act pursuant to the extension granted.  **4.5 Court’s power to validate an invalid deed of company arrangement**    (By Sabrina Ng and Martin Squires, Corrs Chambers Westgarth)  Edward Gem Pty Ltd, in the matter of ACN 005 973 688 Pty Ltd (In liq) [2005] FCA 74, Federal Court of Australia, Merkel J, 16 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca74.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca74.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    The Court found that it had power under section 447A(1) to validate an invalid Deed of Company Arrangement which would take the company named ACN 005 973 688 Pty Ltd (“ACN”), out of voluntary liquidation.    **(b) Facts**    The creditors of ACN (in administration) resolved that ACN enter into a Deed of Company Arrangement. Pursuant to section 444B(2)(a) the Deed had to be executed by 3 February 2005 but was not executed until the next day.  By the time the Deed was executed, ACN was in voluntary liquidation because of the operation of section 446A(2) and did not have the capacity nor the entitlement to execute the Deed.  Edward Gem Pty Ltd, a creditor, applied for orders under section 447A that the time limit in section 444B(2)(a) be extended to 22 days, hence validating the Deed.    **(c) Decision**    Merkel J made the order sought, swayed by the fact that there was no evidence of any third party rights accruing by reason of the liquidation which would be adversely affected by the order.  Merkel J considered whether ACN’s liquidation was an “insuperable discretionary obstacle” to making the order but decided it was not since the Act otherwise provides for companies to be placed into and taken out of liquidation.  **4.6 Possible criminal sanctions relevant to civil penalties for insider trading**    (By Darrel Chia, Mallesons Stephen Jaques)  Australian Securities and Investments Commission v John Petsas and Marc Miot [2005] FCA 88, Federal Court of Australia, Finkelstein J, 15 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca88.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/february/2005fca88.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    This appears to be the first occasion where a judge has been required to impose a civil penalty on a person who has contravened the insider trading provision, section 1034A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Finkelstein J stated that it went without saying that the profits from the trading should be disgorged.  The issue was whether in imposing a civil penalty, a judge can take into account the fact that the offender would have been imprisoned on the same facts had the matter proceeded as a criminal trial. On the basis of this consideration, and the need for deterrence even in civil prosecution, Finkelstein J decided that “at least a moderate penalty” should be imposed in this case. This decision gives guidance on how this consideration can be applied in assessing the quantum of a civil penalty.    **(b) Facts**    BRL Hardy Ltd (BRL) is a public company listed on the ASX, with call options on its shares traded on the Derivatives Trading Facility operated by the ASX. In late November 2002, Constellation Brands Inc (Constellation), a US corporation and one of the world’s largest producers and suppliers of alcoholic beverages, entered into confidential discussions with BRL about a possible merger.  BRL’s banker, Australia and New Zealand Banking Group Limited (ANZ) was retained to assess the impact of the merger on BRL. At the time, Mr Petsas worked as a client manager in ANZ’s Institutional Food Beverages and Agribusiness section which was involved in the assessment (although Mr Petsas was not personally involved in the matter).  On 13 January 2003, Mr Petsas acquired information about the existence of confidential merger discussions between BHL and Constellation from the ANZ’s computer system. On obtaining this information, Mr Petsas communicated the information to his friend, Mr Miot and they agreed to purchase call options over BRL shares in Mr Miot’s name. Mr Miot acquired 95 BRL Hardy call option contracts on the same day.  Both Mr Petsas and Mr Miot were aware at all material times that:           the information was not generally available; and          if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of BHL securities.  The next day, BRL announced it was in merger discussions with Constellation and the price of its shares eventually rose to $10.50, being the cash value attributed to the shares under the proposed merger and effected by a scheme of arrangement. Mr Miot started selling the options on that day, eventually making a total profit of $128,495.15.  ASIC discovered these illegal purchases and the defendants admitted their wrongdoing. ASIC prosecuted the defendants for breach of section 1043A of the Act which under section 1311 attracts criminal liability of a penalty and/or imprisonment, as well as a civil penalty under section 1317G. ASIC elected to conduct the prosecution as a civil trial.    **(c) Decision**    In imposing a civil remedy when on the same facts in a criminal court the offender would have been imprisoned, should the judge attempt to achieve equivalence or disregard this consideration? Finkelstein J noted that the traditional distinction between criminal and civil proceedings has for some time been collapsing, for various reasons.  He considered that serious inequality in sentencing must be avoided, citing Mason J in Lowe v The Queen (1984) 154 CLR 606, 610-611 for the proposal that:  “the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community”.  Finkelstein J considered that putting aside the personal considerations that must be taken into account, the sentence that could be imposed in a criminal court in this case would be a minimum of 3-6 months imprisonment, together with an order for restitution. Although it is impossible to calculate the monetary value of a term of imprisonment, Finkelstein J regarded this as a relevant factor in deciding to impose “at least a moderate penalty” of $75,000 on Mr Petsas for contravention of section 1043A(1)(d) of the Act and $65,000 on Mr Miot for contravention of section 1043A(1)(c) of the Act. Mr Petsa’s offence was the more serious of the two because he had breached his position of trust with ANZ to keep market sensitive information secret and not to make personal use of this information.  In addition, the defendants were jointly required to disgorge their total profits of $128,495.15 to compensate the companies that had sold option contracts to them and who had consequently suffered a corresponding loss. The defendants were also jointly required to pay ASIC’s costs fixed in the sum of $93,254.00.  To assess the impact of a likely term of imprisonment were the proceedings held in a criminal court, Finkelstein J also took note of the following considerations:                 the additional stigma of a criminal conviction attaching to a first time offender;                section 4B of the [Crimes Act 1914](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default) which allows a sentencing judge in an appropriate case to convert a prison sentence to a monetary penalty according to a certain formula;                that general deterrence may require imposing a greater penalty than would be required if specific deterrence were the only consideration;                ensuring that the punishment fits the crime and adheres to the concept of justice; and                the personal circumstances of each defendant, including any mitigating factors.  **4.7 Breach of directors’ duties in the context of a reduction of capital**    (By Isabel Knott, Freehills)  Doyle v Australian Securities and Investments Commission [2005] WASCA 17, Supreme Court of Western Australia, Wheeler, McClure and Jenkins JJ, 11 February 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/february/2005wascaa17.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/february/2005wascaa17.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The case involved an appeal against a decision that the appellants had contravened directors’ duties provisions of the former Corporations Law 1990 (Cth) (Law). The impugned conduct related to the return of money paid for the issue of shares and securities in Chile Minera NL (the Company). The judge at first instance held that:           the first appellant (Doyle) contravened section former 232(6) of the Law by making improper use of his position as a director to gain an advantage for an associated entity;           the first appellant was banned from acting as a director for two years and a pecuniary penalty of $30,000 was imposed;          the second appellant (Satterthwaite) contravened former section 232(4) of the Law by reason of his failure to exercise the degree of care and diligence that a reasonable person in a like position would exercise in the circumstances; and          the second appellant was banned from acting as a director for two years and a pecuniary penalty of $5000 was imposed.  The appeal was heard by the Full Court of the Supreme Court of Western Australia. The Court dismissed Doyle’s appeal on liability but upheld his appeal against penalty. The Court upheld Satterthwaite’s appeal on liability.  **(b) Facts**  In October 1996, the Company issued shares and options to Doyle Capital Partners Pty Ltd (DCP) and its clients for a subscription price of $400,000 (the placement). Doyle was a director and shareholder of DCP. The placement money was paid to the Company on the basis that the shares would rank pari passu with existing shares. However, the placement breached ASX Listing Rule 7.1 and ASX subsequently informed the Company that the shares could not be voted at the Company’s forthcoming annual general meeting.  On 21 November 1996, the day before the Company’s annual general meeting, Doyle wrote to the directors of the Company on behalf of DCP requesting the return of the placement money on the basis that the shares did not rank pari passu with existing shares in relation to voting rights. On the same day, Doyle attended a directors’ meeting as an alternate director. Satterthwaite was also present at the meeting. The directors resolved to cancel the allotment of shares and return the placement money to DCP (the first resolution). Later that day, Doyle and Satterthwaite signed a circular resolution concerning the payment (the Circular Resolution) and then Satterthwaite and another director arranged for a bank cheque of $400,000 payable to DCP.  Doyle was appointed a temporary director of the Company on 22 November 1996 so that he could attend that day’s annual general meeting as a director. Following the annual general meeting, a further directors’ meeting took place at which a resolution to return the subscription money was passed (the third resolution). Doyle was then handed the cheque payable to DCP. The minutes did not record any mention of Doyle declaring a conflict of interest or of not voting on any resolution.  On 17 December 1996, the Company received counsel’s opinion that the payment of $400,000 amounted to a reduction in share capital to which former section 195 of the Law applied. The requirements of section 195 had not been complied with. On 19 December 1996, the Company requested that DCP return the subscription money and three days later Doyle informed the Company that he would not return the placement money.  It was accepted that Doyle was a director of the Company at all relevant times and that he had a material personal interest in the matter of whether the subscription money should be returned to DCP.  **(c) Decision**  **(i) Was the payment to DCP an unlawful reduction of capital?**  The Court considered whether the payment of $400,000 to DCP constituted an unlawful reduction of capital or whether it could properly be characterised as the compromise of an arguable claim that the placement was void or voidable. The High Court in Commonwealth Homes & Investment Co Ltd v MacKellar (1939) 63 CLR 351 established that a company can reduce its share capital without recourse to section 195 of the Law if the contract and associated allotment is void, voidable and has been avoided or there is a bona fide compromise of a claim that the allotment or contract is void or has been lawfully avoided. The trial judge found that the claim was arguable but that, on the facts, there had not been a bona fide compromise.  The Court stated that DCP’s purported avoidance of the placement and the Company’s purported cancellation of the allotment resulted in a reduction of capital. However, the Court was satisfied that the arrangement by which the placement money was held on trust by DCP pending the resolution of the surrounding legal issues was a compromise of an arguable claim that the placement was voidable. This was found to be the case even though the parties differed as to whether counsel’s opinion would be determinative of DCP’s legal entitlement to the return of the subscription money. The compromise was bona fide and, therefore, there was no unauthorised reduction of capital.  **(ii) Did Doyle breach section 232(6) of the Law?**  The requisite connection between improper use and gaining an advantage or causing a detriment is purposive rather than causal. Doyle’s presence at the board meetings on 21 and 22 November and his voting on the first, third and Circular Resolution amounted to improper conduct. The Court accepted that Doyle’s purpose in engaging in the improper conduct was to advantage the allottees, including DCP, by securing the return of the money when the question of the allottees’ legal entitlement to it remained in question.  Doyle contended that, despite his presence, he did not vote at the relevant directors’ meetings. In reliance upon the contemporaneous documentary record, the Court concluded that Doyle did vote. Doyle’s execution of the Circular Resolution provided compelling support for this view. Further, had the directors been conscious of acting in accordance with Doyle’s constraints, the minutes would be expected to acknowledge that fact. The Court found in the alternative that even if Doyle did not vote, but was present at the relevant meetings, Doyle’s opportunity to put DCP’s case would constitute an improper use of position for a relevantly improper purpose.    **(iii) Doyle’s appeal against liability was dismissed**    The Court also dismissed Doyle’s appeal against the finding of the trial judge that his contravention was serious for the purposes of section 1317EA. The Court held that there was a reasonable basis for the finding of seriousness because Doyle was present and actively participated in the meetings and voted on resolutions in which he had a material personal interest and that he did so for the purpose of benefiting a third party.  **(iv) Whether Satterthwaite in breach**  The Court held that the evidence did not support the trial judge’s findings that the Company’s interest in the placement money was entirely unprotected and that Satterthwaite failed to take any measures to ensure the money could be recovered if necessary. The moneys were held in trust pending resolution of the relevant legal issues.  The Court held that, there having been a bona fide compromise of DCP’s claim, it was not satisfied that a breach of duty could be established simply by virtue of the Company ceasing to have unilateral control over the placement money or failing to secure DCP’s agreement to repay the money if counsel advised that the capital reduction was unauthorised.  Satterthwaite’s appeal against liability was upheld.  **(v) Appeal against the penalty imposed on Doyle**  The trial judge’s erroneous finding that there was an unauthorised reduction of capital coloured his approach to penalty and enlivened the Court’s supervisory jurisdiction. The Court concluded that there was a clear and obvious conflict of interest to Doyle’s knowledge and that his conduct amounted to a fundamental intentional breach of a basic and well-known standard of corporate behaviour. The Court was not satisfied that Doyle was a fit and proper person to manage a corporation. However, having regard to Doyle’s previous good character and reputation and the fact that there was no unauthorised reduction of capital, the Court concluded that a relatively short period of prohibition would be appropriate. The prohibition order of two years was set aside and replaced with an order for six months. The pecuniary penalty was not altered.  **4.8 Service of statutory demand**    (May Yeung, Blake Dawson Waldron)  Derma Pharmaceuticals Pty Ltd v HSBC Bank Australia Ltd [2005] SASC 48, Supreme Court of South Australia (Full Court), Duggan, Besanko and White JJ, 10 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/february/2005sasc48.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/february/2005sasc48.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    It is an essential condition to exercising the right to set aside a statutory demand under section 459G of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) that the application is made within 21 days after service of the statutory demand. The Court does not have jurisdiction to extend the time limit.  In this case, receipt by the Appellant of the statutory demand did not occur simultaneously with service of the statutory demand. The statutory demand was taken to be held at the Appellant's registered office more than 21 days prior to the date of the application. The statutory demand was later sent to, and received by the Appellant, at the Appellant's business address (which was at a different location to the registered office).  The Court found that the statutory demand was served in accordance with under section 109X(1)(a) of the Corporations Act at the point when it was held at the registered office. The Appellant applied to have the statutory demand set aside within 21 days of receiving it at its business address, but failed in its attempt because service of the statutory demand occurred at the registered office more than 21 days before the date of the application.    **(b) Facts**    HSBC Bank Australia Limited (Respondent) withdrew credit facilities it had provided to Derma Pharmaceuticals Pty Ltd (Appellant). The Respondent issued a statutory demand dated 9 October 2003 under section 459E of the Corporations Act.  On 13 October 2003, the Respondent's solicitors mailed the statutory demand via express mail to the registered office of the Appellant, which was, at the time, care of an accounting firm in South Australia. The statutory demand was received at the relevant post office in South Australia on 14 October 2003.  The accounting firm held a post box at the post office. The practice of the post office was to deposit the accounting firm's mail in that post box instead of delivering it to the firm's premises. On 14 October 2003, the post office received the statutory demand and placed it in the accounting firm's post box.  The Appellant received the statutory demand at its business address (at another location in South Australia) on 24 October 2003.  On 13 November 2003, the Appellant applied for an order under s459G of the Corporations Act to set aside the statutory demand. The Master dismissed the application on the grounds that the appellant failed to satisfy the requirement under s459G that the application be made within 21 days of the statutory demand being served. Drawing an inference, the Master found that service of the statutory demand occurred at some point between 14 October and 23 October 2003 – more than 21 days before the date of the application.    **(c) Decision**    The Supreme Court unanimously dismissed the appeal. Besanko J gave the leading judgment.    **(i) Service of the statutory demand occurred more than 21 days before the application**    Section 459G(2) provides that an application to set aside a statutory demand can only be made within 21 days after the demand is served. To succeed, the Appellant had to establish that service of the statutory demand occurred 21 days or less before it made its application to have it set aside on 13 November 2003 – ie that the statutory demand was served on or after 23 October 2003.  The Court upheld the Master's decision that the statutory demand was served in accordance with section 109X(1)(a) of the Corporations Act between 14 and 23 October 2003 and therefore, found that the Appellant failed to satisfy the time limit.  The Master determined the date of service by drawing an inference that, after the statutory demand was placed in the accounting firm's post box on 14 October 2003, an employee of the accounting firm, between 14 to 23 October 2003, cleared the post box, took the statutory demand to the accounting firm (that is, the Appellant's registered office) and then sent the statutory demand to the Appellant's business address. Section 109X(1)(a) of the Corporations Act provides that a document may be served by "leaving it at" or posting it to, the registered office of a company – in this case, the accounting firm. The statutory demand was not left at the accounting firm by the Respondent or its agent, however the Appellant did not argue this was a requirement of section 109X(1)(a). The Master decided that so long as the statutory demand was for a time, however briefly, held at the accounting firm, then at that point service on the Appellant within section 109X(1)(a) was effected.    **(ii) Time limit cannot be extended**    The Court rejected the Appellant's submission that despite the conclusion that the statutory demand was served prior to 23 October 2003, the application should nevertheless have been permitted in the circumstances (it was clearly proved that the Appellant did not receive the statutory demand until 24 October). Citing Gummow J in David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation, the Court held that the 21 day time limit is an essential condition of the jurisdiction of the Court to make an order under section 459G and cannot be extended.    **(iii) Obiter – deemed service by post**    Besanko J also considered the Respondent's submission that under, section 29(1) of the [Acts Interpretation Act 1901 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "default) (which is taken to apply to the Corporations Act under section 5C(1) of the Act), the statutory demand was deemed to have been delivered in the ordinary course of post within two days (that is, on 15 October 2003).  Section 29(1) of the ActsInterpretation Act provides that:  “Where an Act requires any document to be served by post… the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.  The Master found that "the contrary was proved" – the act of placing the statutory demand in the accounting firm's post office box instead of delivering it to the accounting firm's address excluded the deeming provision. Justice Besanko referred to cases which may have supported an opposite conclusion, but did not pursue the possibility as the cases were not cited by either counsel and the Court had already reached a decision to dismiss the appeal (for the reasons discussed above).  **4.9 Clear wording of offer documents**    (By Tania Chahine)  Aevum Limited v National Exchange Pty Limited [2004] FCA 1781, Federal Court of Australia, Emmett J, 20 January 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1781.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1781.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**    This was a case brought by Aevum Limited and the Australian Securities and Investments Commission ("ASIC") in two separate proceedings. ASIC commenced its action partly out of concern that Aevum did not have standing to claim the relief sought in its proceedings. The two proceedings were heard separately. However, on request, one judgment was given in respect of both proceedings.  The plaintiffs claimed that the offers made by National Exchange Pty Limited ("NE") did not comply with certain provisions of Division 5A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The Court found that NE had not complied with section 1019E(2) as the offer documents were not sent to the offerees as soon as practicable after the date of the offers, and further, that section 1019G(2) had not been complied with, as the offers were not expressed to remain open for at least one month. However, the Court did not agree with the plaintiffs that NE had engaged in misleading and deceptive conduct.  Accordingly, the Court ordered that NE send the members of Aevum a letter informing them of their rights under section 1019K(3) to refuse to transfer, or to seek the return of their shares.    **(b) Facts**    On 29 September 2004, Aevum published a prospectus offering 11.1 million new shares for subscription at 90 cents each. On 27 October 2004, Aevum wrote to its members to inform them that the offer under the prospectus was open.  On or around 1 to 2 November 2004, the members of Aevum received a written offer by NE to buy the shares in Aevum held by the recipient ("the offer document") for 35 cents per share. The offer document contained an estimate by NE of the value of the shares as being within the range $0.90 to $1.29 per share. That estimate was followed by a statement that the estimate was given to satisfy a legal requirement and should not be considered to be a valuation. The offer document, although dated 22 October 2004, was not sent to members of Aevum until 28 October 2004.  The plaintiffs alleged that:           NE contravened section 1019E of the Corporations Act 2001 (Cth) in that the offers were not sent to the members of Aevum as soon as practicable after 22 October 2004, being the date of the offers;          NE contravened section 1019G(2) (which provides that an offer may be withdrawn by the offeror at any time but not within one month of the date of the offer), by representing that the offers would be withdrawn on the earlier of the following two times: (i) 5pm on 10 November 2004; or (ii) the time when the total number of shares in Aevum in respect of which NE had received acceptances under the first offer exceeds 3,350,000;          NE contravened section 1019G(3) (which provides that an offer can only be withdrawn by the offeror by the sending of a withdrawal document) as it represented in its offers that they could be withdrawn by NE publishing a notice in the Australian newspaper;          NE contravened section 1019I(4) in that the offer document was not worded and presented in a clear and effective manner;          the offer document was misleading or deceptive within the meaning of sections 1019K, materially misleading within the meaning of section 1041E(1) or misleading the public within the meaning of section 12DF(1) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default); and          the conduct of NE in sending the offer documents to members of Aevum was unconscionable, in contravention of sections 12CA, 12CB, 12CC of the Australian Securities and Investments Commission Act 2001 (Cth).  **(c) Decision**    **(i) Section 1019E(2)**    NE submitted that the delay in sending the offer documents to Aevum's members was due to the fact that further revisions had been made to the documents, and there had been confusion with the printing company over the fees payable.  The Court found that NE had taken a "somewhat leisurely attitude towards the despatch of the offer documents" to the members of Aevum. It found that had appropriate enquiries and arrangements been made before sending the documents to the printing company, the printing and despatch of the offer documents could have been effected within 24 hours of the final form of the documents being provided to the company. Accordingly, the Court held that NE breached section 1019E(2) and it followed that any members who had accepted the offer made by NE had the right under section 1019K to refuse to transfer the shares, or to have the shares returned to the member (as the case may be).    **(ii) Section 1019G**    The question before the Court was whether section 1019G(2) prohibits an offer containing a term that the offer will lapse after a specified period of time of less than one month or upon occurrence, within one month, of a particular condition, if not accepted before that time.  Aevum contended that section 1019G(2) should be construed so as to require an offer to remain open for at least one month.  The Court stated that although there was nothing in the section that expressly said that an offer must remain open for any minimum period of time, such as one month, it agreed with the plaintiffs that the underlying intention of the provision (in light of the other provisions of the Act) was that the offer remain open for at least one month to allow the offeree an adequate opportunity to consider the merits of the offer and to obtain advice in relation to it.  Accordingly, the Court found that NE had not complied with section 1019G(2) so construed.  However, Aevum's formulation of the claim was that NE contravened section 1019G(2) by representing that the offer would be withdrawn upon the earlier of the two times specified. The Court stated that the prohibition was not against making representations, and hence the remedy in section 1019G(4), which provides that a purported withdrawal contrary to section 1019G(2) would be ineffective, was not attracted.  In relation to Aevum's claim that NE had contravened section 1019G(3), the Court found that the placing of a notice by NE in The Australian would not be a withdrawal, but was merely a method whereby NE will notify offerees that the offers have terminated, by lapse of time or occurrence of a condition. There was no representation in the offer document that the offer could be withdrawn in a particular way.    **(iii) Section 1019I(4)**    The plaintiffs argued that by breaching section 1019G(2), the wording of the offers was not clear, concise and effective, and hence NE breached section 1019I(4). However, the Court found that the offer document was explicit in its wording and the failure to comply with section 1019G(2) was that a remedy under section 1019K(3) was attracted only. There was no failure to comply with section 1019I(4).    **(iv) Misleading and deceptive statements**    In relation to the claim that the offers made by NE were misleading and deceptive, the Court found that on the evidence, it was fair to conclude that a substantial number of the shareholders who purported to accept the offers were confused and misapprehended the value of their shares. This was adduced from the fact that 22 acceptance forms were sent to Aevum instead of NE, suggesting that members may have perceived some connection between the two, and the fact that a majority of the members elected not to proceed with the sale after being given the opportunity of withdrawing by the Court.  However, the Court stated that it did not follow that any such confusion or misapprehension was in any way connected with the form of the offer document sent by NE. The confusion was likely to have resulted from the fact that members received two communications around the same dates, the offer from NE, and a letter from Aevum, which amounted to two different invitations to dispose of their shares.  Further, the Court held that in making unsolicited offers to specific shareholders of Aevum, NE could not be said to be engaging in conduct that was liable to mislead the public.    **(v) Unconscionable conduct**    While the Court acknowledged that a particular member of Aevum may be successful in a claim against NE for unconscionable conduct, that was not the claim that had been made in this case. It found that it was inappropriate to make a declaration or grant any other relief as to unconscionable conduct except at the suit of a specific person who seeks relief in relation to that conduct.    **(vi) Standing of Aevum**    Aevum contended that its interests had been, or would be, affected by NE's conduct in contravention of the Act, such that it had standing under section 1324 of the Act. The Court found that, in so far as the circulation of such offer documents affected the market for shares in Aevum generally, Aevum may have had standing to seek orders restraining that conduct. However, Aevum had sought to exercise a paternalistic interest on behalf of its members instead. Accordingly, it did not have standing pursuant to section 1324 of the Act.  **4.10 Unclean hands not a barrier to a successful winding up application**    (By John-Paul Cashen, Corrs Chambers Westgarth)  Pham Thai Duc v PTS Australian Distributor Pty Ltd [2005] NSWSC 98, New South Wales Supreme Court, Barrett J, 24 February 2005  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/february/2005nswsc98.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/february/2005nswsc98.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)    **(a) Summary**  This case involved the breakdown of a relationship between two parties who were the only directors and shareholders of a company. One director successfully applied for a winding up order to be made on the basis that it was “just and equitable” under section 461(1)(k) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  The court found that the relationship between the directors, Mr Pham and Mr Tang had been irreparably damaged. The directors were not able to conduct board meetings or communicate with each other and as a result the company was not able to be administered appropriately. This was sufficient to constitute just and equitable grounds for winding up.  The court considered arguments that Mr Pham should not be entitled to seek winding up on just and equitable grounds because he may have breached fiduciary duties owed to the company. However the court found that a failure to come to the court with clean hands was not a complete bar to a successful application. While the applicant’s responsibility for the circumstances which led to the winding up application are a relevant factor the court held that Mr Pham’s degree of fault was not sufficient to deny the application and had to be considered in light of the corresponding inappropriate behaviour of Mr Tang.    **(b) Facts**  Mr Pham and Mr Tang were the only directors and shareholders of PTS Australian Distributor Pty Ltd (PTS) which was formed in 1995 and carried on a grocery retailing business. In 1997 PTS moved premises and undertook a new lease after the lease over the original premises had expired. These new premises were refurbished over several months.  After relocation to the new premises Mr Pham single-handedly entered into a franchise agreement with IGA. He and his associates undertook all expenses, and conducted the business for their own benefit. This business was later sold and the Pham interests did not recognise any rights of PTS.    **(i) Alleged breach of fiduciary duties**  Both Mr Pham and Mr Tang claimed that the other had breached fiduciary duties owed to the company. Those claims were the subject of separate proceedings. Mr Tang claimed that by running the business for his own benefit at the new premises Mr Pham had diverted interests and corporate opportunities to himself which had properly belonged to PTS. Mr Pham claimed that Mr Tang had failed to contribute funds he had undertaken to provide in relation to the relocation of the business and that he had wrongfully appropriated property of PTS.    **(ii) Orders sought**  Mr Pham sought a winding up order under section 461(1)(k) of the Corporations Act 2001 (Cth) on the basis that a fallout between the directors had left the business unable to continue trading and that in those circumstances, it was just and equitable that the business be wound up. Mr Pham also sought winding up on the alternate grounds that PTS had suspended its business for more than one year (section 461 (i) (c)). The court was not ultimately required to consider these alternate grounds.  Counsel for Mr Tang conceded that the parties had fallen out and that the business was effectively unable to trade due to the inability to conduct board meetings, keep records of the company and generally consult on business matters. He also asserted, however, that the business needed to be kept alive in order to deal with pending matters. These matters related primarily to litigation that was already on foot between PTS, Mr Tang and Mr Pham in relation to the alleged breaches of fiduciary duties.    **(c) Decision**  Justice Barrett had no difficulty in finding that grounds had been established for winding up orders on just and equitable grounds under section 461(1)(k). He found that there is a clear public interest in consultation amongst directors in the manner in which company law requires. The failure of Mr Pham and Mr Tang to have board meetings and maintain proper books and records meant that the company was not being properly administered. Barrett J stated that “there has been a complete breakdown in relations between Mr Pham and Mr Tang. PTS cannot be managed and administered as it should be”.    **(i) Carrying on of business by one director cannot mask company’s problems**  There was evidence that Mr Tang had been in de facto control of PTS. He had performed administrative functions such as filing documents with ASIC and attending to the company’s banking. There was also evidence however that Mr Tang had made representations that he was the sole director of the company and had lodged notices with ASIC which incorrectly stated that resolutions had been passed by both directors.  Barrett J found that PTS was not being properly administered. The fact that one director was carrying on the basic functions of the business could not protect a company from a finding it was not operating properly, particularly when the director’s actions were in some cases outside his authority. Barrett J noted that “it is a case in which records have been falsified and misrepresentation has been engaged in in an attempt to mask the paralysis by which the company is afflicted.”    **(ii) Unclean hands not an absolute bar to a successful application**  Barrett J considered whether the fact that Mr Pham had allegedly acted in breach of his fiduciary duties owed to PTS should prevent him from obtaining a winding up order on just and equitable grounds.  Barrett J cited Santow J in Ruut v Head (1996) 20 ACSR 160 who stated that the requirement of clean hands cannot be an absolute bar to an applicant in a winding up application. In many instances both parties will come with unclean hands and this should not prevent the granting of the order. Nevertheless, Barrett J considered that the actions of the applicant should still be an important consideration for the Court when deciding whether or not to grant the order.  Barrett J found that this case was an instance where both parties contributed to the breakdown upon which Mr Pham sought the winding up order. The test he chose to apply was whether the degree of fault on the part of the applicant for winding up (Mr Pham) was such as to make it inappropriate to accede to his application. In the circumstances, Barrett J found that Mr Pham’s fault, when considered in context with Mr Tang’s, was not enough to deter the court from making the winding up order.    **(iii) Cost of liquidator not relevant**  The court rejected Mr Tang’s submission that the court should refuse the winding up order because of the cost involved in appointing a liquidator. Barrett J noted that the cost of a liquidator is an incident of every winding up. This cost will rarely, if ever, be enough alone to cause the court to not make a winding up order. |
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