http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/lawlex_newsfeed.gif

|  |
| --- |
| **Important notice:** You may use this material for your own personal reference only. The material may not be used, copied or redistributed in any form or by any means without a LAWLEX enterprise wide subscription.  **Corporate Law Bulletin**  **Bulletin No. 108, August 2006**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au), Director, Centre for Corporate Law and Securities Regulation  Published by [LAWLEX](http://www.lawlex.com.au/" \t "default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Stock Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new), [Phillips Fox](http://www.phillipsfox.com/" \t "_new).  ***Use the arrows to navigate easily across the bulletin*** [[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#top)= back to Brief Contents [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)= back to top of current section |
| **Brief Contents** |
| |  |  |  | | --- | --- | --- | | [**1. Recent Corporate Law and Corporate Governance Developments**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#h1)  [**2. Recent ASIC Developments**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#h2)  [**3. Recent ASX Developments**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#h3)  [**4. Recent Takeovers Panel Developments**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#h4)  [**5. Recent Corporate Law Decisions**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#h5)  [**6. Contributions**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#6) |  | [**7. Subscription**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#7)  [**8. Change of Email Address**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#8)  [**9. Website Version**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#9)  [**10. Copyright**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#10)  [**11. Disclaimer**](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#11) | |
| **Detailed Contents** |
| **[1. Recent Corporate Law and Corporate Governance Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm" \l "1)**  [1.1 Global developments in internal control](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#011) [1.2 Parliamentary Joint Committee report on statutory oversight of ASIC](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#012) [1.3 Simpler Regulatory System Bill](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#013) [1.4 International CEO survey on global corporate issues](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#014) [1.5 Hedging of ‘at risk’ pay](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#015) [1.6 Transparency reporting by auditors](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#016) [1.7 SEC offers further relief from section 404 compliance for smaller public companies and many foreign private issuers](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#017) [1.8 Annual director pay in the US increased 6.1% in 2005](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#018) [1.9 UK executive remuneration study](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#019) [1.10 Appointment of directors to the top 100 ASX companies and NED fees: study](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0110) [1.11 Canada’s securities regulators develop governance regime for investment funds](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0111) [1.12 Audit practice alert regarding timing and accounting for stock option grants](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0112) [1.13 European Commission enables public access to all national financial services legislation](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0113) [1.14 State governments oppose abolition of rule allowing 100 shareholders to call EGM](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0114) [1.15 SEC votes to adopt changes to disclosure requirements concerning executive compensation and related matters](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0115) [1.16 Risk management and internal control: recommendation](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0116) [1.17 Call to stop ‘short-term obsession’ with financial results](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0117) [1.18 Canadian regulators seek comments on soft dollar arrangements](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0118) [1.19 The Takeovers Panel: research study](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0119)  [1.20 Study of activist hedge funds](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0120) [1.21 More large US companies reporting on social and environmental issues](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0121) [1.22 Seminar – company directors and corporate social responsibility](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0122)  **[2. Recent ASIC Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm" \l "2)**  [2.1 ASIC policy on how to deliver product disclosure about super investment strategies](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#021) [2.2 ASIC reports on Australian Clearing House Pty Ltd and ASX Settlement and Transfer Corporation Pty Ltd](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#022) [2.3 ASIC accepts a legally enforceable undertaking from AMP financial planning](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#023)  **[3. Recent ASX Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm" \l "3)**  [3.1 ASX/SFE Merger](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#031) [3.2 ASX welcomes assessment of its market support structures](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#032)  **[4. Recent Takeovers Panel Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm" \l "4)**  [4.1 Nexus Energy Limited - decision](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#041)  **[5. Recent Corporate Law Decisions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm" \l "5)**  [5.1 Director is ordered to indemnify the Commissioner of Taxation for the repayment of unfair preference payments by company whilst insolvent](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#051) [5.2 Indemnity of a director against liabilities associated with defending defamatory imputations](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#052) [5.3 Breach of officers’ duties – penalties imposed](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#053) [5.4 Special purpose administrators – when will they be appointed?](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#054) [5.5 Effectiveness of steps taken to remove directors from office](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#055) [5.6 Employees, confidentiality covenants and restraint of trade](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#056) [5.7 Application of surplus assets under section 501 of the Corporations Act following a winding up](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#057) [5.8 Vague and unsubstantiated promises by a related company are insufficient to establish solvency](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#058) [5.9 Determining whether an application for the adjournment of a winding-up order is in the best interests of a company's creditors](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#059) [5.10 A meeting must consist of more than one person where multiple persons are entitled to attend and vote](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0510) [5.11 Effect of deeming provisions in the company constitution, procedural irregularities and operation of section 1322(2) of the Corporations Act](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm#0511)  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1** **Global developments in internal control**  In recent years, global guidance and regulations have focused on the development and strengthening of internal control systems as a means of minimizing business risk and protecting shareholder investments. A new publication, “Internal Controls - A Review of Current Developments”, released on 22 August 2006, by the International Federation of Accountants' (IFAC) Professional Accountants in Business (PAIB) Committee, summarizes key internal control frameworks, highlights recent legislative and other initiatives, and discusses the role of internal control in enhancing corporate governance.  The paper finds that current views on internal controls support a principles- and market-based approach in which organisations make a commitment to develop internal control systems particular to their own specific internal and external environments. It also identifies the importance of the tone at the top and the culture and ethical framework throughout the organisation to the effective implementation of an internal control system.  This paper follows on the findings of the 2004 report, Enterprise Governance - Getting the Balance Right, jointly published by IFAC and the Chartered Institute of Management Accountants in the United Kingdom, which found that companies must balance conformance with rules and organisational performance.  The paper is available on the [IFAC](http://www.ifac.org/" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.2 Parliamentary Joint Committee report on statutory oversight of ASIC**  On 16 August 2006 the report of the Parliamentary Joint Committee on Corporations and Financial Services titled “Statutory Oversight of the Australian Securities and Investments Commission” was tabled in Parliament.  The matters dealt with in the report are primarily:   * ASIC's ongoing regulatory involvement with respect to the Westpoint collapse; * superannuation advice and ASIC's shadow shopper exercise; * ASIC's educative role; * conflicts of interest in the financial services industry; * ASIC's new memorandum of understanding with the Commonwealth of Director Of Public Prosecutions (DPP); * the Vizard matter; * increases to ASIC's budget funding; * prosecution rates for corporate law breaches; * the burden of financial services regulation compliance; and * a proposal to incorporate a business judgment rule into the [Corporations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482).   The committee has made 3 recommendations:  1. ASIC conduct a shadow shopping survey on superannuation switching advice in 2007 and publicly name advisers and licensees identified as responsible for repeatedly and seriously breaching the requirement to provide reasonable advice.  2. ASIC and the DPP should regularly update the committee as to the effectiveness of the revised Memorandum of Understanding.  3. ASIC provide advice to the Australian Government on its concerns regarding the enforcement effects of:   * the proposal to broaden the 'business judgment rule' as set out in the Corporate and Financial Services Regulation Review of April 2006; and * any other proposals in the Corporate and Financial Services Regulation Review of April 2006 that would have significant enforcement implications.   The report is available on the [PJC](http://www.aph.gov.au/senate/committee/corporations_ctte/asic/index.htm" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.3 Simpler Regulatory System Bill**  On 14 August 2006, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced information on reforms dealing with corporate and financial services regulation.  In April 2006, Mr Pearce released the Corporate and Financial Services Regulation Review Consultation Paper for a six week consultation period, seeking comments on 56 separate topics. These issues included: company reporting obligations; corporate governance; further refinements to financial service regulation; and dealing with regulators.  Following submissions the reform proposals have been divided into three categories.  The three categories for progressing the reform proposals are:   * draft regulations for consultation; * a proposals paper for consultation (with accepted proposals to be included in the Simpler Regulatory System Bill); and * focused projects for further consultation.   Following is a list of the reform proposals in each of the three categories.  **(a) Draft regulations for consultation**  **1. Financial services regulation** Repetition of information in a Statement of Advice; Issue of disclosure documents when product or advice is rejected;  Provision of a Financial Services Guide by a third party custodian or administrator;  Combining a Financial Services Guide and Prospectus;  Updating Financial Services Guides;  Standardised Financial Services Guide;  Treatment of superannuation trustees;  Treatment of employers;  ‘Bundled’ general insurance products;  ‘Badging’ of disclosure documents;  Jurisdictional reach; Australian financial services licence holders acting on behalf of others;  Offshore branches;  Dollar disclosure for general insurance;  Incorporation by reference in disclosure documents; Exemption from FSR retail client obligations for secondary service providers;  Oral disclosure; and  Sickness and accident insurance.  **(b) Simpler Regulatory System Bill proposals for consultation**  **1. Financial services regulation** Situations where a Statement of Advice does not have to be prepared;  Changes to the scope of general advice;  Exemption from the requirement to provide a Financial Services Guide;  Threshold requirements for Statements of Advice;  Sophisticated investors; Authorised representatives; and Policy Statement PS 146 – training requirements.  **2. Company reporting obligations**  Concise reporting requirements;  Executive remuneration – disclosure requirements;  Thresholds for financial reporting of large proprietary companies;  Removal of duplication in notifications;  Change in officeholders;  Maintenance of registered office address;  Share and member reporting requirements;  Removal of annual review fees for companies approved for voluntary deregistration; and  Parent entity financial statements.  **3. Auditor independence**   Anomalies arising from CLERP 9 (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)).  **4. Corporate governance**  Related party transactions;  Amounts that can be paid to related parties without member approval; and  Amounts given to director or spouse without member approval.  **5. Fundraising** Remove the obligation to produce a prospectus for rights issues of quoted securities;  Review of the fundraising provisions to facilitate certain types of fundraisings; Review of secondary sale disclosure rules; Employee Share Ownership Plans; and  Prospectus advertising and publicity.  **6. Takeovers** Telephone monitoring during takeover bids.  **7. Dealing with regulators**  Implement ‘up front’ payment option for ASIC annual fees;  Enhancing communication with ASIC;  Breach reporting requirements; and  Product Disclosure Statement in-use notices.  **(c) Focused projects for further separate consultation**  **1. Financial services regulation** Overlap of requirements in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and ASX Market Rules; and  Register of sanctioned financial service providers.  **2. Company reporting obligations**  CEO/CFO sign-off.  **3. Corporate governance** Remove directors’ duties for single-director companies; and  Extend the business judgment rule.  **4. Collective investments** Product rationalisation;  Investor Directed Portfolio Services.  **5. Dealing with regulators** ASIC / APRA information exchange.  The paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=017&ContentID=1138" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.4 International CEO survey on global corporate issues**  On 14 August 2006, the NYSE Group Incorporated released its 2nd annual CEO Report presenting the views of more than 200 CEOs from corporations in 21 countries.  The base of companies participating in the report represent more than 50 industries and total US$1.7 trillion in combined global market capitalisation.  In CEO Report 2007*,* these corporate leaders reflect on issues such as the current scope of corporate governance rules.  **(a) Valuing people, planning for growth** Eight out of ten NYSE CEOs agree that operational efficiency, driven by employees, will have the greatest impact on internal profitability in 2007; 75% view this as the most vital asset of a company, and half of all CEOs surveyed will increase their employee education and retention programs.   **(b) US markets and globalisation** More than 75% of all CEOs cite NAFTA as an area they will focus on throughout 2007, with many (66%) specifically concentrating on the U.S. Almost all CEOs surveyed (95%) say the U.S. economy is an important external growth factor for their companies. However participating CEOs do not neglect global markets, drawing attention to the BRIC region (Brazil, Russia, India and China) in particular.  Fifty-seven percent describe emerging markets as an opportunity to expand sales and marketing activities.  **(c) Governance and compliance** CEOs raised concerns over governance rules and compliance costs, with almost all (97%) raising the issue of increased compliance expenditures. One-third stated they spend at least twice as much as in 2003 to comply with regulatory requirements; 40% suggest higher costs resulted in delays and/or cancellations in expansion, 64% state that strategic planning has been affected, and more than half say that infrastructure has suffered. Almost nine out of ten CEOs spend more time on regulatory issues, and more than 25% spend less time on daily management.Although only 6% of CEOs say they believe investors are better served, many saw a positive outcome of SOX and NYSE governance rules: 57% state they had a positive relationship with their boards, and 53% say that board members are now an excellent source of advice and insight.   **(d)** **Role of the CEO**  The role of the CEOs has become less attractive in recent years. Nearly 100% state their jobs put them at greater personal legal risks than three years earlier; 96% report their jobs are more time consuming.  **(e) Reputation management**  A new aspect of this year’s survey was the response to the importance of managing a company's reputation, with 16% of CEO’s reporting that they could do more to protect this valuable intangible asset. The most common ways to monitor reputation include information discussions with relevant parties, followed by discussions with or surveys of employees.  The NYSE CEO Report is available on the [NYSE](http://www.nyse.com/about/publication/1154081601879.html" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.5 Hedging of ‘at risk’ pay**  On 13 August 2006, the Australian Council of Superannuation Investors (ACSI) published research which indicates that companies in the Top 200 ASX/S&P allow their executives to hedge their ‘at risk pay’ but shareholders are not told about it when it happens.  **(a) Prohibit hedging of unvested share options**  ACSI has criticised the use of financial products to remove the risk associated with long-term incentives before they vest.  Rosalind McKay, Research and Policy Officer of ACSI said “Allowing executives to hedge their incentives prior to vesting makes a mockery of the aim of these incentives to align the interests of executives and shareholders.” However, she also noted that “The laws do not require the disclosure of hedging practices.”  ACSI wrote to the ASX/S&P 200 companies to enquire whether their company had a policy that permitted employees to trade in securities and associated products, which operate to limit the economic risk of those securities. 120 responses were received. Eighty-six respondents explained that they had a share trading policy i.e. 72%. Of those, sixty-three covered the issue of hedging and 22 of those in particular would allow hedging of incentives after they vest. However, the general position was that this would still be subject to the share trading policy and trading windows etc.  Given the reliance placed on long-term incentives to align interests of executives with shareholders the paper argues that more needs to be done to improve the disclosure regime.  The first step is to prohibit hedging of unvested incentives according to ACSI.  **(b) Improve disclosure of hedging vested incentives**  Directors, executives and other officers i.e. key management personnel should be required to disclose that they have hedged their vested incentives according to ACSI.  Currently only directors are required to disclose changes in their shareholdings under the relevant interest requirements under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and the Listing Rules but these requirements do not cover the issue of hedging. ACSI also argues that those disclosures should be made in 2 days.  ACSI’s research also suggests that greater emphasis is required on monitoring of compliance with share trading policies both by the companies themselves and the regulators.  Further information is available on the [ACSI](http://www.acsi.org.au/" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.6** **Transparency reporting by auditors**  On 11 August 2006, the UK Professional Oversight Board, a part of the UK Financial Reporting Council, published a consultation document on the information which the auditors of public interest entities, in particular listed  UK companies, should be required by law to publish. “Transparency” reports should include information on the processes and procedures by which the audit firm ensures audit quality and auditor independence, on the firm’s structure, governance and network arrangements, and on the way in which the firm remunerates partners.  The consultation will form the basis for the development of regulations to give effect to the requirements on transparency reporting in the revised EU 8th Company Law Directive on the regulation of auditors, which was agreed earlier this year.  According to the consultation document, transparency reports have a valuable role to play in encouraging audit quality. They can help investors to understand the strengths of a particular audit firm.   The closing date for the consultation is Friday 27 October.  The consultation paper is available on the [FRC](http://www.frc.org.uk/documents/pagemanager/poba/POB%20trans%20consdocument%20final.pdf" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.7 SEC offers further relief from section 404 compliance for smaller public companies and many foreign private issuers**  On 9 August 2006, the US Securities and Exchange Commission issued two releases to grant smaller public companies and many foreign private issuers further relief from compliance with section 404 of the Sarbanes-Oxley Act of 2002. The relief is in furtherance of the "next steps for Sarbanes-Oxley implementation" (SEC Press Release 2006-75) announced on 17 May 2006, and includes some new initiatives not previously announced.   The releases follow the 11 July 2006 publication of a Concept Release soliciting public comment on guidance for management the SEC plans to issue to assist companies in assessing their internal controls over financial reporting.   A summary of the subjects of the two releases appears below:  **(a) Relief from section 404 compliance dates for smaller companies (non-accelerated filers)**   The Commission is proposing to grant relief to smaller public companies by extending the date by which non-accelerated filers must start providing a report by management assessing the effectiveness of the company's internal control over financial reporting. The initial compliance date for these companies would be moved from fiscal years ending on or after 15 July 2007, until fiscal years ending on or after 15 December 2007. The Commission also proposes to extend the date by which non-accelerated filers must begin to comply with the section 404(b) requirement to provide an auditor's attestation report on internal control over financial reporting in their annual reports. This deadline would be moved to the first annual report for a fiscal year ending on or after 15 December, 2008. This proposed extension would result in all non-accelerated filers being required to complete only the management's portion of the internal control requirements in their first year of compliance with the requirements. This proposal is intended to provide cost savings and efficiency opportunities to smaller public companies and to assist them as they prepare to comply fully with section 404's reporting requirements. This proposed extension will provide these issuers and their auditors an additional year to consider, and adapt to, the changes in Auditing Standard No 2 that the Commission and the Public Company Accounting Oversight Board intend to make, as well as the guidance for management the SEC intends to issue, to improve the efficiency of the section 404(b) auditor attestation report process.  Approximately 44% of the US domestic companies and 38% of the foreign private issuers that file periodic reports with the Commission are non-accelerated filers.  The Commission seeks public comment on all aspects of this proposal. Comments should be submitted within 30 days of the proposal's publication in the Federal Register.  **(b) Relief from section 404(b) compliance date for certain foreign private issuers.**   The Commission is granting relief from section 404(b) compliance for foreign private issuers that are accelerated filers (but not large accelerated filers), and that file their annual reports on Form 20-F or 40-F. These companies will have their compliance deadline extended for an additional year, so that they will not begin complying with the section 404(b) requirement to provide an auditor's attestation report on internal control over financial reporting in their annual reports until fiscal years ending on or after 15 July 2007. This group of issuers will be required to comply only with the section 404 requirement to include management's report in the Form 20-F or 40-F annual report filed for their first fiscal year ending on or after 15 July 2006. They will not need to comply with the requirement to provide the registered public accounting firm's attestation report until they file a Form 20-F or 40-F annual report for a fiscal year ending on or after 15 July 2007.  The Commission's data indicate that about 23% of the approximately 1,200 foreign private issuers that are subject to the Exchange Act reporting requirements are accelerated filers that will receive the one-year extension of the compliance dates for the section 404(b) auditor attestation requirement. Because approximately 38% of foreign private issuers are non-accelerated filers that will benefit from the steps outlined in Item (a) above, over 60% of the community of foreign private issuers will receive a measure of relief as a result of the actions announced by the Commission. The Commission's actions do not change the date by which a foreign private issuer that is a large accelerated filer must comply with both the section 404(a) and (b) requirements. These filers are required to include both a report by management and an attestation report by the issuer's registered accounting firm on internal control over financial reporting in their Form 20-F or 40-F filed for a fiscal year ending on or after 15 July 2006.  This extension is a final Commission action and will be effective shortly, on the date that the Commission release granting the extension is published in the Federal Register.  **(c) Proposed transition relief for newly public companies.**  In the same release in which it proposes an extension of the section 404 compliance dates for non-accelerated filers, the Commission also proposes a transition period for newly public companies. This transition relief would apply to any company that has become public through an IPO or a registered exchange offer, or that otherwise becomes subject to the Exchange Act reporting requirements. It would include a foreign private issuer that is listing on a U.S. exchange for the first time. To provide meaningful relief to companies that are new to the U.S. markets and the U.S. reporting requirements, the Commission is proposing to amend its rules so that a company would not be required to provide either a management assessment or an auditor attestation report until it has previously filed one annual report with the Commission. This relief is being proposed in recognition of the fact that preparation of a newly public company's first annual report can be a time and resource intensive process that may quickly follow an IPO or initial listing. By not requiring the section 404 reports until a newly public company files its second annual report with the SEC, the Commission hopes to increase the efficiency and effectiveness with which those companies ultimately meet their section 404 compliance obligations.  The Commission seeks public input on this proposal from foreign and domestic companies, their financial and other advisors, investors and other interested members of the public. As with the proposed extension for smaller public companies, comments on this proposal should be submitted within 30 days of publication in the Federal Register.  The Commission has stated that it will continue to work on its own, and with the Public Company Accounting Oversight Board, to take several additional steps previously outlined on 17 May 2006, in SEC Press Release 2006-75 to improve the implementation of section 404 so that it will work efficiently and effectively for companies and auditors of all sizes.   Further information is available on the [SEC](http://www.sec.gov/index.htm" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.8** **Annual director pay in the US increased 6.1% in 2005**  Growth in US director compensation appears to have slowed, according to a new study published on 7 August 2006 by Mercer Human Resource Consulting.  The Mercer study, based on an analysis of proxy statements of 350 mainly large publicly traded US organizations, found that director pay increased modestly in 2005 compared to recent years. The study also found that the use of stock options to compensate directors continued to decline in favor of other equity vehicles.  Median total direct compensation (pay for board and committee service, and equity grants) for board members at large US companies increased 6.1% in 2005 to US$164,637. That increase contrasts sharply with the much higher 17.8% jump in overall director pay between 2003 and 2004.  **(a) Elements of compensation shift**  Elements of compensation have also shifted. Mercer’s study found that fewer directors received stock option grants — 53% in 2005 versus 59% in 2004 and 66% in 2003 — while last year more directors (63% versus 58% in 2004) received full-value equity awards, often in the form of restricted stock. Mercer’s study shows that total annual compensation for directors jumped a median 6.7%, from US$75,000 in 2004 to US$80,000 last year, nursed along by double-digit jumps in median cash retainers and median stock retainers. However, total median long-term grant value grew at a modest 5.9%, compared to a much more significant 30.7% increase between 2003 and 2004.  **(b) Other "pay element" areas remain steady**  Moreover, Mercer reports that in other “pay element” areas there was no change at all. For example, board and committee meeting fees both remained constant at US$1,500. In a continuing trend, fewer companies (214) paid board meeting fees last year than they did in 2004 (224). This reflects the change in how boards work, with more meeting preparation and time spent outside of meetings to fulfill fiduciary duties.  In a similar vein, the aftermath of Sarbanes-Oxley and other regulatory and market events forced chairs of audit and compensation committees to take on more responsibilities. Mercer’s study found that their compensation reflects the additional burdens: Among the companies that reported pay levels for the position, 73% pay the audit committee chair a premium over what they pay other committee chairs. Some 23% of the compensation committee chairs receive a premium.  **(c) Larger companies pay more**  According to Mercer’s study, when it comes to establishing director pay levels, bigger companies tend to pay more. Directors at companies with median annual revenues of US$3.1 billion received median total direct compensation of US$139,651 in 2005. Companies with median annual revenues of US$20.2 billion paid their directors US$187,348.  As in previous years, Mercer’s director compensation study found some sharp industry differences, and in 2005 they were fairly significant. For example, computer/office equipment firms paid their directors the most, with a median total direct compensation level of US$261,704. At the other extreme, directors at forest/paper products companies took in a median of US$124,000.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.9 UK executive remuneration study**  On 2 August 2006, a new study published by Deloitte reveals that executive remuneration packages at FTSE 350 companies are becoming ever more dominated by performance based elements of pay, and the performance measures used are increasingly aligned to a company’s business strategy.  The proportion of executive pay linked to performance continues to increase. Only 38% of FTSE 350 companies rely on simple share price growth measures as the primary driver of performance related reward.  Companies are introducing tailored economic measures to assess director performance.  The report, ‘Measuring Up’ on performance measurement in executive remuneration shows that, even in an average year, incentives account for around half of total pay, often rising to around 80% for significant out performance.    Although total shareholder return (TSR) remains the most common form of performance measure, there is an increasing trend towards using a combination of TSR, Earnings Per Share (EPS), and other tailored measures, such as return on capital employed and economic spread.  Banks and financial services companies have the largest proportion of performance linked remuneration, and offer the highest potential annual bonuses.  However, the actual bonuses paid in these companies, as a percentage of the maximum were the lowest, with over a quarter of financial services companies paying no bonus to their executive directors.  At the other end of the scale, utility companies, transportation and business services, retail and real estate companies have the lowest proportion of performance linked pay.  Banks, financial services and real estate companies tend to have a package weighted towards the short term, whereas companies with longer term business cycles such as oil & gas and chemical companies tend to weight packages towards the long term.  Across the FTSE 350, annual bonuses have doubled in the last three years.  The research findings indicate that typically 75% of the bonus payment is based on financial performance during the year, with profit being the primary driver of awards.  However, many plans will include specific business measures. Health and safety measures are common in mining & metals and oil & gas companies; customer service is a key measure in utility companies; a high proportion of media companies use revenue; industrial goods and services companies tend to use cash flow; and real estate companies include net asset value as a measure.  There is an increasing trend across the board towards performance share plans, with packages more likely to be weighted towards the longer term in the largest companies. Of the new long term plans introduced since August 2005, 75% were performance share plans; 83% of FTSE and 70% of FTSE 250 now participate in these plans.  In terms of how companies have actually performed, the research shows that smaller companies have typically outperformed the larger companies in terms of relative shareholder return.  There have also been significant differences between sectors, for example, the median returns to shareholders over the last three years in the oil & gas sector have been 30% compared to 14% in the retail sector.  This supports the use of business specific comparator groups for assessing a company’s performance, rather than comparing performance against a broad index.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.10 Appointment of directors to top 100 ASX companies and NED fees: study**  On 1 August 2006, the Australian Council of Superannuation Investors (ACSI) published research indicating that almost two-thirds of all new directors of top 100 companies appointed during 2005 came from the ranks of existing top 100 company directors.  The finding, from an annual study of board composition and non-executive director pay commissioned by ACSI, which represents major public sector, corporate and industry super funds, and conducted by institutional governance adviser Institutional Shareholder Services (ISS) Australia, found that 61% of all new directors appointed to S&P/ASX 100 company boards in the 2005 financial year were already, or had been in the past, a director of an S&P/ASX 100 company.  Appointments of past and present S&P/ASX 100 directors rose sharply in 2005; ACSI’s 2004 study of non-executive director pay and board composition found that only 27% of new directors appointed to top 100 companies in 2004 already were or had been a director of a top 100 company.  These ‘appointments from within’ also occurred during a period when there was a considerable increase in board renewal at top 100 companies, with 173 new non-executive director board seats being filled in 2005, up from 93 in 2004.  Of the 57 women on S&P/ASX 100 company boards, 62% held multiple board seats while only 41% of male S&P/ASX 100 directors held multiple board seats. Women continue to be significantly under-represented on top 100 company boards, accounting for just 9.2% of all directors (down from 9.3% in 2004) and 11.1% of all board seats (up from 11% in 2004).  ACSI’s 2005 study, which also examined the movements in non-executive director fees in 2005, found director fees continued to rise faster than inflation and average weekly earnings. In 2005, the average non-executive director (excluding board Chair) received $154,165 in fees, up 7.1% from 2004, while the average non-executive board Chair saw their total remuneration rise 6.6% from 2004, to $363,576.  By comparison, in the 12 months to 30 June 2005, the consumer price index rose by 2.5% and in the 12 months ending May 2005, average weekly adult earnings grew by 5.5%. In 2004, the average non-executive director fee grew by 5.4% over 2003, and the average fee for a non-executive chairperson by 9.9%.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.11 Canada’s securities regulators develop governance regime for investment funds**  On 28 July 2006,the Canadian Securities Administrators (CSA) announced a rule aimed to improve governance of all publicly offered investment funds. National Instrument 81-107-Independent Review Committee for Investment Funds (the Rule) requires investment fund managers to have independent oversight of their management and monitoring of conflicts of interest.  The Rule requires all investment funds that are reporting issuers to establish an Independent Review Committee (IRC) to oversee all decisions involving conflicts of interest faced by a fund manager. The role of the IRC, depending on the nature of the conflict, will be to either approve the fund manager’s decision or provide recommendations before the manager may proceed. The fund manager will also be required to establish and follow written policies and procedures before referring issues to the IRC.  The CSA Notice, Rule and related amendments are available on several CSA members' websites. The Rule and amendments could be in force as early as 1 November 2006.  The CSA, the council of the securities regulators of Canada’s provinces and territories, co-ordinates and harmonizes regulation for the Canadian capital markets.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.12 Audit practice alert regarding timing and accounting for stock option grants**  On 28 July 2006, the US Public Company Accounting Oversight Board (PCAOB) published a practice alert titled "Matters Relating to Timing and Accounting for Options Grants." The practice alert was prompted by recent reports and disclosures about issuer practices related to the granting of stock options, including the "backdating" of such grants.  These reports and disclosures indicate that some issuers’ actual practices in granting options might not have been consistent with the manner in which these transactions were initially recorded and disclosed. Some issuers have announced restatements of previously issued financial statements as a result of these practices. In addition, some of these practices could result in legal and other contingencies that may require recognition of additional expense or disclosure in financial statements.  The alert advises auditors that these practices may have implications for audits of financial statements or of internal control over financial reporting and discusses factors that may be relevant in assessing the risks related to these matters.  The practice alert is available on the [PCAOB](http://www.pcaobus.org/" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.13 European Commission enables public access to all national financial services legislation**  On 28 July 2006, the European Commission opened a publicly available internet database giving complete access to national laws implementing EU financial services Directives. This was one of the Better Regulation tasks contained in the White Paper on Financial Services Policy (see IP/05/1529).  According to the Commission, the database of weblinks should aid the overall process of implementation and curb regulatory additions to legislation, known as "gold-plating". It will also reduce costs and barriers for business and consumers as they will be armed with the information they need to utilise EU legislation more effectively in the various Member States.  The current use of the national legislation 'state of play' chart, which has already proved successful in achieving more efficient implementation, will be enhanced to provide a single resource where all information on national implementation can be easily accessed and compared.  Further information is available on the [European Commission](http://ec.europa.eu/index_en.htm" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.14 State governments oppose abolition of rule allowing 100 shareholders to call EGM**  Several Australian state governments have announced their opposition to the proposal contained in the Corporations Amendment Bill (No 1) 2006 to remove the rule allowing just 100 shareholders to call an extraordinary general meeting. The removal of the 100 member rule is based on its potential for misuse.   Under the Corporations Agreement, legislation of this nature requires the approval of three jurisdictions (other than the Federal Government), two of which must be states.  Several key organisations have written to the state governments stating they support the proposal. The organisations are:   * Chartered Secretaries Australia; * Business Council of Australia; * Australian Institute of Company Directors; * FINSIA; * Australasian Investor Relations Associations; * Investment & Financial Services Association; and * Australian Employee Ownership Association.   Following is an extract from the letter:  "The signatory bodies to this submission are all deeply involved in the promotion of good corporate governance and increased shareholder participation in Australia.  "We are disappointed that [your government] has stated to the Parliamentary Secretary to the Treasurer its opposition to the repeal of the '100-member rule'in the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in section 249D.  "For many years the signatory bodies to this letter have advocated for the repeal of the rule allowing 100 members to requisition general meetings of companies (the 100-member rule). We have made joint submissions on this issue in 2001 and 2005 endorsing this reform.  "Importantly, this reform:   * has bipartisan support. Both the Federal Government and the Opposition support the reform, which has been examined in detail by the Department of Treasury and the Parliamentary Joint Committee on Corporations and Financial Services; * avoids the complications of the tiered solutions (such as the square root rule) recommended in the past. This will ensure that neither companies nor shareholders suffer additional costs; * prevents mischief, given that while there is little history of the rule being abused, its potential for abuse remains clear. Both political parties have noted that it is not necessary for parliament to wait until some quota of abuses is observed before reforming the provision; * brings Australian law into line with overseas practice. Comparable jurisdictions employ a percentage test for shareholder-requisitioned general meetings: United Kingdom 10%; USA 10%; Canada 5%;New Zealand 5%; European jurisdictions between 5% and 20%.   "We understand you are concerned that the repeal of the 100-member rule will work against the interests of minority shareholders, constituting the general public. The 2005 report of the Parliamentary Joint Committee on Corporations and Financial Services clearly notes that the reform encourages appropriate shareholder participation in corporate governance, while reducing the associated costs of such participation, especially when meetings are called for frivolous or vexatious reasons.  "All signatories to this letter support the the retention of section 249N of the Act that preserves the right of 100 shareholders to put forward a resolution at a general meeting. Our support for the repeal of the 100-member rule only applies to the calling of special meetings.  "We trust that state-based political interests will not prevent a reform that has been through two rounds of public consultation and which has garnered widespread support from all relevant parties."  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.15** **SEC votes to adopt changes to disclosure requirements concerning executive compensation and related matters**  On 26 July 2006, the US Securities and Exchange Commission (SEC) voted to adopt changes to the rules requiring disclosure of executive and director compensation, related person transactions, director independence and other corporate governance matters, and security ownership of officers and directors. These changes would affect disclosure in proxy statements, annual reports and registration statements, as well as the current reporting of compensation arrangements. The rules would require that most of this disclosure be provided in plain English.  **(a) Executive and director compensation**  The amendments will refine the currently required tabular disclosure and combine it with improved narrative disclosure to elicit clearer and more complete disclosure of compensation of the principal executive officer, principal financial officer, the three other highest paid executive officers and the directors.  **(i) Compensation discussion and analysis**  New company disclosure in the form of a compensation discussion and analysis will address the objectives and implementation of executive compensation programs - focusing on the most important factors underlying each company's compensation policies and decisions.  The compensation discussion and analysis will be filed and will thus be a part of the disclosure subject to certification by a company's principal executive officer and principal financial officer.  A new furnished Compensation Committee Report will require a statement of whether the compensation committee has reviewed and discussed the Compensation Discussion and Analysis with management and, based on this review and discussion, recommended that it be included in the company's annual report on Form 10-K and proxy statement.  The performance graph will be retained, but no longer coupled with executive compensation disclosure. The requirement for the Performance Graph will be moved to the disclosure rule covering the market price of common equity and related matters, and the Performance Graph will be required in annual reports to security holders that accompany or precede proxy statements relating to annual meetings at which directors are to be elected.  **(ii) Tabular and narrative disclosure**  Following the compensation discussion and analysis section, executive compensation disclosure will be organized into three broad categories: compensation over the last three years; holdings of outstanding equity-related interests received as compensation that are the source of future gains; and retirement plans, deferred compensation and other post-employment payments and benefits.  The summary compensation table will be the principal disclosure vehicle for executive compensation, showing compensation for each named executive officer over the last three years. The summary compensation table will be accompanied by narrative disclosure and a grants of plan-based awards table that will help explain the compensation information presented in the table. The summary compensation table will include, in addition to columns for salary and bonus:   * A dollar value for all equity-based awards, shown in separate columns for stock and stock options, measured at grant date fair value, computed pursuant to Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment ("FAS 123R"), to provide a more complete picture of compensation and facilitate reporting total compensation; * A column reporting the amount of compensation under non-equity incentive plans; * A column reporting the annual change in the actuarial present value of accumulated pension benefits and above-market or preferential earnings on nonqualified deferred compensation, so that these amounts can be deducted from total compensation for purposes of determining the named executive officers; * A column showing the aggregate amount of all other compensation not reported in the other columns of the table, including perquisites. Perquisites will be included in the table unless the aggregate amount is less than US$10,000, and interpretive guidance will be provided for determining what is a perquisite; and * A column reporting total compensation. As proposed, the accompanying narrative would have required disclosure for up to three employees who were not executive officers during the last completed fiscal year, but whose total compensation was greater than that of any of the named executive officers. This provision will be revised and reproposed for public comment. The new proposal would require that the accompanying narrative disclosure include the total compensation (excluding the same items that would be deducted from total compensation for purposes of determining named executive officers) and job positions of each of a company's three most highly compensated employees, whether or not they were executive officers during the last completed fiscal year, whose compensation for the last completed fiscal year was greater than that of any of the named executive officers included in the tables, except that employees having no responsibility for significant policy decisions within the company, a significant subsidiary, or a principal business unit, division or function would be excluded when determining which employees are among the most highly compensated. Under the revised proposal, this provision would only apply to large accelerated filers.   Disclosure regarding outstanding equity interests will include:   * The Outstanding Equity Awards at Fiscal-Year End Table, which will show outstanding awards representing potential amounts that may be received in the future, including such information as the amount of securities underlying exercisable and unexercisable options, the exercise prices and the expiration dates for each outstanding option (rather than on an aggregate basis); and * The Option Exercises and Stock Vested Table, which will show amounts realized on equity compensation during the last fiscal year.   Retirement plan and post-employment disclosure will include:   * The Pension Benefits Table, which will require disclosure of the actuarial present value of each named executive officer's accumulated benefit under each pension plan, computed using the same assumptions (except for the normal retirement age) and measurement period as used for financial reporting purposes under generally accepted accounting principles; * The Nonqualified Deferred Compensation Table, which will require disclosure with respect to nonqualified deferred compensation plans of executive contributions, company contributions, withdrawals, all earnings for the year (not just the above-market or preferential portion) and the year-end balance; and * A narrative description of any arrangement that provides for payments or benefits at, following, or in connection with any termination of a named executive officer, a change in responsibilities, or a change in control of the company, including quantification of these potential payments and benefits assuming that the triggering event took place on the last business day of the company's last fiscal year and the price per share was the closing market price on that date.   **(iii) Disclosure regarding option grants**  The Commission will provide in the release additional guidance regarding disclosure of company programs, plans and practices relating to the granting of options, including in particular the timing of option grants in coordination with the release of material nonpublic information and the selection of exercise prices that differ from the underlying stock's price on the grant date.  Required disclosure will include clear tabular presentations of option grants including:   * the grant date fair value; * the FAS 123R grant date; * the closing market price on the grant date if it is greater than the exercise price of the award; and * the date the compensation committee or full board of directors took action to grant the award if that date is different than the grant date.   Further, if the exercise price of an option grant is not the grant date closing market price per share, the rules will require a description of the methodology for determining the exercise price.  The Compensation Discussion and Analysis section will also require enhanced narrative disclosure about option grants to executives. Companies will be called upon to analyze and discuss, as appropriate, material information such as the reasons a company selects particular grant dates for awards or the methods a company uses to select the terms of awards, such as the exercise prices of stock options.  With regard to the timing of stock options in particular, companies will be called upon in the guidance to answer questions such as:   * Does a company have any program, plan or practice to time option grants to its executives in coordination with the release of material non-public information? * How does any program, plan or practice to time option grants to executives fit in the context of the company's program, plan or practice, if any, with regard to option grants to employees more generally? * What was the role of the compensation committee in approving and administering such a program, plan or practice? How did the board or compensation committee take such information into account when determining whether and in what amount to make those grants? Did the compensation committee delegate any aspect of the actual administration of a program, plan or practice to any other persons? * What was the role of executive officers in the company's program, plan or practice of option timing? * Does the company set the grant date of its stock option grants to new executives in coordination with the release of material non-public information? * Does a company plan to time, or has it timed, its release of material non public information for the purpose of affecting the value of executive compensation?   Disclosure will also be required where a company has not previously disclosed a program, plan or practice of timing option grants to executives, but has adopted such a program, plan or practice or has made one or more decisions since the beginning of the past fiscal year to time option grants.  Similar disclosure standards will apply if a company has a program, plan or practice of awarding options and setting the exercise price based on the stock's price on a date other than the actual grant date or if the company determines the exercise price of option grants by using formulas based on average prices (or lowest prices) of the company's stock in a period preceding, surrounding or following the grant date.  **(iv) Director compensation**  Director compensation for the last fiscal year will be required in a director compensation table (along with related narrative), which will be similar in format to the summary compensation table  **(b) Related person transactions, director independence and other corporate governance matters**  **(i) Related person transactions**  The amendments will streamline and modernize the related person transaction disclosure requirement, while also making it more principles-based. The changes to this disclosure requirement will include:   * Increasing the dollar threshold for transactions required to be disclosed from US$60,000 to US$120,000; * Requiring disclosure of a company's policies and procedures for the review, approval or ratification of related person transactions; * Eliminating the distinction between indebtedness and other types of related person transactions, and eliminating requirements for disclosure of specific types of director relationships; and * Specifying exceptions for some categories of transactions that do not fall within the principle for disclosure under the related person transaction disclosure requirement.   **(ii) Director independence and other corporate governance matters**  A new Item 407 of Regulations S-K and S-B will consolidate existing disclosure requirements regarding director independence and related corporate governance matters, in most cases without substantive change, and will also update disclosure requirements regarding director independence to reflect the Commission's current requirements and current listing standards.  The disclosure under this requirement will include:   * Disclosure of whether each director and director nominee is independent; * A description, by specific category or type, of any transactions, relationships or arrangements not disclosed as a related person transaction that were considered by the board of directors when determining if applicable independence standards were satisfied; * Disclosure of any audit, nominating and compensation committee members who are not independent; and * Disclosure about the compensation committee's processes and procedures for the consideration of executive and director compensation.   **(iii) Security ownership of officers and directors**  The amendments will require disclosure of the number of shares pledged by management, and the inclusion of directors' qualifying shares in the total amount of securities owned.  **(iv) Form 8-K**  The rules will modify the disclosure requirements in Form 8-K to capture some employment arrangements and material amendments thereto only for named executive officers. The rules will also consolidate all Form 8-K disclosure regarding employment arrangements under a single item.  **(v) Plain English disclosure in proxy and information statements**  The rules will require companies to prepare most of this information using plain English principles in organization, language and design.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.16 Risk management and internal control: recommendation**  On 24 July 2006, the European Corporate Governance Forum adopted a statement on risk management and internal control. The statement considers that there is no need to impose an EU obligation on boards to certify the effectiveness of internal controls as required in the US by the Sarbanes-Oxley Act. The European Corporate Governance Forum has also agreed to recommend to the Council of the European Union and the European Parliament the introduction of a rule obliging financial intermediaries to facilitate the exercise of voting rights in general meetings of listed companies by or on behalf of their clients. The European Corporate Governance Forum was established by Commission Decision of 15 October 2004 and provides high level advice to the European Commission in the field of corporate governance.  The full texts of the statement and recommendation together with more information on the Forum's activities are available on the [European Commission](http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.17 Call to stop ‘short-term obsession’ with financial results** On 24 July 2006, the US based Center for Financial Market Integrity (CFA) and the US Business Roundtable Institute for corporate ethics jointly called on corporate leaders, asset managers, investors, and others to break the “short-term obsession” harming shareholders’ interests by reforming practices involving earnings guidance, remuneration, and communications to investors.  The report outlines five broad areas of recommendations:   * Reform earnings guidance practices**:** Companies need to reconsider the benefits and consequences of giving earnings guidance and make adjustments to their involvement in the “earnings guidance game” that best reflect shareowners’ interests. * Develop long-term incentives across the board**:** Remuneration for corporate executives and asset managers should be structured to achieve long-term strategic and value-creation goals. * Demonstrate leadership in shifting the focus to long-term value creation. * Improve communications and transparency**:** More meaningful, and potentially more frequent, communications about company strategy and long-term value drivers can lessen the financial community’s dependence on earnings guidance. * Promote broad education of all market participants about the benefits of long-term thinking and the costs of short-term thinking.   Specific recommendations from those five areas include:   * End the practice of providing quarterly earnings guidance; * Align corporate executive remuneration with long-term goals and strategies and with long-term shareowner interests; * Improve disclosure of asset managers’ incentive metrics, fee structures, and personal ownership of funds they manage; and * Endorse the use of corporate long-term investment statements to shareowners that will clearly explain—beyond the requirements that are now an accepted practice—the company’s operating model.   The report’s findings and recommendations are based upon a research review by the CFA Center and the Business Roundtable and several symposia discussions with key stakeholders, including: corporate issuers, analysts, asset managers, shareowners, institutional investors, hedge fund managers, regulators, and the media.  The full report and an executive summary are available on the [CFA](http://www.darden.virginia.edu/corporate-ethics/pdf/Short-termism_Report.pdf" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.18 Canadian regulators seek comments on soft dollar arrangements**  On 21 July 2006, the Canadian Securities Administrators (CSA) announced they are seeking comments on proposed National Instrument 23-102 - Use of Client Brokerage Commissions as Payment for Order Execution Services or Research (“Soft Dollar” Arrangements) and Companion Policy 23-102. The proposed instrument and companion policy clarify how advisers and registered dealers can use client brokerage commissions and include guidelines regarding disclosure of “soft dollar” arrangements.  Soft dollar arrangements refer to the advisers’ use of brokerage commission dollars to pay for trading-related goods or services, including research, advice and analytical tools in addition to trade execution costs. Such arrangements may result in conflicts of interest and obscure the adviser’s best execution.  The CSA Proposed National Instrument 23-102 - Use of Client Brokerage Commissions as Payment for Order Execution Services or Research (“Soft Dollar” Arrangements), - and Companion Policy 23-102 are available on several CSA members’ websites. The comment period ends on October 19th, 2006.  The CSA, the council of the securities regulators of Canada’s provinces and territories, co-ordinates and harmonizes regulation for the Canadian capital markets.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.19 The Takeovers Panel: research study**  On 8 August 2006, the University of Melbourne’s Centre for Corporate Law and Securities Regulation published a research report which presents the results of an empirical study of the Australian Takeovers Panel. The Takeovers Panel is the primary forum for resolving disputes about a takeover bid while the takeover is underway. The Takeovers Panel was established in 2000 and replaced the earlier Panel which was widely regarded as ineffective, hearing very few matters and the extent of its powers being subject to extensive litigation in the courts. The new Takeovers Panel was given enhanced powers by Parliament with the objective of enabling the Panel to replace the courts as the primary forum for the resolution of takeovers disputes. It was expected that the new Panel would be able to facilitate resolutions to takeovers disputes more rapidly, informally and cost effectively than the courts.  Researchers at the Centre for Corporate Law and Securities Regulation examined all decisions of the Takeovers Panel during the first 5 years of its existence (2000-2005). The study provides insight into how the Panel has operated since 2000 and how effective it has been in terms of matters such as the time taken to reach decisions.  The key results of the study are:  1.                  How active is the Takeovers Panel?  During the first 5 years of its operation (2000 to 2005), the new Panel made 153 decisions. As of 31 July 2006, the Panel had published 189 decisions.   2.                  Who makes applications to the Takeovers Panel?  Applications were made mainly by bidders (42% of all applications). Targets made 31% of applications. Shareholders made 20% of applications and ASIC made 5% of applications.   3.                  Speed of decision making  The Panel has proved to be a very efficient decision making body. The median time for the Panel to dispose of an application was only 14 days.   4.                  The Panel as a facilitator of takeover bids  Of the 153 matters that were examined, 112 of these were applications by a party for a declaration of unacceptable circumstances. The Panel made 21 declarations of unacceptable circumstances. In another 21 applications, the Panel refused to commence proceedings. In 63 of the 112 applications the Panel conducted proceedings but refused the application. However, 32 applications for declarations of unacceptable circumstances were refused but only after the Panel accepted undertakings from parties or otherwise negotiated a settlement to the dispute.  These undertakings or settlements included the bidder or target making additional disclosure of material matters to target company shareholders and the market. This is part of the Panel achieving its objective of ensuring that takeover bids are decided by informed shareholders.  5.                  Basis for applications and basis for decision  The ground most frequently raised in submissions of parties or discussed by the Panel in its written reasons was that shareholders were not given enough information to enable them to assess the merits of the takeover bid.  6.                  Size of companies involved in Takeovers Panel applications  Although the Takeovers Panel has made decisions involving very large companies, it is typically smaller companies which are involved in Takeovers Panel applications. The median market capitalisation of listed public company bidders was $31 million. The median market capitalisation of listed public company targets was $27 million.  7.                  Industry classification of parties to Takeovers Panel applications  Industry classification data was obtained for companies involved in Takeovers Panel applications. Applications mostly involved companies operating in the materials sub- sector. 58% of bidders, 43% of targets and 57% of applicants belonged to the materials sub-sector. Within this sub-sector, companies involved in mining operations formed the highest proportion.  8.                  Review applications  The takeovers legislation allows for a review by the Panel of an earlier decision of the Panel upon application by ASIC or a party to the original proceedings. Only 13% of the applications to the Panel involved a review of an earlier Panel decision.  The research report was written by Chris Miller, Rebecca Campbell and Professor Ian Ramsay. Professor Ramsay is a member of the Takeovers Panel. The report is available on the website of the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.20 Study of activist hedge funds** Activist hedge funds have had “surprising success” with their proposals against targeted companies, with more than 35% of campaigns resulting in their winning board representatives, according to a study published on 31 July 2006 by investment bank Morgan Joseph & Co Inc.  In the study, Morgan Joseph examined 94 campaigns waged publicly by 29 hedge funds. As a group, the 29 activist hedge funds ranged in size from less than US$100 million to nearly US$10 billion under management, with average equity capital of US$1.9 billion.  According to the report, activist investors target companies whose stocks, in their opinion, are underperforming. Their goal is to influence management and the board of directors to adopt the proposals that they believe will produce a rapid stock price improvement. However, their weapon of choice is not the unsolicited tender offer, but the purchase of an influential block of stock that serves as the rallying point for proposals to effect change.  The report states that activist demands tend to be concentrated around the following initiatives:   * Changing the capital structure; * Altering a company’s M&A decisions, forcing a sale of all or part of the company; * Replacing management or modifying a board’s composition, often to include the fund’s nominees; and * Returning cash to shareholders through either a dividend or a stock repurchase program.   [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.21 More large US companies reporting on social and environmental issues**  A report published in July 2006 has found that a growing number of the largest publicly traded U.S. companies are reporting on their environmental and social performance. The study was published by the Social Investment Research Analysts Network (SIRAN).  SIRAN issued its first analysis on the environmental and social reporting practices of companies in the S&P 100 Index in June 2005. The latest study reflects company reporting practices for the period from June 2005 to May 2006.  Among the new findings of the 2006 SIRAN study of how reporting practices have changed in the past year:   * More than three-quarters of the S&P 100 Index (79 companies) now have special sections of their websites dedicated to sharing information about their social and environmental policies and performance. This represents a 34% increase from last year, when 59 companies in the S&P 100 included this information on their websites. * Overall, in the last year a dozen new companies issued corporate social responsibility reports for the first time, including Cisco Systems, General Electric, Time Warner, and Wells Fargo. Other members of the S&P 100, such as American International Group and Black & Decker, have pledged to issue their first reports later this year. * Over a third of the S&P 100 Index (34 companies) say they base their CSR reports on a widely recognized external standard for reporting called the Global Reporting Initiative’s (GRI) Sustainability Reporting Guidelines. This was up sharply from 2005, when 25 companies in the S&P based their reports on the GRI guidelines. In 2006, 27 S&P 100 companies included an index to GRI indicators in their reports, up from 23 in 2005. This year, six of the companies met the highest standard of reporting fully “in accordance” with the GRI guidelines. * Forty-three companies in the S&P Index now issue annual corporate social responsibility (CSR) reports (up from the 39 companies in the S&P 100 that issued such reports for the 2005 study). Note that this net figure reflects both the addition of 12 companies that joined the ranks of CSR reporters in 2005, and the deletion of eight companies that have moved to web-based CSR reporting rather than issuing stand-along reports, issued CSR reports in 2004 but not in 2005, or dropped out of the S&P 100.   Institutional investors filed 19 shareholder proposals over the last year calling on companies to issue sustainability reports that detail their social and environmental performance. The proposals received record levels of support, including 48% in favor for a proposal filed at construction equipment manufacturer Terex.  A summary of findings from the 2005 study and updated findings and company profiles for 2006 are available on the [SIRAN](http://www.siran.org/" \t "new) website  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **1.22 Seminar – company directors and corporate social responsibility**  You are invited to attend the next seminar of the Corporate Law & Accountability Research Group.  The topic for discussion will be "Company Directors and Corporate Social Responsibility". The speakers are:  Professor Lyn Stout - the Paul Hastings Professor of Corporate and Securities Law at UCLA School of Law, USA John Kluver - Executive Director, Corporations & Markets Advisory Committee  Associate Professor Vince Morabito, Department of Business Law & Taxation, Monash University  The seminar details are as follows:  Date: Wednesday 20 September 2006 Time: 5.45 pm - 8.30 pm (including refreshments) Venue:  Monash Conference Centre, Level 7, 30 Collins Street Melbourne (between Spring & Exhibition Streets)  Registration Costs: General Rate:  $99 including GST Academic & Alumni Rate:  $77 including GST  To register go to:  <http://www.buseco.monash.edu.au/depts/blt/clarg/september-seminar.php>  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC policy on how to deliver product disclosure about super investment strategies**  On 3 August 2006, the Australian Securities and Investments Commission (ASIC) issued its policy on how superannuation trustees (trustees) can deliver product disclosure information about investment strategies to members.  Policy Statement 184 “Superannuation: Delivery of product disclosure strategies” [PS 184] is relevant to each trustee that:   * allows members to instruct the trustee to follow a particular investment strategy, and * offers at least some investment strategies to members that result in the members’ money being invested into a specific accessible financial product (e.g. a named managed investment scheme).   Typically these kinds of trustees operate superannuation master trusts.  The policy deals with product disclosure about investment strategy choice within a superannuation fund, it does not deal with product disclosure about choice of superannuation fund.  The policy allows a trustee to deliver the required information about investment strategies with specific accessible financial products in two ways, by either:   * preparing the information themselves in a product disclosure statement (PDS) for a particular accessible financial product (under the law, without relief, the trustee is not permitted to prepare this PDS as it is not the product issuer), or * giving a member a PDS prepared by the issuer of the particular accessible financial product (as provided for in the law without relief).   ASIC has also given relief to limit the amount of information about particular financial products that must be included in the PDS for the superannuation entity prepared by the trustee. This relief applies whatever way the trustee chooses to give members a PDS about a particular accessible financial product.  The relief relates to both the s1012IA disclosure obligation and to the general disclosure obligations in s1013D and s1013E of the [Corporations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482).   The following background provides more information about ASIC’s policy.  **Background**  **(a) The new requirement**  The [Financial Services Reform Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (FSR Act) introduced a new requirement to the [Corporations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482) (the Act) for providers of certain types of custodial arrangements. In general terms, if a member of a superannuation fund can instruct the trustee to acquire a particular financial product (an accessible financial product) for their benefit or the benefit of a person they nominate, the trustee must provide the member with a product disclosure statement (PDS) for that financial product before it is acquired: see s1012IA.  Before the FSR Act, similar requirements applied to investor directed portfolio services (IDPS) (e.g. wrap accounts) and IDPS-like registered managed investment schemes (e.g. master trusts): see Policy Statement 148 “Investor directed portfolio services” [PS 148]. However, these requirements did not apply to the superannuation industry, although there were, and continue to be, specific disclosure requirements under the [Superannuation Industry (Supervision) Act 1993 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default) and regulations about the investment strategies that members of a superannuation entity can select. The s1012IA requirements apply to superannuation entities from 1 July 2007: see ASIC Class Order [CO 03/1097] and [IR 06/22] issued on 23 June 2006. The delayed commencement will give trustees of superannuation entities time to review their current practices and decide how they want to deliver the product disclosure information required under s1012IA (by complying with ASIC relief or s1012IA without modification).  Since the commencement of the FSR Act, the s1012IA requirements have applied to IDPS and IDPS-like registered managed investment schemes. ASIC policy in [PS 148] has been adjusted to accommodate the application of s1012IA: see [Class Order [CO 02/296]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co02-296_pdf)IDPS-like services provided through a registered managed investment scheme.  **(b) How does the new requirement apply to superannuation entities?**  To meet its obligations under s1012IA (without relief), a trustee of a superannuation entity must:  (a) work out which investment strategies a member can choose from that involve the acquisition of accessible financial products (i.e. strategies to which s1012IA applies);  (b) provide the member with a PDS for an accessible financial product before the member selects an investment strategy that includes the acquisition of that product (or that kind of product), if a PDS would have been required for the member to acquire the product directly (see s1012IA together with reg 7.9.14A). This PDS needs to be prepared by the issuer of the accessible financial product; and  (c) provide a further PDS each time an acquisition is made in accordance with the member’s investment strategy selection, except where a further PDS would not have been required for the additional acquisition if the member acquired the product directly (e.g. s1012D).  **(c) ASIC’s policy**  ASIC policy offers two ways by which the trustee can deliver information about available investment strategies*.* The two ways contained in the policy statement are:  (a) to permit the trustee of a superannuation fund to prepare the information in a PDS about an accessible financial product that is given to members instead of using the product issuer’s PDS (the trustee’s accessible product PDS option) (see Section B of [PS 184]); and  (b) to continue to allow the trustee (as set out in the current law) to give to members the PDS about an accessible financial product that is prepared by the issuer of the accessible financial product (the issuer’s accessible product PDS option) (see Section C of [PS 184]).  Whatever way a trustee chooses to give a PDS about an accessible financial product ASIC has also granted relief to limit the information about accessible financial products that must also be given in the superannuation fund’s PDS.  Note: Without relief, information about accessible financial products must be provided in full both:  (a) in a PDS for the product itself (e.g. the underlying product issuer’s PDS); and  (b)as part of the information about the available investment strategies in the superannuation entity’s PDS, resulting in substantial overlap between the information provided in the product-specific PDS and in the superannuation entity’s PDS.  ASIC also provided relief to limit the obligation to repeatedly provide the same information for additional contributions to an investment strategy that the member has previously selected (see Section D of [PS 184]).   Schedule 1 gives examples of when s1012IA will and will not apply.  Schedule 2 explains how to decide which relief option to use.   Schedule 3 explains how the related disclosure provisions in the Superannuation Industry (Supervision) Act 1993 apply.  **(d)** **What disclosures are trustees providing in the meantime?**  Currently, trustees are complying with general product disclosure obligations in s1013D and 1013E of the Act. Typically, trustees are complying in two ways that are substantially similar to the options contemplated under ASIC’s final policy on s1012IA of the Act. ASIC’s policy will provide greater certainty for trustees as they adjust their current practices to comply with the intent of s1012IA. Based on ASIC’s consultation with industry ASIC expects these adjustments to be minor.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **2.2 ASIC reports on Australian Clearing House Pty Ltd and ASX Settlement and Transfer Corporation Pty Ltd**  On 2 August 2006, the Australian Securities and Investments Commission (ASIC) released the findings of its fourth assessment of the Australian Clearing House Pty Limited (ACH) and ASX Settlement and Transfer Corporation Pty Limited (ASTC).   Under the Corporations Act, ASIC is required to conduct an annual assessment of how well ACH and ASTC are complying with their obligations to supervise their respective clearing and settlement facilities.  ACH and ASTC each hold an Australian clearing and settlement facility licence and are wholly owned subsidiaries of Australian Stock Exchange Limited (ASX). ACH provides all clearing services and ASTC provides all settlement services, for transactions entered into on ASX’s financial products market.   ASIC’s latest report concludes that ACH and ASTC continue to have adequate arrangements for supervising their respective clearing and settlement facilities, including arrangements for:   * handling conflicts between the commercial interests of the licensee and the need to ensure that the clearing and settlement facility’s services are provided in a fair and effective way; and * enforcing compliance with the operating rules of the clearing and settlement facility.   ASIC’s fourth assessment of ASX as an Australian market licence holder was released earlier this year in a report dated February 2006.  A copy of the report is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=ACH_ASTC_report_published_Aug06_pdf" \t "new) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **2.3 ASIC accepts a legally enforceable undertaking from AMP financial planning**  On 27 July 2006, the Australian Securities and Investments Commission (ASIC) accepted a legally binding commitment from AMP Financial Planning Pty Limited (AMPFP) to modify key aspects of how it provides financial advice to its customers.  The Enforceable Undertaking (EU) offered to the regulator by AMPFP follows an extensive surveillance of its operations by ASIC between 1 October 2005 and 12 April 2006. During this period, ASIC reviewed 300 files selected from 30 AMP Planners chosen at random.  ASIC’s analysis of the files (which primarily related to superannuation switching advice) and subsequent investigations found that on many occasions, AMPFP:   * planners' files did not disclose a reasonable basis for advice; * failed to make proper disclosures about the costs of acquiring the recommended product and the significant consequences of replacing the existing product; * made statements on its website and in its Financial Services Guide that suggested AMPFP Planners could consider a broader range of products than permitted, which could have misled consumers; and * may not have had adequate arrangements in place to manage conflicts of interest.   The EU offered by AMPFP sets out how it intends to rectify these issues and how it will provide suitable redress for clients who received advice which did not have a reasonable basis.  AMPFP will appoint an independent expert who will review the effectiveness of the actions undertaken by AMPFP. AMPFP must consider any recommendations and, as appropriate, provide to ASIC a Remedial Action Plan to rectify any deficiencies. AMPFP will then be reviewed by the expert to assess if the Action Plan has been effective in raising compliance standards. Of the superannuation switching advice files selected, ASIC found that 45% failed to adequately disclose a reasonable basis for the advice.  AMPFP will now write to affected clients, in a form agreed by ASIC, offering to review the advice they received. If a dedicated resolution team can find no reasonable basis for the advice, clients will be offered an alternative, which will include a refund of the AMP Planner’s adviser fees and any exit/entry fees that may have been incurred and a transfer to the fund of their choice.  The Enforceable Undertaking offered by AMPFP is a public document and is available from the [ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=AMP_enforceable_undertaking_pdf) website.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **3. Recent ASX Developments** |
| **3.1 ASX/SFE Merger**  Australian Stock Exchange and SFE Corporation Ltd have successfully completed their merger, effective 25 July 2006.  Further information is available on the [ASX](http://www.asx.com.au/) website  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%233)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **3.2 ASX welcomes assessment of its market support structures**  Australian Stock Exchange Limited (ASX) welcomed the release of the Australian Securities and Investments Commission’s (ASIC’s) annual assessment of its clearing and settlement arrangements and systems.  The assessment is ‘issues free’ as it contains no recommendations for follow-up action by ASX, and mirrors the findings of the previous assessment of ASX’s market support structures.  Further information is available on the [ASX](http://www.asx.com.au/) website  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%233)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Nexus Energy Limited - decision**  On 22 August 2006, the Takeovers Panel advised that it has considered the application (Application) by Nexus Energy Ltd (Nexus) dated 27 July 2006 in relation to an off-market takeover offer (Anzon Offer) for Nexus by Anzon Australia Ltd (Anzon), which closed on 6 June 2006 (see TP 06/69).  The Panel has decided not to make a declaration of unacceptable circumstances in relation to the Application. However, had the effect of either of the circumstances complained of in the Application been greater, the Panel may well have come to a different conclusion. As it is, the Panel’s conclusion is based on the lack of evidence presented to it of any significant effect of the circumstances, rather than any approval or acceptance by the Panel of those circumstances.  **(a) Background**  The Application related to:  (a) the acquisition by Anzon Energy Limited (AEL), Anzon's majority shareholder and parent company, of shares in Anzon during the Anzon Offer period (Acquisitions); and  (b) the announcement by Anzon during the Anzon Offer period of a bonus offer of options (Bonus Options) at a premium to the market price of Anzon shares. After the Anzon Offer closed, Anzon reduced the exercise price of the options.  In summary, Nexus submitted to the Panel that:  (a) the Acquisitions by AEL, and AEL’s failure to make timely disclosure of those Acquisitions during the Anzon Offer period; and  (b) the announcement of the Bonus Options,  led to the creation of a false market in Anzon shares during the Anzon Offer period and a false impression given to the market and Nexus shareholders as to the value or perceived value of the Anzon shares offered as consideration under the Anzon Offer.  **(b) Decision**  The Panel was concerned that the trading in Anzon shares by AEL on a number of days was not adequately explained. Overall, the Panel was concerned that the trading on those days had the appearance of being designed to support the share price of Anzon rather than to enable AEL to acquire Anzon shares at the lowest possible prices.  The Panel also considered that the common directors of Anzon and AEL should have assumed that, given the particular circumstances of this case, disclosure of the Acquisitions and AEL’s intention to make the Acquisitions would be required. Anzon and AEL submitted that the announcement made to ASX by Anzon on 2 May 2006, when it released a letter from AEL to Anzon stating that AEL was “keen to maximise its ownership interest in Anzon Australia”, put “the market on notice that AEL intended to purchase Anzon shares”. The Panel did not accept that submission. If that announcement was intended to avoid the need for further disclosure when the Acquisitions occurred, the Panel considers that it was seriously inadequate.  The Panel considered that, notwithstanding the concerns set out above, it should decline to make a declaration of unacceptable circumstances with respect to the Acquisitions, given that:  (a) despite the fact that some aspects of AEL’s trading with which the Panel had concerns were not satisfactorily explained by AEL, no probative evidence was presented to the Panel to establish that the Acquisitions had been large enough to create a false market or a false impression as to the value of Anzon shares;  (b)the Panel was not satisfied that non-disclosure of the Acquisitions had had any material effect on Nexus shareholders’ decision whether to accept the Anzon Offer; and  (c) the Panel was not satisfied that the circumstances constituted by AEL’s acquisitions of Anzon shares during the Anzon Offer period gave rise to a contravention of Chapters 6 to 6C, or that they were large enough to have a material effect on the control or potential control of Nexus or Anzon or the acquisition or proposed acquisition of a substantial interest in Nexus or Anzon.  Anzon submitted to the Panel that the Bonus Options had been issued as a reward to Anzon shareholders for the positive performance of Anzon, in circumstances where it could not pay dividends to shareholders.  However, the Panel found it difficult to accept that the Bonus Option issue could be regarded as a reward to Anzon shareholders given the structure of the issue, including the short exercise period and the premium of the initial exercise price over the underlying Anzon share price on the day the Bonus Options were announced. On that basis, the Panel was concerned that the issue of Bonus Options appeared to have some other motive. The Panel considered that Anzon, as an offeror of scrip during a takeover period, should have been particularly careful not to engage in any capital management which might give the impression that it was seeking to affect the perceived value of the securities it was offering as consideration under its takeover offer.  However, ultimately the Panel did not consider that it was presented with evidence that the Bonus Option issue had any demonstrated effect on the market for Anzon shares, nor did it apparently influence Nexus shareholders to accept the Anzon Offer. Accordingly, the Panel considered that it should not make a declaration of unacceptable circumstances with respect to the Bonus Option issue.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%234)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **5. Recent Corporate Law Decisions** |
| **5.1 Director is ordered to indemnify the Commissioner of Taxation for the repayment of unfair preference payments by company whilst insolvent**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Woodgate (Liq of Fairfax ESP) v Commissioner of Taxation [2006] NSWSC 778, New South Wales Supreme Court, Equity Division, Palmer J, 9 August 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc778.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  The Liquidator of Fairlight ESP Pty Ltd (the Company) brought an application to recover $195,000 paid to the Commissioner of Taxation (Commissioner) as unfair preferences and insolvent transactions, pursuant to s588FA(1), s588FC and s588FE(2) of the Corporations Act 2001 (Cth) (the Act). The Commissioner cross-claimed against the director of the Company, David Hannay, for indemnity under s588FGA(1) and (2).  The New South Wales Supreme Court (Court) found that the Company was insolvent at the time the payments were made and that the Liquidator should recover the $195,000. The court rejected Mr Hannay’s defence under s588FGB(3) of the Act that he had reasonable grounds to expect and did expect that the Company was solvent and ordered Mr Hannay to indemnify the Commissioner.  **(b) Facts**  The Company had an outstanding tax liability of $888,779.889. In August 2002 the Commissioner agreed to accept payment of the liability in 9 instalments. The Commissioner did not agree to a change in this arrangement when the Company later tried to pay in lesser amounts.  Whilst the Company made its initial payment of $100,000 on 27 September 2002 subsequent payments were haphazard and of significantly reduced sums. In March 2003, a voluntary administrator was appointed and by mid April 2003 a resolution of the Company’s creditors appointed a Liquidator.  Each of the payments from 27 September 2002 was made during the six month relation back period referred to in s588FE(2)(b).  The Commissioner raised as its only defence that the Company was not insolvent at the time the payments were made, but this was not pressed.  Mr Hannay raised two defences to the cross-claim, being that:  1. the Company was not insolvent at the time the payments were made to the Commissioner, so that the payments were not insolvent transactions within s588FC(a)(i); and  2. even if the Company was insolvent, Mr Hannay was protected by s588FGB(3) in that he had reasonable grounds to expect and did expect the Company was solvent and would remain solvent after the payments.  **(c) Decision**  Palmer J affirmed that to establish solvency, a company must be able to show that it can pay all its debts as and when they fall due, which is a cash flow, not an asset test. His Honour found that during the relation-back period the Company was not paying, and was not able to pay, its debts as and when they fell due, and that the payments made to the Commissioner “further depleted cash resources which were already insufficient to pay all creditors’ debts”.  Mr Hannay made the following submissions on solvency:  1. the Australian Securities and Investments Commission (ASIC) had investigated the Company’s insolvency in 2002 and had been satisfied that the Company could pay its debts;  2. the Company’s trading and cash position was improving in early 2002; and  3. many of the Company’s debts had attached to them informal agreements that repayment would be extended.  Palmer J dismissed any views formed by ASIC as irrelevant as ASIC had inadequate information on which to form a judgment and it was relying on information provided to it by Mr Hannay and the main equity holder in a Japanese company which was the Company’s major investor. Palmer J found that the Company’s cash flow inadequacies were “not temporary but chronic”. His Honour found there was no admissible evidence to support the third submission and in fact a number of creditors whose debts had not been met had cut off supplies to the Company.  Mr Hannay’s defence under s588FGB(3) required an objective measurement of whether he had reasonable grounds to expect that the Company was solvent during the relation-back period. Palmer J relied on a number of factors to support a finding that Mr Hannay had no reasonable grounds on which to base his belief that the Company was solvent. In particular, his Honour relied on the content of letters written to the Commissioner which indicated that Mr Hannay had no reliable knowledge of what arrangements the major investor had made for the provision of further funding to the Company.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.2** **Indemnity of a director against liabilities associated with defending defamatory imputations**  (By David van Dieren, Mallesons Stephen Jaques)  Whitlam v National Roads and Motorists’ Association Limited [2006] NSWSC 766, New South Wales Supreme Court, Bergin J, 3 August 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc766.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Background**  The NRMA Group (the Group) was comprised of two mutual organisations that were in the form of a company limited by guarantee and several other subsidiary companies. The Board of Directors resolved to restructure the Group so as to retain:   * one of the mutuals to conduct motoring services (the defendant); and * create a separate publicly listed company to carry on the Group’s general insurance and financial services businesses (NRMA).   The restructuring process created a great deal of interest from the media.  This media interest included an interview by the Sunday program on the Nine Network (Nine) with Nicholas Whitlam (the plaintiff), President of the defendant, to discuss “the long road to the demutualisation of the NRMA”. The Sunday program was broadcast on 11 March 2001 and parts of the program were variously rebroadcast throughout 2001.  On 19 December 2002 the plaintiff filed defamation proceedings against Nine. The plaintiff claimed that the broadcast and the republications conveyed several defamatory imputations, including inter alia, that he “abused his position as President of the NRMA” and “behaved corruptly” by arranging NRMA work for persons and organisations solely in return for the support of his candidacy to the NRMA Board of Directors.  In this case, Whitlam sought a declaration and orders that the NRMA was obliged to indemnify him for expenses associated with the defamation proceedings against Nine pursuant to two Deeds of Indemnity Insurance and Access he entered into with the defendant in 1999 and 2002 and under the general law.  **(b) Deeds of indemnity**  The two Deeds of Indemnity were identical in nature, except the second Deed, drafted in response to the corporate restructure, included changes to accommodate the corporate restructure and the enactment of the Corporations Act 2001 (Cth) (Corporations Act).  The defendant (NRMA) argued that the first Deed was the applicable deed, but that the indemnity in the first Deed was prohibited by section 241 of the Corporations Law as in force at the time the Deed was executed in 1999.  The plaintiff argued that if the law prohibited the indemnity in the first Deed, he is in any event entitled to make the claim for indemnity under the second Deed.  **(c) Corporations legislation**  The Corporations Act, section 199A, prohibits a company from indemnifying its officers, except under certain circumstances. The court examined section 199A as well as its predecessor provisions - section 241 of the Corporations Law and section 237 of the Companies Code.  **(i) Section 199A**  Bergin J held that the most recent indemnification provision, section 199A  (enacted in March 2000), provided that the defendant was able to fully indemnify the plaintiff against legal costs incurred in defending or resisting an action under circumstances such as these in this case. This was evident in the Explanatory Memorandum which stated:  Substantial liability may be incurred (for example, on-going legal costs) during the course of a proceeding, which are unable to be paid to the indemnified officer, until the outcome of the proceedings is known. To address this… the company may be able to give a person a loan or advance in respect of legal costs. Once the outcome of the proceedings is known, the person would be either obliged to pay back the loan or advance, if not entitled to an indemnity, or may retain the loan monies as the indemnity to which the person is now entitled.  Her Honour noted that section 199A applied to both the first Deed and the second Deed, despite the first Deed being signed before the enactment of section 199A, for the reasons that section 199A was an “equivalent” provision and the Deed included “changes to the law from time to time”.  **(ii) Section 241**  Bergin J held that notwithstanding the fact that section 199A applied to the first Deed, section 241 of the Corporations Law did not prohibit the plaintiff from seeking an indemnity from the defendant under the first Deed. Indeed, section 241 permitted a company to indemnify an officer against liabilities to “another person including legal costs and expenses”, so long as the liability “did not arise as a result of a lack of good faith”.  This is despite the fact that the Explanatory Memorandum in respect of the 1994 amendments to section 241 asserted that section 241 has “attracted extensive criticism both because of its doubts as to the scope of the prohibition and because its operation is inconsistent with appropriate commercial practices”.  **(iii) Section 237**  Bergin J recognised that the ambit of section 237 of the Companies Code, the predecessor to section 241, was not clear and observed that the Companies and Securities Law Review Committee (CSLRC) reported that section 237 “was a broad provision capable of upsetting various indemnifying provisions and susceptible to frustratingly varied interpretations”.  **(d) General law**  In addition to the statutory prohibitions, Bergin J considered the general law given that the expression “[the indemnity was] to the full extent permitted by law” incorporated the general law.  Although there was no case directly on point, Bergin J referred to In Re Famatina Development Corporation [1914] 2 Ch 271. This case was held to be authority for the proposition that a director who is alleged to have defamed a co-director while performing his duties, may be indemnified for costs of the proceedings to defend an entitlement to publish the defamation.  The court also referred to the Restatement (Second) of Agency 440 (1958) where it was stated that:  unless otherwise agreed… the principal has no general duty to indemnify the agent for harm resulting from the torts of third persons caused by the employment, such as false imprisonment and defamation.  The words “unless otherwise agreed” were emphasised by Bergin J.  Bergin J concluded that the modern commercial environment requires that directors are indemnified against liabilities incurred whilst performing their duties in order to attract highly qualified and appropriately experienced officers. Therefore, she held that the “general law does not prohibit an indemnity of a director to defend himself or herself against defamatory imputations published about the director arising from the performance of his or her duties”.  **(e) Capacity as an officer and performance of duties**  Importantly, her Honour held that the defamatory imputations were made against the plaintiff as an officer of the defendant and arose directly out of performance of his duties (it was an “authorised interview with Nine”). This was supported by the following matters:   * the defendant specifically advised the plaintiff on the way to deal with particular interview topics; * the plaintiff was acting on behalf of the defendant; * the plaintiff was not interviewed in a personal capacity but rather as director and Chairman of the defendant; and * if the defendant had not authorised the plaintiff to give the interview, the broadcast would not have conveyed the specific defamatory imputations.   **(f) Conclusion**  As a result, Bergin J concluded that the plaintiff was entitled to be indemnified under the second Deed (where section 199A was the applicable law) for the costs of the defamation proceedings to the extent that the proceedings are successful either by way of an apology, a settlement or a judgment in his favour.  Her Honour added that, even if the first Deed applied, the indemnity in the first Deed was not prohibited by section 241 or section 199A, and the indemnity under both Deeds was not prohibited by the general law.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.3** **Breach of officers’ duties – penalties imposed**  ASIC v Vines [2006] NSWSC 760, New South Wales Supreme Court, Austin J, 2 August 2006  (By Lindsay Mackay, Freehills)  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc760.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  This judgment is the third in a series relating to an application by ASIC alleging contravention of statutory duties by three senior executives of GIO Insurance Ltd. The first judgment on the question of liability, ASIC v Vines [2005] NSWSC 738, was handed down by Justice Austin on 22 August 2005. In the second judgment, ASIC v Vines [2005] NSWSC 1349 on 23 December 2005, Justice Austin declined to grant the defendants relief under the “honesty defences”. This third judgment outlines his Honour’s decision regarding the penalties to be imposed on the defendants.  In the first judgment, Justice Austin found the following contraventions:   * The three defendants had breached their duties of care and diligence by failing to ensure that the company, its auditors and the due diligence committee (DDC) was properly informed and the target statement correct. * The third defendant, Mr Fox was also found to have breached his duty of honesty in relation to an uncommercial reinsurance agreement entered into by GIO Re with America Re which was not in the best interests of GIO Re.   In this judgment, his Honour made declarations that the three senior executives of GIO Insurance Ltd had breached their duties of care, disqualified each of the executives from managing corporations for a certain period and made orders for them to pay pecuniary penalties. In addition, his Honour made a declaration that one of the executives had breached his duty of honesty and made orders for compensation.  **(b) Facts**  In 1998 a subsidiary of AMP announced a takeover of GIO Insurance Ltd, a subsidiary of GIO Australia Holdings Ltd. The first defendant, Mr Vines, was then the CFO of the GIO Group and a director of GIO Insurance; the second defendant Mr Robertson was an Executive Director of GIO Insurance and the third defendant, Mr Fox, later succeeded Mr Robertson in this position.  After the takeover was announced, the defendants subsequently prepared a profit forecast for the GIO business. However, reports within GIO indicated that the level of claims resulting from damage caused by Hurricane Georges would have an impact on the profit forecast of the reinsurance business, GIO Re. These reports and the assumptions on which the profit forecasts were based were not communicated to the DDC which had been set up to conduct investigations to prepare the target statement. The target statement was released including the original profit forecast for GIO Re.  The target statement gave this profit forecast as a reason for the directors’ recommendation to reject AMP’s bid. AMP’s bid was successful and shareholders who did not accept AMP’s offer were required to accept AMP securities at a lower price under a scheme of arrangement. After release of the target statement, the profit was reassessed as a $19.6 million loss rather than the $80 million profit stated in the profit forecast based on the claims arising out of Hurricane Georges.  **(c) Decision**  His Honour applied the Corporations Law as it was in place in 1998 when the contraventions occurred before the introduction of the Corporations Act.  **(i) Declarations**  ASIC applied for declarations that the defendants had contravened a civil penalty provision in section 1317EA of the Corporations Law (section 1317E(1) of the current Corporations Act 2001 (Cth)). Based on his Honour’s findings in the first judgment, the court was under a statutory duty to make the declarations. This then lead the court to consider whether it should make a disqualification order or a pecuniary penalty order against each defendant.  **(ii) Disqualification**  ASIC sought a disqualification order against each defendant under section 1317EA(3)(a) (now section 206C of the Corporations Act), prohibiting the defendant from managing a corporation for a specified period.  In the previous formulation of the law as considered by Justice Austin in this case, the court must consider whether the defendant is a “fit and proper person to manage a corporation.” Justice Austin found that this was to be assessed generally and not specifically in relation to a particular corporation. His Honour gave the example that to lack sufficient expertise in relation to a particular industry in which the corporation was involved would not necessarily be a factor, however in this case a failure or unwillingness to appreciate corporate governance obligations was a factor. The critical factor is whether the deficiency relates to the defendant’s ability to manage corporations generally.  In this case, his Honour found that a failure to meet the corporate governance obligations for a listed company meant that a defendant was not a fit and proper person to manage corporations in general. There was also a pattern of failure to disclose and the failure was at a critical time for the company in preparing its target statement.  Justice Austin considered the factors outlined by Justice Santow in Re HIH Insurance; ASIC v Adler (2002) 42 ACSR 80 and Justice McHugh in Rich v ASIC (2004) 220 CLR 129. These factors aim to protect the public; protect the defendant by reducing the period of disqualification in certain circumstances; deter others; deter the defendant from breaching his/her duties again and achieve retribution.  The need for general deterrence was greater where there had been findings of dishonesty as was the case for Mr Fox. His Honour considered that declarations alone did not provide sufficient general deterrence where there had been serious contraventions, as in this case, where managers in possession of information did not disclose it in the due diligence process.  In terms of personal deterrence, his Honour considered the likelihood of the defendants holding a similar role again and whether the public would need to be protected from the possibility that they may again breach their duties. His Honour considered that Mr Vines had shown contrition by assisting with the investigations by ASIC and this was taken into account in reducing the length of his disqualification. On the other hand, Mr Fox was understood to have shown no contrition, a factor that went towards a longer period of disqualification. His Honour took into account evidence of Mr Vines’ successful career after the contraventions. Here this was not enough to show he was a fit and proper person but had an impact on the period of his disqualification. Evidence of a successful career after the contraventions held more weight than a successful career beforehand.  After determining the periods of disqualification, his Honour determined that the periods should run from the time when the defendants would reasonably have expected a judgment to be handed down in respect of their case. His Honour found this to be in 2004 as the case had been long and complex and had involved multiple defendants. His Honour also permitted Mr Vines an exception to be able to continue to manage his family trusts.  **(iii) Pecuniary penalties**  Under section 1317EA(3)(b) (now section 1317G of the Corporations Act) the court can make an order for a penalty of up to $200,000. The contravention must be a serious one and the contraventions are considered as a whole.  His Honour applied the factors and categories of penalties outlined by Santow J in ASIC v Adler. The principal objective of ordering pecuniary penalties was general deterrence. Personal deterrence was also a factor as some of the directors may hold directorships in the future.  His Honour considered that a pecuniary penalty may be ordered in addition to a disqualification order where, as in this case, there had been a serious contravention.  The penalty imposed on Mr Robertson was significantly reduced based on evidence of financial hardship.  **(iv) Orders for compensation**  ASIC applied to the court for a compensation order to be made against Mr Fox under section 1317HA(1) as a result of his causing the company to enter into the artificial agreement with American Re that was not in its best interests. This required the court to consider whether the company suffered loss or damage as a result of the contravention.  His Honour found that the ordinary meaning of causal connection applied and that mere participation in the decision would not be sufficient. His Honour considered that evidence that Mr Fox had instructed subordinates in relation to negotiation of the agreement and had at the time considered that he had caused the company to enter into the agreement. The court allowed a reduction in the calculation of the loss suffered by the company to take into account some renegotiation of the terms of the agreement by Mr Fox.  **(v) Costs**  Justice Austin considered that costs should be expressed severally against the defendants so that ASIC was not entitled to recover all of its costs from each defendant. Therefore the court divided ASIC’s costs into thirds. A reduction was made in respect of time spent by ASIC on unsuccessful allegations of dishonesty and impropriety against Mr Vines and Mr Robertson and in respect of time spent on issues that did not relate to Mr Robertson. The court ordered that ASIC pay the costs of Mr Vines and Mr Robertson associated with the withdrawn allegations.  **(vi) Findings**   * Mr Vines was disqualified for 3 years, ordered to pay a pecuniary penalty of $100,000 and 22% of ASIC’s costs; * Mr Robertson was disqualified for 3 years, ordered to pay $50,000 and 28% of ASIC’s costs; and * Mr Fox was disqualified for 12 years, ordered to pay $220,000 and a third of ASIC’s costs and ordered to pay compensation of the Australian dollar equivalent of US$143,750.   [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.4 Special purpose administrators – when will they be appointed?**  (By Andrew Dienhoff, Clayton Utz, Sydney)  Honest Remark Pty Ltd v Allstate Explorations NL [2006] NSWSC 735, New South Wales Supreme Court, Brereton J, 21 July 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc735.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  In this case, the NSW Supreme Court decided it did not have the power to appoint a special purpose administrator for the purpose of investigating the conduct of the current deed administrators of a company.   **(b) Facts**  The Plaintiffs ("Honest Remark") were 0.1% shareholders in the First Defendant ("Allstate"), a company subject to a deed of company arrangement.   The Second Defendants, Michael Ryan and Antony Woodings ("Administrators"), were the deed administrators (and former administrators) of Allstate.  Prior to going into administration, Allstate had managed a joint venture to mine the Beaconsfield gold mine in Tasmania. Its principal asset was a lien over the joint venture assets of the venture ("Lien"), valued at approximately $6.7 million in June 2001.  In September 2000, Allstate renegotiated its financing facilities with Macquarie Bank Limited, and granted fixed and floating charges to Macquarie over Allstate, and its subsidiaries.   The Administrators were appointed by resolution of Allstate's directors on 8 June 2001. This occurred after Macquarie had first asked the Adminstrators to act in the administration.  In September 2001, the Administrators sold the Lien to the secured creditors of Allstate and the other joint venturer (being Macquarie and Bankwest respectively), for a deferred payment of $500,000 to be made to unsecured creditors ("Lien Sale").   In March 2002, a further proposal for the transfer of intercompany debts owed by the subsidiaries of Allstate to Macquarie, for the sum of $300,000, was put to creditors and approved ("Loan Assignment").   The final deed of company arrangement for Allstate was then executed on 28 March 2002.  In 2005, Honest Remark commenced legal proceedings. In essence, it contended that:   * but for the Lien Sale and the Loan Assignment, Allstate would no longer be under external administration, and Allstate's debt to Macquarie would have been repaid in full; * both the Lien Sale and Loan Assignment were "apparently uncommercial". In the case of the Lien Sale, Honest Remark alleged that a preferable course of action would have been to enforce the Lien as against the relevant assets, which would have led to the unsecured creditors being paid in full; * statements made by the Administrators, including in creditors' circulars, in relation to the Lien Sale and Loan Assignment were misleading and "cast doubt upon whether the Administrators [had] properly performed their duties" in recommending these transactions to the unsecured creditors of Allstate; * Honest Remark held a bona fide concern that the Administrators "might" have acted in a manner prejudicial to the interests of members and unsecured creditors of Allstate by preferring their own interests, and Macquarie's interests, to the interests of members and unsecured creditors, and may have breached various statutory duties owed by them to Allstate; * the personal interests of the Administrators in avoiding any liability to Allstate created a conflict with their duty to investigate whether they had caused any compensable loss to Allstate;   Accordingly, Honest Remark asked the court to appoint a special purpose administrator to investigate whether the Administrators had caused compensable loss, and to consider whether there were reasonable grounds for the institution of proceedings against the Administrators and/or other parties.  The Defendants applied for summary dismissal of the claim, on various grounds. However the principal issues were:   * whether the court had jurisdiction to make the orders sought by Honest Remark (ie to appoint a special purpose administrator to investigate the Administrators); and * if so, whether the court should exercise its discretion to do so.   **(c) Decision**  An initial consideration for the court was whether the Administrators actually had a conflict of interest and duty that could lead to the need for the appointment of a special purpose administrator.  This required the court to consider whether an administrator has a duty to investigate allegations of misconduct made against him in the first place.  After considering the decision in Re George A Bond & Company Limited(1932) 32 SR (NSW) 301, the court strongly doubted that an administrator has any such duty.   Nevertheless, on this matter, the court was content to proceed on the assumption that if the matter were to be investigated, the Administrators were not the appropriate persons to perform that investigation.  Brereton J next considered the nature of the court's power to appoint a special purpose administrator. After considering various decisions discussing the role of special purpose liquidators, his conclusion was that:  "A special purpose liquidator is appointed to co-exist with the existing liquidators, to fulfil a specific purpose which would otherwise form part of the responsibilities of the original liquidator, but which is carved out from those usual responsibilities because of difficulties in the original liquidator performing it.   Because the investigation of the conduct of a liquidator is not part of the matters entrusted to a liquidator, but a supervisory function of the court, an investigation by one of several liquidators into the conduct of another in the liquidation does not involve carving out of the liquidation a part of the ordinary responsibilities of the liquidator. To the contrary, it involves circumventing the ordinary and proper procedures for supervision of liquidators, and the protections that attend them.  In my opinion, there is no power to appoint a special purpose liquidator for the purpose of investigating the conduct of the original liquidator as such."  His Honour saw no reason, in principle, why these comments did not apply equally to a special purpose administrator.  This left three remaining questions for the court:   * whether section 447A or 447E of the Corporations Act provided the court with power to appoint a special purpose administrator for the purpose of investigating the conduct of a deed administrator; * alternatively, whether the court had inherent power to do so under section 23 of the Supreme Court Act; * whether, assuming there was power for the court to appoint a special purpose administrator for Honest Remark's purposes, the court should exercise its discretion to do so.   The court concluded that there was no power under either section 447A or 447E to appoint a special purpose administrator for Honest Remark's purposes.   As to section 447A, Brereton J. was unconvinced that the order sought was an order "about how [Part 5.3A of the Corporations Act] was to operate".   As to section 447E, the court's principal concern was that the threshold requirement - namely that the court be satisfied that the deed administrator has managed the company's affairs in a prejudicial manner - was not satisfied in circumstances where there was a mere allegation of suspicion that the Administrators had breached their duties to Allstate, and Honest Remark was not prepared to undertake to the court to prove that the Administrators had breached those duties.   The court also doubted that there was a sufficient nexus between the prejudicial conduct of the Administrators complained of and the order sought. The court's view was that section 447E could be used, for example, to obtain orders regulating, compensating or prohibiting prejudicial conduct - but not to appoint a special purpose administrator.  The argument that the court had inherent power to appoint a special purpose administrator under the Supreme Court Act, to investigate and report on the conduct of a deed administrator, was also rejected. Brereton J said that it would be "entirely novel" for inherent jurisdiction to be invoked as a basis for the court to order an investigation, given that the inherent jurisdiction of the court is "concerned [only] with things necessary for the administration of justice".  Finally, the ccurt said that, even if any of its conclusions were wrong, no court acting reasonably could grant the relief sought by Honest Remark.  The court's conclusion on this issue primarily reflected its view that the purpose of appointing a special purpose administrator is not to investigate an administrator's conduct.   However, the court also noted sections 247A, 236, and 1321 of the Corporations Act, which it said potentially provided more "orthodox" remedies for Honest Remark to seek. Given the existence of these potential remedies (with their "built in" safeguards), the court held that it would be wholly inappropriate instead to appoint a special purpose administrator.  **(d) Implications**   The decision is an important reminder for those creditors dissatisfied with the conduct of an administrator or a deed administrator.  As Brereton J noted, the court "does not readily embark on or permit enquiries into the conduct of [administrators]". A creditor should therefore assume:   * they will likely need to establish a prima facie case of wrongdoing by the administrator, which prejudicially affects their interests, in order to attract substantive legal remedies; * it will not be sufficient to identify mere concerns or suspicions about the conduct of an administrator - particularly in relation to commercial decisions that the administrator has made; and * the court is unlikely to provide a creditor with any special assistance so as to enable it to pursue legal action against an administrator for the recovery of monies.   As noted above, the court suggested that Honest Remark should have considered, amongst other provisions, section 247A of the Corporations Act - which permits the inspection of company documents.   From this it may be inferred that: the court requires a creditor to gather evidence in support of a claim against an administrator as any other litigant would; and the court will be reluctant to authorise any process that allows a creditor to circumvent the normal litigation process, except in exceptional circumstances.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.5 Effectiveness of steps taken to remove directors from office**  (By Robert Feiner, Freehills)  Gosford Christian School Ltd v Totonjian [2006] NSWSC 725, New South Wales Supreme Court, Barrett J, 20 July 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc725.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  This case involved an application by Gosford Christian School Limited (“School”) and its sole member, Gosford Christian Centre Limited (“Centre”), to restrain certain individuals (“Defendants”) from acting as directors of School.  At issue was the effectiveness of steps taken by Centre, in its capacity as sole member, to remove the directors from office. Centre had purportedly removed the directors of School through a series of resolutions. First, a board resolution of Centre appointing a body corporate representative to act on its behalf in relation to School. Secondly, a special member resolution of School signed by that representative of Centre amending the constitution of School to enable the removal of directors on a member resolution. Thirdly, a member resolution of School signed by the representative removing the Defendants from office.  The Defendants raised a number of issues with the efficacy of the resolutions, the internal management of Centre and its compliance with its constitution and the Corporations Act 2001 (“Act”). Issues of particular note raised by the Defendants, and which required resolution by Barrett J, included:   * where a constitution requires retirement of directors at each AGM and no AGM has been held, whether the offices of each director become vacant or whether they continue until such time as an AGM is held; * the effect of a failure by a company to comply with section 201A of the Act, which requires public companies to have at least 3 directors in office; * the extent to which a resolution appointing a body corporate representative must specify the powers to be exercised by that representative; * where resolutions must be passed in a particular order and are all signed on the same day, whether there is a presumption that they have been signed in the correct order; and * whether a meeting must be held to pass member resolutions removing directors of a sole member company or whether a signed sole member resolution in accordance with section 249B of the Act is sufficient.   The Defendants were ultimately unsuccessful in challenging the efficacy of the resolutions, and Barrett J made orders restraining the Defendants from acting as directors. The case provides some useful interpretation of common issues that can arise in the internal management of companies.  **(b) Facts**  Both School and Centre are public companies. Centre is the sole member of School (this fact was disputed at trial, however, it was found by Barrett J that this was the case). Centre is a body corporate, and therefore by virtue of section 250D of the Act, is entitled to appoint an individual as its representative to exercise all of the powers that a body corporate may exercise.  As referred to in the summary above, a series of three resolutions, the product of which was purported to be the removal of the Defendants as directors, were at issue. All of the resolutions were dated 26 June 2006.  The Defendants challenged the effectiveness of the resolutions on a number of bases, most of which are summarised below.  **(c) Decision**  **(i) Directors that passed board resolution of Centre were not directors of Centre at that time**  The Defendants submitted that the board resolution of Centre appointing the body corporate representative to act on its behalf in relation to School was invalid. It was argued that the directors that passed that resolution were not directors of Centre at that time.  Although an ASIC company extract provided evidence that the directors that passed the board resolution of Centre were in office, the constitution of Centre provided that each director automatically retired and could be re-elected at the conclusion of the AGM of Centre each year. At the time of the board resolution, the time for an AGM of Centre had passed and no such meeting had been held.  The question to be decided by the court was whether the directors of Centre did not retire until an AGM had actually taken place, or whether they were deemed to have retired (and therefore were unable to pass the board resolution) at the deadline for the holding of an AGM.  Barrett J, referring to past authority on the issue, decided that two of the three directors of Centre that passed the board resolution were deemed to have retired at the deadline for the holding of the last AGM.  In the case of the third director, Barrett J held that he should not be deemed to have retired as he was appointed to the board of Centre ex officio. In the case of a director appointed ex officio, their office remains unaffected (unless specified otherwise) by any requirement to retire at an AGM. That two directors who were not in office had signed the board resolution was not considered to have invalidated its effect, rather their signatures were regarded as mere surplusage.  **(ii) Breach of section 201A**  The fact that two of the three directors of Centre were held to not be directors of Centre at the time of the board resolution meant that Centre was not in compliance with section 201A. Section 201A requires public companies to have at least 3 directors. Barrett J considered whether the board resolution appointing the corporate representative was invalidated by non-compliance with section 201A.  It was held that non-compliance with section 201A would not invalidate the board resolution if it was appropriate to make an order under section 1322 of the Act. A court may make an order pursuant to section 1322(4) of the Act declaring that any act purported to have been done in accordance with the Act (such as appointing a body corporate representative) is not invalid by reason of any contravention of the Act.  A court is prevented from making an order pursuant to section 1322(4) in certain circumstances, such as where a person concerned in the contravention has acted dishonestly, or where there would be substantial injustice. However, Barrett J found that neither of those circumstances applied in the present case and therefore made such an order declaring that the board resolution was not invalid because of the operation of section 201A.  **(iii) Wording of resolution appointing corporate representative**  The Defendants argued that the board resolution appointing the corporate representative was not in the required form to appoint a representative pursuant to section 250D. The Defendants submitted that an appointment pursuant to section 250D must specify the powers to be exercised by the representative with sufficient particularity. The board resolution merely stated that the individual was appointed as the representative of Centre pursuant to section 250D of the Act.  However, Barrett J held that a resolution worded in the way expressed in the board resolution, despite the absence of any explicit delineation of powers, is sufficient to make an appointment pursuant to section 250D.  **(iv) Sequence of the resolutions**  The Defendants submitted that the resolutions were not effective because there was no evidence that they had been passed in the correct order. Each of the resolutions was dated on the same day. It was agreed that the order in which the resolutions were completed was of fundamental importance.  Barrett J held that it must be presumed that the parties that passed the resolutions intended them to have the effect that they were designed to have. Further, in the absence of evidence to the contrary, a presumption of regularity should be inferred. It was held that as a matter of probability, the documents were signed in the order necessary to give them effect.  **(iv) Requirement for physical meeting of member**  The final point on which the Defendants unsuccessfully challenged the efficacy of the resolutions was on the basis that a member resolution removing directors of a sole member company must be passed at a meeting. Section 249J of the Act requires that notice of a meeting of members must be given to each member and director of a company. It was submitted by the Defendants that this requirement implied a right on the part of the directors for a physical meeting to be held.  However, Barrett J held that section 249J does not carry with it a right for a meeting to be convened in a case where the particular objective can be carried out without a meeting. Section 249J provides no more than a right for members and directors to be given notice of a meeting in cases where a meeting is to be convened. In this case, it was open for the corporate representative to pass the resolution without a meeting in accordance with section 249B of the Act, which provides that a sole member may pass resolutions by written resolution.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.6 Employees, confidentiality covenants and restraint of trade**  (By Tarryn Billings, Phillips Fox)  Cactus Imaging Pty Ltd v Glenn Peters [2006] NSWSC 717, New South Wales Supreme Court, Brereton J, 18 July 2006  The full text of this judgement is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc717.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  The plaintiff, Cactus Imaging Pty Ltd (Cactus) sought to restrain its former state sales manager Glenn Peters (Peters) from disclosing Cactus’ confidential information, and for a period of twelve months to restrain Peters from:   * canvassing soliciting or endeavoring to entice away from Cactus any persons who were its clients or customers during the year before Peters’ departure; * soliciting or enticing away from Cactus any employee consultant or contractor of Cactus; and * counseling procuring or otherwise assisting any person to do any of those acts.   These restraints were included in Peters' employment contract, along with a provision restraining him from engaging in any business of the same nature within New South Wales for a period of twelve months.  Brereton J considered each aspect of the proposed restraint separately, with reference to both case law and the Restraints of Trade Act 1976 (NSW). His Honour found that the clauses in Peters' employment contract protected a legitimate interest of Cactus in the confidentiality of aspects of its operations. It also protected a legitimate interest in customer connection, prohibiting the solicitation of the existing clientele of Cactus. The period of twelve months was considered reasonable for the duration of this restraint.  The prohibition on the recruitment of Cactus' staff was found to be supported by a legitimate interest in the protection of confidential information and staff connection and enforceable for up to twelve months in respect of New South Wales sale staff, but only in respect of the solicitation of staff for the purpose of engaging in a competing business.  **(b) Facts**  Cactus is a printing company, servicing the outdoor advertising industry. Peters was employed as a salesman under a written contract which included provisions:   * by which Peters agreed not to disclose any information which he might have received, arising out of or in the course of his employment, to any other party; * for the protection of goodwill, by which he agreed not to be engaged in any business of the same nature within New South Wales for a period of twelve months after the end of his employment; * by which Peters agreed not to solicit or endeavour to entice away from Cactus any person who or which had at any time during the preceding twelve months been a client or customer of Cactus; * by which Peters agreed not to solicit, interfere with or endeavour to entice away from Cactus any person who had at any time during the preceding twelve months been an employee, consultant or contractor of Cactus; and * by which Peters agreed not to otherwise assist any person to do any of these acts.   Peters left Cactus in September 2005 and in February 2006 took a position with Cactus' chief competitor, Metro Media Technologies Inc (MMT). Cactus did not seek to prevent Peters from remaining in the employment of MMT (despite the contrary provision in Peters' employment contract).  The issues before the court were:   * Did Peters have in his possession confidential information of Cactus? * Was the restraint on solicitation of customers no more than reasonable for protection of Cactus’ legitimate interest? * Was the restraint on solicitation of employees enforceable, and no more than reasonable for protection of Cactus’ legitimate interest?   The court decided this case in the context of the Restraint of Trade Act 1976 (NSW), under which a restraint is valid to the extent to which it is not against public policy.  **(c) Decision**  **(i) Confidential information**  Cactus relied on the alleged possession by Peters of confidential information to support both the covenant in Peters' employment contract against disclosure of such information, and also the covenant against soliciting customers.  Brereton J based his decision on the premise that an employer has an interest in its confidential information and it may legitimately protect this interest by a restraint of trade. This is so even if the information is not a trade secret so as to attract equitable protection in the absence of any contractual agreement.  On the facts before it, the court held that Peters was in possession of confidential information, and that there was a risk of him using this information in the course of his employment with MMT. As such, Cactus' interests in maintaining this confidentiality justified the prohibition on Peters using the confidential information for at least as long as the information remained current.  Brereton J went further to say that Cactus' interest in maintaining confidentiality also justified the prohibition against Peters' working for a competitor. Cactus did not seek to enforce this clause in the employment contract, but his Honour stated that the clause protected the legitimate interest of Cactus in the confidentiality of aspects of its operations which afforded it a commercial advantage.  **(ii) Customer connection**  His Honour cited a number of cases in support of the principle that customer connection is an interest which can support a reasonable restraint of trade. A restraint is legitimate if the employee is the person who represents the business to the customer, as Peters did in this case, being the sales manager.  The court considered the case of Koops Martin Financial Services v Reeves [2006] NSWSC 449 which is authority for the proposition that an employer is not entitled to be protected against mere competition by a former employee, but is entitled to protection against unfair competition based on the use by the former employee of customer connections built up during their employment.  **(iii) Scope of restraint - customers**  The court held that even though the scope of the restraint in this case extended beyond those customers with whom Peters had personal contact, it was still reasonable by virtue of the fact that Peters may have acquired influence over or special knowledge of the clientele as a result of the seniority of his position.  The restraint was also supported with respect to the protection of confidential information. Peters had knowledge of information which would advantage him, in the employ of MMT, in soliciting customers of Cactus. Cactus could therefore legitimately prohibit solicitation of the existing clientele of Cactus.  **(iv) Duration of restraint**  The test used by the court to determine the reasonableness of the duration of restraint was 'what is a reasonable time during which the employer is entitled to be protected against solicitation, which in turn depends on how long it would take a reasonably competent employee to show his or her effectiveness and establish rapport with customers' (Stenhouse Australia Limited v Phillips [1974] AC 391).  The court also took into account how long the influence of the former employee over the clientele might last, and how long the confidential information known by the former employee was likely to remain current.  Brereton J held that the twelve month period in Peters' employment contract was reasonable based on the facts relating to Cactus' customers and their business practices.  **(v) The non recruitment covenant**  Brereton J looked carefully at the competing case law regarding whether a covenant not to solicit employees is enforceable. The two main, competing decisions referred to were Hanover Insurance Brokers Limited v Shapiro [1994] IRLR 82 (which held that an employer has no entitlement to impose restrictions on solicitation of staff) and Ingham v ABC Contract Services UKCA, 12 December 1993, unreported (which held that employers have a legitimate interest in maintaining a stable, trained workforce in a competitive environment).  It was held on these facts that a non recruitment covenant may be justified where the former employee may use confidential knowledge, gained in the course of their employment, to target particular employees. In the case of Peters, the covenant in his contract therefore protected not only staff connection, but also Cactus' confidential information.  It was held that the covenant was enforceable for twelve months, in respect of New South Wales sales staff, and only in respect of their solicitation for the purpose of engagement in a competing business.  **(vi) Orders**  Brereton J ordered that Peters be restrained from directly or indirectly disclosing to any other person Cactus’ confidential information. He was also restrained from canvassing, soliciting or endeavoring to entice away from Cactus any clients or customers, and from soliciting or endeavoring to entice away, for the purpose of being engaged within New South Wales in any business of the same nature as Cactus' business, any person who was as at 28 September 2005 a sales representative of Cactus in New South Wales.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.7 Application of surplus assets under section 501 of the Corporations Actfollowing a winding up**  (By Justin Fox and Brooke Lanarus, Corrs Chambers Westgarth)  Yanollee Pty Limited (In Liq) [2006] NSWSC 705, Supreme Court of New South Wales, Barrett J, 13 July 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc705.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  A liquidator applied to the court for confirmation of the correct method for distributing surplus assets among members following the winding up of the Company. The main issue for the court to consider was whether the constitution of the Company precluded the Company’s shareholders from receiving surplus assets beyond the return of their paid up capital.  At the time of winding up, no shares other than 12 ‘A’ class shares were on issue.  The articles of association of the Company provided that upon winding up, surplus assets were to be applied first, to the return of paid up capital of ‘A’ class shareholders and then exclusively to the holders of ‘B’ class, ‘C’ class and ordinary shareholders. The articles of association expressly stated that ‘A’ class shareholders had no further entitlement to participate in the surplus, beyond the return of their capital.  The court ultimately found that as a matter of construction, the surplus was to be applied first, in repaying the capital paid up on the twelve ‘A’ class shares and, second, by division among the members in proportion to the capital paid up on their shares.  **(b) Facts**  The plaintiff was appointed as liquidator of Yanollee Pty Limited (Company) following a members resolution to voluntarily wind the Company up. After the sale of the company’s principal assets and the payment of creditors, a surplus of more than $680,000 remained in the liquidator’s hands for distribution.  At the time of the winding up, the Company had twelve fully paid ‘A’ class shares on issue, six of which were held by Mr Sidney McCutcheon and six of which were held by Mr Allan McCutcheon. No other shares were ever issued. The memorandum and articles of association of the Company divided the share capital of the company into ‘A’ class, ‘B’ class, ‘C’ class and ordinary shares, each with their own nominal value.  Article 5(2)(iii) of the articles of association provided that in the event of the Company being wound up, the surplus assets were to be applied first to the amount paid up on ‘A’ class shares and then were to belong exclusively to the holders of ‘B’ class shares, ‘C’ class shares and ordinary shares. The articles of association specifically provided that ‘A’ class shareholders were not entitled to any further participation in the surplus assets.  Article 141 of the articles of association provided that in the event of a surplus upon winding up, the excess shall be distributed among the members “in proportion to the capital at the commencement of the winding up, paid up or which ought to have been paid up on the shares held by them respectively”, but without prejudice to the rights of the holders of shares issued upon “special terms and conditions”.  The issue for the liquidator was whether article 5(2)(iii) meant that the ‘A’ class shareholders (being the only shareholders in the company) were to be denied participation in the surplus beyond the amounts paid up on their shares. The liquidator approached the court to determine the correct application of the surplus.  **(c) Decision**  The court was directed to section 501 of theCorporations Act (Cth) (2001) (Act) which provides that:  "Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally, and, subject to that application, must, unless the company’s constitution otherwise provides, be distributed among the members according to their rights and interests in the company."  Barrett J made reference to a long line of case law (including Re Driffield Gas Light Company [1898] 1 Ch 451), in which it was concluded that the proportionate interests of members for these purposes should be measured according to the nominal amount paid up on their shares – subject, however, to recognition of any preferred or superior claims created by the company’s constitution.  Barrett J acknowledged however that this general principle was formulated at a time when shares had par value and the extent to which a share was paid up was measured by reference to that par value (or nominal value). This concept of par value has since been abolished and section 1427(1) of the Act states that any provisions in a company’s constitution stating the amount of the company’s share capital, and dividing that share capital into shares of a fixed amount, are repealed.  In that context, the court concluded that it seems clear that the general principle of proportional participation now pays attention to interests in share capital measured by numbers of shares held rather than according to par or nominal value. As described above, this general principle will always be subject to modification by the constitution. The question to Barrett J’s mind therefore was whether the constitution indicated an intention that the members as a whole, both being “A” class shareholders, are to be denied altogether participation beyond the amounts paid up on their shares.  Barrett J concluded that there was no real doubt that if ‘B’ class, ‘C’ class or ordinary shares were on issue, those shares would entitle their holders to share in the surplus beyond the return of the capital contributions on the ‘A’ class shares and that ‘A’ class shareholders would be precluded from sharing in that surplus. In the absence of any ‘B’ class, ‘C’ class or ordinary shares however, Barrett J concluded that the second sentence of article 141, which provided that any surplus be distributed among members in proportion to the capital that had been or ought to have been paid on their shares, had application. As article 141 provided for a method of distribution of the surplus which was qualified only where there were shares issued “upon special terms and conditions”, Barrett J concluded that the principle applied in an unqualified manner where there were no such special shares on issue.  In conclusion, Barrett J held that as a matter of construction, the constitution provided that the surplus in the liquidator’s hands is to be applied, first, in repaying the capital paid up on the twelve outstanding ‘A’ class shares, and second by division among the members in proportion to the capital paid up on their shares at the commencement of the winding up. Section 501 of the Corporations Act requires that effect be given to the constitution in this respect so that the net result is that the surplus remaining after the return of the capital on the ‘A’ class shares must be divided equally between those two members.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.8 Vague and unsubstantiated promises by a related company are insufficient to establish solvency**  (By Liam Brown, Mallesons Stephen Jaques)  Duncan v Commissioner of Taxation; in the matter of Trader Systems International Pty Ltd (in liq) [2006] FCA 885, Federal Court of Australia, Young J, 12 July 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/july/2006fca885.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary** The court was asked by the liquidator of Trader Systems International Pty Ltd (“TSI”) and TSI Australia Limited (“TSIA”) (together “the Companies”) for an order that certain payments made by the Companies to the Commissioner of Taxation (“the Commissioner”) between November 2002 and April 2003 were void as against him on the basis that they were either unfair preferences or uncommercial transactions. In the same proceedings the Commissioner brought a third party action against two former directors of the Companies seeking an order for indemnification for loss and damage he would suffer in the event that the liquidator was successful with his action.  The directors’ primary defence rested on an argument that at the relevant times the Companies were solvent. The directors asserted solvency due to an agreement between two related companies whereby one agreed to be bound by the liabilities of the Companies. Advances were made, the Court was told, in accordance with the purported agreement, to allow the Companies to satisfy certain liabilities. However, Young J found that there was insufficient evidence to establish that the related company would make the necessary payments for the Companies to meet all of their liabilities, as they fell due. Accordingly, Young J was satisfied that the relevant transactions were either unfair preferences or uncommercial transactions that were void as against the liquidator.  **(b) Facts**  TSI and TSIA were part of a group of companies engaged in the development and marketing of a software program designed for use by retail options traders. In particular, Swift Securities and Investments Limited (“Swift Malaysia”) a Malaysian company, and Swift Securities and Investments Pty Ltd (“Swift Australia”) were part of the group. From time to time, Swift Malaysia and Swift Australia advanced funds to TSI and TSIA to support their operations.  The plaintiff liquidator was appointed as administrator of the Companies on 15 May 2003 and as liquidator on 23 July 2003. The plaintiff claimed that certain payments in respect of taxation liabilities made by the Companies to the Commissioner were unfair preferences pursuant to section 588FA or uncommercial transactions pursuant to section 588FB of the Act. The Commissioner sought an order under section 588FGA that where any avoided payments relate to income tax withholdings liabilities (“ITW Liabilities”), he was to be indemnified by the directors of the Companies.  At the hearing the liquidator gave evidence that, having investigated the financial position of the Companies, he was of the opinion that they were insolvent at all times from 1 July 1999 onwards. The Judge found that there was overwhelming evidence to support this opinion. In particular, the Companies had failed to meet taxation liabilities for a lengthy period of time, the Companies’ outstanding creditors were owed approximately $3 million, and the Companies’ largest debtors pertained to related party loans.  Before the hearing commenced the plaintiff and the Commissioner settled the claims as between each other. However, the settlement did not extend to the claims brought by the Commissioner against the directors. In any event, the court accepted that the directors were able to contest the liquidator’s claims against the Commissioner.  **(c) Decision  (i) Voidable transactions - section 588FE**  Transactions between the Companies and the Commissioner were voidable under Section 588FE if they were:   * insolvent transactions and were entered into during the 6 months ending on the relation back day (15 May 2003); or * both insolvent transactions and uncommercial transactions that were entered into during the two years ending on the relation back day.   Section 588FC provided, relevantly, that an insolvent transaction of the Companies is either an unfair preference or an uncommercial transaction entered or effected whilst the Companies were insolvent.  **(ii) The solvency defence**  The directors argued that none of the transactions was an insolvent transaction because the companies were solvent at the relevant times. Young J reiterated that the appropriate test of solvency under the Act requires a cash flow rather than a balance sheet approach and the Court should take a commercially realistic view in determining the resources available to a company to enable it to pay its debt as and when they fall due. Further, solvency can be established even though the arrangement under which funds are to be provided is from a third party and is entirely voluntary. “In the end, it is a question of fact to be ascertained from the consideration of a company’s financial position taken as a whole whether a voluntary arrangement with a third party for provision of funds amounts to a sufficient basis for concluding that the company is able to meet its liabilities as they fall due”.  The directors relied heavily on an agreement between Swift Malaysia and another company in the corporate group whereby Swift Malaysia agreed to purchase the shares of TSI and TSIA and agreed to “take over and be responsible for the liabilities of TSI and TSIA”. The directors asserted that the agreement and ad hoc payments made thereafter constituted an undertaking or promise by Swift Malaysia to pay the ongoing liabilities of the Companies. However, Young J found that, on the facts, there was little to suggest a binding obligation on Swift Malaysia to make any payments. In any event, the agreement had not been performed (including the transfer of shares) and advances of money from Swift Malaysia or Swift Australia were recorded as loans against the Companies. Overall the picture was not consistent with the proposition that the funds were provided as a matter of obligation under the terms of the agreement or as a matter of course to discharge all future liabilities. There was nothing to suggest that Swift Malaysia agreed to be bound by liabilities other than those existing at the time of entering the agreement. His Honour was satisfied that there was clear evidence that the Companies never had sufficient funds, whether from Swift Malaysia or elsewhere, to pay all of their debts as and when they fell due.  **(iii) Unfair preferences - section 588FA(1)** To establish that the relevant transactions were unfair preferences the liquidator needed to prove that the payments were transactions; that the Commissioner received the payments in his capacity as a creditor; andthat each payment resulted in the Commissioner receiving in respect of an unsecured debt more than he would receive if he proved that debt in the winding up.  On the basis of the liquidator’s evidence and the Judge’s own findings on solvency there was little dispute about the second and third requirements. However, the directors argued that the payments were not “transactions” because the payments to the Commissioner were sourced from either monies paid by Swift Malaysia or monies withheld from employees to satisfy tax liabilities. Justice Young found that this argument was “utterly misconceived” as each payment was made from a bank account of the Companies.  **(iv) Uncommercial transactions - section 588FB(1)** The liquidator alleged that three payments made by TSIA to the Commissioner in discharge of TSI’s tax liabilities constituted uncommercial transactions within the meaning of section 588FB(1). The test for an uncommercial transaction under section 588FB(1) is that it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to the benefits and detriments to it of entering into the transaction, the respective benefits to other parties to the transaction, and any other relevant matter. Young J found that the relevant transactions conferred no benefits on TSI, only detriments. The transactions had the effect of increasing the outstanding liabilities of TSI to TSIA in circumstances where there was no prospect that TSI would be able to repay the advances. Accordingly, these were uncommercial transactions.  **(v) Indemnity from the directors to the Commissioner - section 588FGA** As the court was satisfied that an order should be made in favour of the liquidator, voiding the uncommercial transactions and unfair preferences, the final question was whether the Commissioner was entitled to be indemnified by the directors in respect of any relevant loss or damage resulting from that order. The directors raised two defences:   * at each time a payment was made the directors had reasonable grounds to expect (based on the Swift Malaysia agreement), and did expect, that the company was solvent at that time and would remain solvent even if the payment was made; and * there was no relevant loss or damage for which indemnity could be sought because all the order required was the Commissioner to deliver up funds to which he was not entitled.   As to the first point, Young J found that there was no evidence to support a reasonable expectation on behalf of the directors that Swift Malaysia could be relied upon to provide funds to the Companies in such a way as to enable the Companies to discharge all their ongoing liabilities as and when they fell due. On the contrary, it was clear that whilst Swift Malaysia and Swift Australia had advanced considerable sums of money this was dramatically insufficient to meet ongoing liabilities. As to the second point, by ordering the Commissioner to pay the liquidator amounts in respect of ITW liabilities paid by the Companies, the Commissioner would have to prove for these debts in the winding-up of the Companies. It was clear from the liquidator’s evidence that unsecured creditors would not receive any distribution in the winding up of the Companies. Consequently, on the basis of existing authority, the orders against the Commissioner resulted in relevant loss or damage.  **(d) Postscript** A Notice of Appeal to the Full Federal Court from Young J’s decision was filed on 1 August 2006.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.9 Determining whether an application for the adjournment of a winding-up order is in the best interests of a company's creditors** (By James Williams,Phillips Fox)  David Lambourne Yacht Rigging Pty Ltd v Perry Catamarans Pty Ltd (Receivers and Managers Appointed) [2006] FCA 887, Federal Court of Australia, Greenwood J, 10 July 2006  The full text of this judgement is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/july/2006fca887.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  The case involved an application for an order pursuant to section 440A(2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act') to adjourn the hearing of a winding-up application made under section 459A of the Act in relation to an insolvent company. Greenwood J held that he could not be satisfied that such an adjournment was in the best interests of all the creditors of the company. His Honour therefore dismissed the application and ordered that the company be wound-up in insolvency.  **(b) Facts**  Perry Catamarans Pty Ltd ('the Company') was incorporated on 7 September 2004 and operated a luxury catamaran boat building business ('the Business'). The Business was initially operated by Perry Catamarans Australia Pty Ltd ('PCA'). PCA was then acquired by Farallon Capital Pty Ltd ('Farallon') through its two subsidiary companies, Perry Holdings Australia Pty Ltd ('Perry Holdings') and the Company.  Perry Holdings purchased the intellectual property and business assets from PCA. The Company purchased the trading assets and became responsible for the operation of the Business.  Mr Gregory Nunn was the sole director and secretary of the Company. Mr Nunn was also the director and secretary of Perry Holdings and Farallon.  An analysis of the Company's trading performance revealed that the Company had incurred significant operating losses since the date of its incorporation. On 24 July 2006, Receivers and Managers were appointed. Significantly, the Company received considerable financial support from Perry Holdings and Farallon throughout the period in which the Business operated. This support, which amounted to $6,937,873, comprised advances made to the Company and the discharge of one of the Company's bank bills with the ANZ Banking Group Ltd, which were secured by charges in favour of the two companies. The Company also incurred $1.4 million in debts to unrelated unsecured creditors.  The Administrators of the Company declared that the Company became insolvent when Perry Holdings and Farallon decided not to provide any further support to the Company on 22 April 2006. However, it was suggested by a number of the Company's creditors that Mr Nunn, Farallon and Perry Holdings may have contravened sections 588G(2) and 588M of the Act by allowing the Company to incur debts in insolvent circumstances. It was argued that as a result of Mr Nunn's involvement with Perry holdings and Farallon, coupled with his intimate knowledge of the operating performance of the Company, he would have been aware that the Company was not able to repay a number of the unsecured and secured debts it incurred prior to 22 April 2006.  David Lambourne Yacht Rigging & Consultancy Pty Ltd ('the Applicant'), a creditor of the Company, applied for an order pursuant to section 459A of the Act to effect the winding up of the Company.  Farallon and Perry Holdings sought to adjourn the determination of the winding up application pursuant to section 440A(2) of the Act, so as to afford the Company's creditors sufficient time to consider a Deed of Company Arrangement ('the Deed') at an upcoming meeting of creditors.  Farallon and Perry Holdings proposed to make $300,000 available to Deed Administrators shortly after the execution of the Deed. The money was to be distributed to the Company's unsecured creditors. The two companies argued that the distribution would result in unsecured creditors receiving a greater and more accelerated dividend than would be the case if the Company was wound-up.  Thus, as Greenwood J stated, the question was whether the proposal by the secured creditors, Farallon and Perry Holdings, to promptly establish a fund to be administered under the terms of the Deed was one which was likely to more favourably serve the interests of the Company's creditors as compared with the effect upon those interests of a winding-up.  **(c) Decision**  Greenwood J analysed the potential distributions to the unsecured creditors under the proposed Deed and in the event of the Company being wound-up. His Honour referred to the Administrator's report which suggested that creditors would receive a greater and accelerated dividend under the Deed. This conclusion was based on the likelihood that the insolvent trading claims by the liquidator against Mr Nunn, Farallon and Perry holdings would be resisted and significant costs would be incurred, which would significantly reduce the potential judgment amount.  However, Greenwood J also noted that the rights and entitlements available to creditors under section 588G of the Act could only be asserted in circumstances of liquidation. Thus, a winding-up order constituted the only means by which the creditors would have access to these rights and entitlements.  His Honour referred to the fact that the Applicant argued that the powers of a liquidator were expansive and that the Act provided the necessary machinery to enable a liquidator to properly investigate whether there were matters which ought to be pursued which may result in a greater distribution to the creditors than that proposed under the Deed.  Greenwood J further noted that the position of the Company's creditors differed. For example, his Honour referred to the fact that not all the creditors' debts had been allegedly incurred when the Company was in a state of insolvency. However, Greenwood J confirmed that the assessment as to whether the Company should proceed with the administration depended on whether it was in the interests of all the Company's creditors to do so.  Greenwood J concluded that it had not been demonstrated that it was in the best interests of all the creditors to proceed with the administration of the Company. His Honour stated, "[i]f the effect of the meeting is to approve a deed of company arrangement which will extinguish the claims of the creditors, release the respondent company and prevent a liquidation which would in turn foreclose any opportunity for a relevant creditor to consider and if thought fit, invoke the processes contemplated by Subdivision B of Division 4 of Pt 5.7B, I remain unpersuaded that the evidence demonstrates that such a result is in the interests of the relevant creditors of the company."  Greenwood J ordered that the adjournment application be dismissed and that the company be wound-up in accordance with the original application.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.10 A meeting must consist of more than one person where multiple persons are entitled to attend and vote**  (By Nicholas Mavrakis, Clayton Utz, Sydney)  Re Altitude Scaffolding [2006] EWHC 1401 (Ch), English High Court, Chancery Division, Richards D, 14 June 2006  The full text of this judgment is available at:  <http://www.bailii.org/ew/cases/EWHC/Ch/2006/1401.html>  **(a) Summary**  If there is more than one member of a class in a proposed scheme of arrangement, a class meeting will only be valid if more than one member attends and votes.  **(b) Facts**  Two separate English companies (ASL and T&N) wanted to enter into schemes of arrangement with their creditors, under section 425 of the Companies Act 1985 (Eng) (which is similar to section 411 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)).  ASL obtained court orders for the class meetings to consider the scheme. Those meetings were held. At one class meeting, only only creditor turned up and voted (despite the fact that there were a number of creditors in the class). The scheme went back to the court for its approval.  At about the same time, T&N applied for court orders for the convening of scheme meetings for its proposed scheme. T&N was concerned that it also might face the possibility of having only one creditor turn up for a class meeting. Accordingly, it asked the Court for a direction that the attendance of only one creditor at a class meeting would constitute a valid meeting.  Both matters raised the same issue: is a scheme meeting a valid "meeting" if only one member or creditor (out of several) turns up at the meeting?  **(c) Decision**  The court held that, where there are multiple persons entitled to attend and vote, a valid meeting requires the attendance of more than one person.  It referred to longstanding authority that a "meeting" is "an assembly or coming together of two or more … persons" (Sharp v Dawes (1876) 2 QBD 26; In re Sanitary Carbon Co [1877] WN 223; James Prain & Sons, Petitioners [1947] SC 325; In re London Flats Ltd [1969] 1 WLR 711; In re MJ Shanley Contracting Ltd (1980) 124 Sol Jo 239).  It acknowledged Lord Coleridge's statement in Sharpe v Dawes that "meeting" can have a different meaning if the surrounding circumstances indicate it. That statement had been used many times to uphold meetings of one person where the class or group entitled to attend and vote at the meeting consisted of only one person. However, that was an exception to the general rule. To extend it to situations in which only one person (out of a number of eligible attendees) turned up would simply negate the rule. There was no indication that Parliament, when enacting section 425, had intended "meeting" to have anything other than its normal legal meaning, as a coming together of two or more persons.  The court noted, without comment, the possibility that "meeting" might extend to include a situation in which only one person was physically present, but another potential attendee voted by proxy.  The court therefore had no jurisdiction to approve the ASL scheme. Nor would it direct that a meeting of only one creditor would constitute a valid meeting for the purposes of the T&N scheme.  **(d) Comment**  The first point to be made here is that this is not a decision about quorum. Rather, the judgment is concerned with the more fundamental issue of what constitutes a "meeting" in the context of a creditors' or shareholders' meeting.  Normally, the rules for a scheme meeting will be the subject of the court order convening the meeting. However, as the court in this case clearly believed, there may be doubts about whether the court's power to make rules for a meeting allows it to order that a meeting of one person would constitute a "meeting" for the purposes of section 425/411. If "meeting" in the statute means a meeting of more than one person, it is probably beyond the power of the court to change that statutory meaning (except where that power is expressly conferred on the Court). In Australia, that conclusion may be fortified by the separation of powers in relation to Commonwealth courts.  It is also worth noting that the primary case relied upon by the English Court (Sharpe v Dawes) is apparently good law in Australia. It was applied as recently as 1995, by Young J (NSW Sup Ct) in Touzell v Cawthorn (1995) 18 ACSR 328.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top)  **5.11 Effect of deeming provisions in the company constitution, procedural irregularities and operation of section 1322(2) of the Corporations Act**  (By Yi-Hua Lu, Freehills)  MTQ Holdings Pty Ltd v RCR Tomlinson Ltd [2006] WASC 96, Supreme Court of Western Australia (in Chambers), Le Miere J, 7 June 2006  The full text of this judgment is available at:  <http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc96.htm>  or  <http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp>  **(a) Summary**  The plaintiff (MTQ Holdings) sought an order to set aside the result of a poll at a general meeting of the defendant (RCR Tomlinson Ltd) on the grounds that it had been improperly conducted. Mr Sanders, who was the proxy holder for the plaintiff, was denied an opportunity to object to the validity of a number of proxy votes. At issue were: the effects of two provisions in the company constitution that deem decisions on the validity of votes final or conclusive and binding and the consequence of irregular conduct of the meeting. Le Miere J held that although the deeming provisions did not make the declaration of the validity of votes final or conclusive, and there had been a procedural irregularity, there had not been substantial injustice and thus declined to declare the poll invalid pursuant to section 1322(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  **(b) Facts**  The plaintiff (MTQ Holdings) was a Singaporean registered public company that held through its two Australian subsidiaries 26.4 per cent of the defendant’s share capital. For the purposes of acquiring two new companies the defendant planned to raise $10.16 million of new equity. The plaintiff was of the view that the acquisitions should be funded by a combination of debt and equity and planned to oppose the share issue at the general meeting.  Relevant to the dispute were the following provisions of the defendant company’s constitution:   * Article 61.1: “an objection may be raised to the qualification of a voter only at the meeting at which the vote objected is given or tendered”; * Article 61.2: “An objection mentioned in Article 61.1 must be referred to the chairman of the meeting, whose decision is final”; * Article 61.3: “A vote is valid for all purposes unless it is disallowed as a result of an objection”; * Article 61.3(a) “The Board may require the Auditor to audit and report on the validity of the instruments appointing a proxy and powers of attorney deposited under these Articles”; and * Article 61.3(b) “The certificate of the Auditor is conclusive and binding on Members and the Company as to all matters stated in the certificate”.   A general meeting was scheduled for 3 November 2004 to approve the share issue. Prior to the meeting, the Board engaged an auditor to audit the list of proxies and excluded shareholders from the upcoming general meeting. The auditor concluded that the list of proxies as provided by the company was eligible and valid, and that correct voting exclusions had been applied. Also prior to the meeting the plaintiff requested more information so it could identify shareholders in the defendant who may be ineligible to vote because they might obtain a benefit under the share issue.  At 9am on 3 November 2004 Mr Sanders, partner of Bennett & Co and proxy holder for the plaintiff, and other solicitors from Bennett & Co arrived at the voting venue and with the permission of Mr Dundo, solicitor advising the defendant, scrutinised the instruments empowering proxy votes and subsequently identified some 4,185,000 proxies to which objection might be taken, on the grounds that the instruments appointing the proxies may be invalid or improperly executed. The plaintiff also requested further information to identify shareholders who may be excluded from the vote. This enquiry was still ongoing when the general meeting was convened at 10:15am by the Chairman of the defendant, Mr Lynch. Three motions were to be considered, resolution 1 and 2 were to approve the share issue.  Upon opening the meeting, Mr Lynch declared that the proxies were valid and in accordance with the Company’s constitution. Resolutions 1 and 2 were carried on a show of hands (including the proxies in question) but Mr Sanders demanded a poll. During the adjournment to conduct the poll the plaintiff approached Mr Dundo continuing to raise the issue of the validity of the proxies and requesting more time to identify possibly excludable votes but Mr Dundo would not further discuss the matter. Mr Sanders then informed Mr Lynch that when the meeting reconvened, he would exercise his right as a proxy holder to object to the proxies being included in the poll, to which Mr Lynch made no reply.  When the meeting reconvened Mr Lynch announced the resolutions carried (resolution 1 by 6,453,589 votes and resolution 2 by 5,953,266 votes) and immediately declared the meeting closed. During trial there was substantial factual dispute as to the exact sequence of events, but ultimately Le Miere J concluded that Mr Sanders had stood up for the purpose of raising his objections and started to voice his objection before or just as Mr Lynch declared the meeting closed, and that Mr Lynch deliberately ignored Mr Sanders and denied him a chance to complete his objection.  The plaintiff sought an order declaring the proceedings at the general meeting, including the passing of resolutions 1 and 2, to be void and sought such further or other orders as the court thinks fit. The central issues were: the effect of the deeming provisions of Article 61.2 and 61.3(b); and the consequences of the conduct of the meeting, in particular the manner in which the chairman dealt with the plaintiff’s objections.  **(c) Decision**  Le Miere J dismissed the plaintiff’s application. It was held that, although the deeming provisions did not put the auditor’s report or the chairman’s declaration beyond legal examination and that there had been a procedural irregularity, there had not been substantial injustice and thus declined to declare the poll invalid pursuant to section 1322(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Section 1322(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) states:  “A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.”  **(i) Deeming provisions**  The effect of Article 61.3(b) deeming the auditor’s report on the validity of the votes final and conclusive did not make the decision unamenable to law. Given a deeming provision such as Article 61.2, a chairperson’s decision would not be subject to objection if taken in good faith after proper legal considerations, but where such a decision disallows a valid vote, the shareholder may object to the courts (citing Wall v Exchange Investments Corp Ltd [1926] 1 Ch 143). A chairperson’s decision will be amendable to review by the court if there has been a mistake of law (citing Templeman J in Fast Scout Ltd v Bergel (2001) 25 WAR 244).  Thus a member may object to the auditor’s ruling that the votes were valid despite Article 61.3(b) on the grounds that the ruling was: not made in good faith; is contrary to statutory law or the Company’s constitution; or is otherwise erroneous in law.  **(ii) Procedural irregularity and section 1322(2) of the Corporations Act**  The chairperson of a company has a wide discretion to conduct business at company meetings as required. Where the conduct was in good faith and done rationally it will not be reviewed by the courts. However, a chairperson’s conduct should meet certain conventional standards to facilitate a meeting. In this case, closing the meeting early with knowledge that Mr Sanders intended to object was an irregularity in the conduct of the meeting.  Where an irregularity goes to the ‘thing to be done’ as opposed to the ‘manner in which the thing is to be done’ it will constitute a substantive, not procedural irregularity (quoting Palmer J in Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd (2005) 55 ASCR 185). In the case of voting at a meeting, the ‘thing to be done’ is the admission of valid votes. Hence non-admission of valid votes or admission of invalid votes would amount to a substantive, not procedural irregularity.  The plaintiff did not attempt to establish that the proxies in question were actually invalid, but merely that Mr Lynch had denied Mr Sanders a proper opportunity to object. Thus the irregularity in this case was a procedural and not a substantive one and thus capable of being within section 1322(2).  The court stated that the application of section 1322(2) is not restricted to procedural irregularities arising from inadvertence or accidental non-compliance, but also applies to conduct deliberately engaged in. However in the present case this was not an issue: Mr Lynch did not deliberately cause the procedural irregularity as he believed he had no obligation to afford Mr Sanders an opportunity to object.  **(iii) No substantial injustice**  There was no substantial injustice caused to the plaintiff. There was insufficient evidence to determine if the proxies at issue were in fact invalid. However their number in total was less than the margin of approval for each of resolution 1 and 2. Thus there would have been no difference to the result of the poll and section 1322(2) applied.  **(iv) Other issues raised**  The plaintiff raised the argument that Mr Lynch had breached his duty as a director by his conduct at the meeting. However Mr Lynch was not a party to the proceedings and this argument was only raised on closing. Le Miere J declined to make the declaration sought. The plaintiff also sought a declaration that the poll was conducted otherwise than in accordance with the law, but Le Miere J declined on the grounds that such a declaration would be too broad.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **6. Contributions** |
| If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au)".  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%236)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **7. Subscription** |
| To subscribe to the Corporate Law Bulletin or unsubscribe, please send an email to "[cclsr@lawlex.com.au](mailto:cclsr@lawlex.com.au)".  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **8. Change of Email Address** |
| [Click here](http://research.lawlex.com.au/" \t "default) to change your profile  LAWLEX welcomes users' suggestions for improving this service. Please contact [Customer Service](mailto:alert@lawlex.com.au).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **9. Website Version** |
| As a subscriber, you may view and print the latest Bulletin on the [LAWLEX website](http://research.lawlex.com.au/cclsr/archive" \t "default), from where you can also access previous editions of this bulletin.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **10. Copyright** |
| Centre for Corporate Law and Securities Regulation 2006  You may use this material for your own personal reference only. The material may not otherwise be used, copied or redistributed in any form or by any means without a multiple user licence with LAWLEX.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |
| **11. Disclaimer** |
| No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is provided on the terms and understanding that (1) the authors, editors and endorsers are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, authors, editors and endorsers expressly disclaim all and any liability and responsibility to any person in respect of anything done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20108%20August%202006.htm%23top) |

[Click here](http://research.lawlex.com.au/) to modify your Alert profile.  
To trial a Newsfeed subscription, or for general assistance, please contact [Customer Service](mailto:alert@lawlex.com.au).  
LAWLEX also welcomes users' suggestions for improving this service.

**Disclaimer:** This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. LAWLEX expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. A complete copy of the disclaimer terms of use and licence agreement is available through the links above this summary. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify LAWLEX immediately by telephone on 03 9278 1555 or email alert@lawlex.com.au.

Sent to : i.ramsay@unimelb.edu.au