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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 APRA's HIH enforcement actions**  On 20 March 2006, the Australian Prudential Regulation Authority (APRA) published a status report of its enforcement actions against individuals involved in the circumstances surrounding the collapse of HIH Insurance in 2001.  To date, a total of 42 people have been asked to 'show cause' as to why they should not be disqualified from senior roles in the general insurance industry. Of this total, APRA has disqualified 22 persons and has accepted an enforceable undertaking from one other person.  Another four people were disqualified but had their disqualifications overturned on internal review, while four of the 22 disqualifications are currently still on appeal at the Administrative Appeals Tribunal. A further three people have challenged APRA at the 'show cause' stage in the Federal Court. It was unnecessary to 'show cause' for another three individuals who were automatically disqualified as a result of criminal convictions on ASIC charges.  More information on these cases is available on the [APRA website](http://www.apra.gov.au/media-releases/06_13.cfm" \t "_new).  **1.2 Fourth annual Business Roundtable corporate governance survey**  On 20 March 2006, the US Business Roundtable published its fourth annual survey of corporate governance practices among its members, showing continuing improvements in corporate governance practices, including a continual rise in the percentage of companies that have increased pay-for-performance for senior executives.  The survey's key findings include:   * Pay-for-performance: Almost 6 out of 10 companies (57%) report an increase in the pay-for-performance element of senior executive compensation in the past year, compared to 49% in 2005 and 40% in 2004. Of the companies placing more emphasis on performance, 20% indicate that the performance element includes primarily long-term goals, 73% stress a mix of long- and short-term performance goals, and only 7% stress short-term goals. * Board independence: More than nine out of ten companies (91%) have an independent chairman, lead director or presiding director - up from 83% in 2005 and 71% in 2004. The percentage of companies with an independent chairman has continued to increase, from 4% in 2004 and 9% in 2005, to 11% in this 2006 survey. * Executive session: 69% of companies reported that independent (non-management) directors met in executive session at every board meeting in 2005, and 75% expect the same for 2006. This percentage is up from 68% in 2004 and 55% in 2003. * Shareholder communications: 91% of companies have established procedures for shareholder communications with directors, up from 90% last year and 87% in 2004. And 93% of companies say their Nominating/Governance Committee is willing to consider shareholder recommendations for board nominees, a steady increase from the 85% of companies in 2005. * Costs of Sarbanes-Oxley: Sarbanes-Oxley compliance costs appear to be declining, with 94% expecting costs to either remain the same (42%) or decrease (52%) for 2006, and only 6% projecting that costs will go up this year. The portion of companies reporting estimated costs of more than US$10 million dropped to 40% from the 47% reported in 2005. * Director evaluations: 38% of companies performed individual director evaluations in 2005 and 45% are planning to do such evaluations in 2006, up sharply from the 27% in 2004. Of these companies, a growing number rely on peer reviews - 38% in 2005, and 48% planning to do so in 2006. * Director qualifications: 97% of companies say their Nominating/Governance Committee has established qualifications for directors, a significant increase from 87% in 2005. * Committee meetings: Over half (52%) of companies indicate they have seen a "significant" increase in the number or length of meetings of the Audit Committee in the past two years, while 33% indicate a "significant" increase in the number or length of meetings of the Compensation Committee in the same period. * Compensation consultants: 85% of companies report that they have retained a compensation consultant in the last year, and 53% of CEOs report that their Nominating/Governance Committees have retained a search firm in the last year. * Stock ownership requirements: 93% of companies say their compensation committees have stock ownership guidelines or requirements for senior executives and 88% of companies have stock ownership guidelines or requirements for directors, with 32% establishing the director guidelines within the past year.   The key findings of the survey are available on the [Business Roundtable website](http://www.businessroundtable.org/publications/publication.aspx?qs=2AC6BF807822B0F1AD34484" \t "_new).  **1.3 FSA publishes measure of scale of market abuse**  On 17 March 2006, the UK Financial Services Authority (FSA) published a method of measuring the cleanliness of UK financial markets. The methodology measures market cleanliness by looking at the extent to which share prices move ahead of the regulatory announcements that companies are required to make to the market.  The methodology should enable the FSA to measure, over time, its success in tackling market abuse, one of its key aims. This is part of the FSA's drive to establish key indicators that will help it understand better how successful it is at achieving the intended benefits of regulation.  **(a) The analysis**  The researchers analysed two kinds of market announcements: those relating to take-over bids in 2000 and 2004 and announcements about the trading performance of FTSE 350 listed companies between 1998 and 2003 - around 1500 announcements in total. They then examined announcements that led to a large or abnormal share price movement since these are the announcements most likely to contain information of use to an insider trader. They then assessed the proportion of such announcements that, in fact, were preceded by an apparent "informed price movement" that could mean that some trading on unpublished information occurred.  **(b) Results**  The analysis of FTSE350 announcements covers a period before the Financial Services and Markets Act (FSMA) came into effect, and a later period, when FSMA was in force but the FSA had yet to complete any enforcement action against market abuse. The analysis indicated that there was no change in market cleanliness in relation to announcements by FTSE 350 listed companies. The analysis of announcements relating to takeovers included 2004, when five misuses of information cases were completed, and showed that there was a small but statistically significant increase in informed price movements suggesting deterioration in market cleanliness.  The first enforcement cases in relation to misuse of information under the new rules were concluded in 2004 and resulted in comparatively low fines. These are the only cases in the period analysed in this research.  The results do not show exactly how much market abuse is going on but the researchers detected price movements which suggested that some informed trading may have taken place prior to 28.9% of the takeover announcements and 21.7% of the FTSE350 trading announcements which were identified as being most likely to contain information of use to an insider trader.  **(c) Future work**  The FSA intends to repeat the analysis later this year for later periods. If this future work shows a change in the level of the measure for takeover announcements of more than four percentage points (up or down), this would indicate a change in the frequency of informed trading. Similarly, a change in the FTSE350 announcements measure of more than eight percentage points (up or down) would indicate a change in the frequency of informed trading.  **1.4 European Parliament agreement on directive to simplify the formation, maintenance and alteration of companies' capital**  On 14 March 2006, the European Commission welcomed the European Parliament's agreement at first reading on the Commission's proposal for a Directive (see IP/04/1334) to make it easier for public limited liability companies to take certain measures affecting the size, structure and ownership of their capital. The proposed Directive amends the parts of the 1976 Second Company Law Directive covering the formation, maintenance and alteration of capital.  The proposed Directive is part of the Commission's contribution to the twin objectives of "Growth and Jobs" and "Better Regulation". The Second Company Law Directive established a system giving minimum guarantees for shareholders and creditors where public limited companies are set up or alter their share capital. A number of elements of this system were identified as too inflexible and costly and, therefore, modifications were recommended notably by the Simpler Legislation for the Internal Market (SLIM) group in 1999 and by the Group of High Level Company Law Experts in 2002.  The proposed Directive will implement a number of these recommendations, including the acquisition of shares through contributions in kind and the acquisition by a company of its own shares. Also, the current rules on financial assistance that a company can give for the acquisition of its shares by a third party will be relaxed.  In parallel to the adoption of the Directive, the Commission is preparing a study that will examine the feasibility of an alternative system to that of the Second Company Law Directive, in order to explore further ways of increasing the flexibility of public limited liability companies.  The full text of the proposed Directive and a working document with further detailed information is available on the [Europa website](http://europa.eu.int/comm/internal_market/company/capital/index_en.htm" \t "_new).  **1.5 Intangibles directly influence financial analyst opinions according to "return on reputation" study**  Reputations of corporations and leadership rank high in importance to financial analysts who rate companies and issue opinions, according to a major global survey published on 13 March 2006. "Return on Reputation", the latest in the Hill & Knowlton (H&K) series of corporate reputation watch studies, was conducted with public opinion research firm MORI, which surveyed financial analysts in North America, Europe and Asia on reputation and its impact on this group's opinions and ratings of companies.  When asked the importance of specific tangible and intangible factors in making recommendations to invest in a company, "financial performance" (87% rated it as extremely or very important), "quality of the leadership team" (86%) and "making good on promises" (85%) were virtually tied as the top criteria. Analysts put so much importance on reputation matters that a huge majority (88% of North America, 91% of Continental Europe, 93% of UK and 94% of Asia Pacific) agree that a company that fails to look after its reputation will ultimately suffer financially.  The study found that reputations of the CEO, CFO and COO, were more important in influencing analysts (96%, 95% and 90% respectively) rating them as fairly, very or extremely important) as a group, than business unit leaders (81%), the company chairman (76%) or the independent board of directors (68%).  The "Return on Reputation" study found that transparent disclosure as well as clear and consistent communication with key stakeholders were widely influential non-financial elements affecting analysts' assessments, 93% agreeing that each of these factors contributed to their assessment of a company's value. Both ranked high (88% and 79% respectively) in causing respondents to give a company a negative rating when done poorly. A "clear path or strategy" (87% extremely or very important) and "achieving the milestones against that strategy" (86% extremely or very important) were rated as the most important items to communicate to the investment community.  Nearly half (46%) of analysts surveyed said that a CEO should be allowed less than a year of consecutive bad quarters before he or she should be replaced. In addition, good or poor management by former executives may leave a lasting effect on analysts' impressions - nearly half (48%) said that past management still affects their opinions for up to two years into the new leadership's tenure.  **Survey details**  "Return on Reputation" is designed to understand the various ways financial analysts assess companies and to identify the key factors driving investment decisions. The analysts surveyed were located in Australia, Canada, Denmark, France, Germany, Italy, Hong Kong, Japan, Netherlands, Norway, Singapore, Sweden, UK and US. Interviews were completed by 3 November 2005.  More information is available on the [Hill & Knowlton website](http://www2.hillandknowlton.com/crw/home.asp" \t "_new).  **1.6 Investment factors considered important to asset performance**  Almost two-thirds of investment managers globally (65%) believe the effects of globalisation are material to mainstream asset performance, while a similar proportion (62%) think corporate governance is a relevant issue, according to a survey published on 13 March 2006 by Mercer Investment Consulting (Mercer IC). Environmental issues like climate change feature less prominently now (15%) but are tipped to grow in consideration within five years.  The survey reflects the views of 157 investment management firms from around the world which manage aggregate assets in excess of US$20 trillion. Respondents were asked how significant environmental, social and corporate governance (ESG) issues were to investment performance, and what expectations of future client demand are for related investment services.  Over the next five years, environmental issues overall (climate change, environmental management and access to clean water) are expected to have a larger impact on asset performance, and in many regions environmental management is likely to become one of the top three issues for consideration.  While terrorism is also currently a key concern in many regions, managers outside the US believe its impact and relevance to investment decision-making will decrease considerably in five years' time.  **(a) Integrating ESG into mainstream investment processes**  Investment managers from every region except Australia expect to see some client demand for ESG factors to be integrated into investment processes this year. Current anticipated demand is highest in Europe (ex UK) at 26%, followed closely by the UK (21%). Australian managers predict the biggest jump in demand, from zero to 44% in less than three years. Over the next three years more than a third of managers (38%) expect clients to demand that ESG issues should be integrated into their investments.  **(b) Demand for specialist ESG products**  This year, 13% of investment managers anticipate increased client demand for specialist investment strategies built on ESG analysis. This expectation is greatest in Europe where 39% of managers predict growing demand, followed by the UK and Canada. Singapore is the only place where demand is not anticipated to grow.  Looking forward, expectations rise dramatically, with 31% of managers globally expecting to see more requests for specialist products built on ESG analysis. Forecasted demand more than doubles in all regions other than Europe (ex UK), with 47% of UK managers anticipating an increase in requests for specialist ESG strategies over the next three years. US managers remain least convinced, with just 19% expecting that such demand will materialise.  **(c) Impact of other issues on capital markets**  Survey results indicate that the ESG issues considered most relevant to performance at the individual asset level - corporate governance and globalisation - are not expected to be primary drivers of overall capital markets. Instead, interest rates and corporate profits are forecasted to have the greatest impact. Oil prices are also expected to play a role in every region's capital markets.  Further information is available on the [Mercer IC website](http://www.merceric.com/riforecast" \t "_new).  **1.7 Canadian regulators release proposals on harmonised internal control reporting requirements**  On 10 March 2006, the Canadian Securities Administrators (CSA) announced proposals that would require all publicly-traded companies in all Canadian jurisdictions to report on the effectiveness of their internal controls over financial reporting, as early as 31 December 2007.  After extensive consultation, the CSA has decided not to proceed with an earlier proposal that would have required companies to obtain from their external auditors an audit opinion in respect of management's evaluation of the effectiveness of internal controls over financial reporting.  The proposed harmonised requirements would apply in all Canadian jurisdictions to all companies listed on the TSX and TSX Venture exchanges. The earliest the proposed requirements would be adopted would be for financial years ending on or after 31 December 2007. This schedule would allow significant time for companies to plan and implement the activities needed to support the new disclosures.  The CSA, the council of the securities regulators of Canada's provinces and territories, coordinates and harmonises regulation for the Canadian capital markets.  **1.8 Call for direct voting by shareholders**  The outdated and widely misunderstood system of appointing a proxy to vote at annual general meetings (AGMs) would be less open to abuse if shareholders had the opportunity to vote directly as well, according to Chartered Secretaries Australia (CSA). On 9 March 2006, CSA published a discussion paper on direct voting.  The discussion paper lists a variety of ways in which the proxy system can, and has been, abused.  **How does voting by appointing a proxy work?**  Shareholders who cannot attend an AGM can appoint another person (a proxy) to attend and vote on their behalf. At present, this is generally viewed as the only model for absentee voting. However, the appointment of a proxy in fact involves a temporary transfer of the shareholder's rights, particularly to attend and vote or choose not to vote. As such, according to CSA, the system has wide potential for abuse as it is open to the proxy holder (unless he/she is the chairman) to choose not to vote as directed.  **What is direct voting and how would it work?**  Direct voting enables shareholders unable to attend AGMs to exercise their voting rights without the need to appoint proxies over whom they may have no control. Like other types of voting, a shareholder completes a voting form which is binding. The voting form can be lodged by post, fax or electronically and must be lodged 48 hours before the meeting, as is the case with proxies.  **What are the advantages of direct voting?**  According to CSA, direct voting has the following advantages:   * Introduces greater transparency in the voting process by 'cutting out the middle man' * Makes it easy for shareholders to vote and have their vote counted, thereby improving shareholder participation * Ensures that all votes are recorded and counted accurately * Improves the integrity of the vote collection process as direct votes would need to be lodged directly with the company or share registry.   **Can companies begin introducing direct voting right away?**  If a company's constitution provides for it, direct voting is already feasible. Several companies have paved the way: NRMA introduced direct elections of directors some years ago; others, like AWB Limited, have a constitution that provides for direct voting as well as the appointment of proxies.  The discussion paper is available on the [CSA website](http://www.csaust.com//AM/Template.cfm?Section=Home" \t "_new).  **1.9 Merger and acquisition activity expected to stay strong in 2006**  On 8 March 2006, Ernst & Young published its Mergers & Acquisitions Index. According to the Index, a high level of corporate confidence is driving continued acquisition activity in Australia.  Industries to watch in 2006 included food, energy, IT consulting, general services and healthcare. Merger and acquisition activity by the top 360 listed Australian industrial companies reached its highest point in 2005 since it started 13 years ago.  But with fewer large deals in the pipeline in 2006 compared to the same time last year, it was unlikely that the merger and acquisition index in 2006 would surpass the 2005 levels. Therefore, activity was likely to continue to be high but flat. Intense competition for quality acquisition opportunities had resulted in a surge in prices paid for acquisitions during 2005.  Multiples being paid were increasing, indicating that expected synergies and strategic values were being factored into transaction prices. But as purchasers priced in greater synergies, risks also lifted.  According to the Index, there had been a number of instances where earnings downgrades had been necessary because expected synergies had not been realised. The current market was highly favourable for sellers as private equity firms continued to challenge corporate buyers for assets, which pushed up prices.  The number of transactions in 2005 increased eight per cent to 385 from 356 in 2004, and total value rose to $23.3 billion compared to $21.7 billion in 2004. Average transaction value was steady at $60.7 million.  Deals that broke the $1 billion mark in 2005 included Foster's Group's $3.1 billion acquisition of Southcorp; Tabcorp Holdings $2.1 billion acquisition of TAB, Transurban Group's $1.8 billion acquisition of Hills Motorway Trust, and Woolworth's $1.3 billion acquisition of Australian Leisure & Hospitality group.  Major deals in the pipeline this year include Alinta's $8.9 billion merger with AGL; Toll Holdings' $4.6 billion takeover of Patrick Corp; the potential sale by Burns Philp of Uncle Toby's for a predicted $1.4 billion; and divestment of Myer stores by Coles Myer.  **1.10 European Forum clarifies 'comply or explain' principle**  On 6 March 2006, the European Corporate Governance Forum, which examines best practices in Member States in the field of corporate governance, issued a public statement clarifying the 'comply or explain' principle, which obliges companies to justify any deviation from corporate governance codes. The Forum has also issued a report detailing its activities in 2005 and its plans for future activities, such as an exchange with bodies monitoring the application of national corporate governance codes and further work to examine the "one share one vote" concept.  **(a) 'Comply or explain' principle**  The 'comply or explain' principle forms the basis of the European code-based approach to corporate governance. It provides for more flexible and effective market-led regulation. However, there is agreement that 'comply or explain' can work only if its surrounding regulatory framework ensures that companies respect the obligation to give reasons for deviations from the applicable corporate governance codes.  The Forum has therefore undertaken to define in more detail the advantages and the limits of the 'comply or explain' principle from a European perspective. As a first step it has now adopted a common statement on the basic principles that guide the system of 'comply or explain'.  **(b) Annual report 2005**  In its annual report the Forum sets out the activities it undertook in 2005, including discussions on the following: recent developments in the Member States in the field of corporate governance; the "comply-or-explain" principle; the role and the rights of shareholders in the company; and rules on internal control and risk management mechanisms.  The Forum states in its report that in 2006 its work on the role and rights of shareholders will continue, and that in particular it intends to examine in more detail the "one share one vote" concept.  On internal control the Forum concludes that for the moment there appears to be no need for further concrete steps. However, it will continue to review whether the current approach is sufficient for ensuring that internal controls within the EU meet best practice standards.  The Forum's statement on the 'comply or explain' principle and its 2005 annual report are available on the [Europa website](http://europa.eu.int/comm/internal_market/company/ecgforum/index_en.htm" \t "_new).  **1.11 Survey: the relevance of corporate governance disclosure**  On 6 March 2006, the Australian Stock Exchange Corporate Governance Council released key findings of a survey aimed at understanding the relevance of corporate governance disclosure to the investment and analyst community.  The 'user survey', conducted late last year, found a large majority of respondent's private investors and organisations/professionals, do use corporate governance information in analysing or reviewing their investments. Respondents named BHP Billiton, Wesfarmers, Westpac, ANZ and Woolworths as companies whose annual reports contained good corporate governance reporting.  When prompted to suggest ways in which corporate governance reporting could be improved, investors suggested greater clarity of reporting about remuneration, and the provision of information about board members' experience and affiliations.  The Council chairman, Eric Mayne, said the Council will use the survey results in its current review of the Principles of Good Corporate Governance and Best Practice Recommendations.  The Council's review takes into account the CLERP 9 amendments, reporting trends to date, the need for any additional guidance, and the emerging debate about non-financial risk reporting and corporate responsibility. The review encompasses the request to Council from the Minister for the Environment and Heritage, Senator the Hon Ian Campbell, to consider ways to encourage non-financial reporting. Council will seek the views of the general public as part of the review, which it intends to complete by the end of 2006. Any revised version of the Principles and Recommendations will have an effective date of 1 July 2007.  **(a) Key Findings**  The key findings of the survey are:   * In total, 80% of private investors and 75% of organisations/professionals surveyed use corporate governance information in analysing or reviewing equity investments. The areas of most interest were:   + Financial reporting (84%).   + Board structure/responsibilities - particularly for organisations/professionals (69%).   + Remuneration - particularly for private investors (67%).   + Risk management - particularly for organisations/professionals (56%).   + Shareholder/stakeholder management (59%). * A large majority of respondents, private investors and organisations/professionals do use corporate governance information in analysing or reviewing their investments. Private investors need to know where to find corporate governance information and want clearer, simpler explanations. * There is a need for better understanding of the terminology used and corporate governance in general. Approximately ten per cent of private investors and seven per cent of organisations/professionals needed prompting about what corporate governance covers. * When prompted to suggest what corporate governance information could be included in annual reports users commented:   + Existing information could be clearer and more concise (26%).   + Existing information could be more accessible (11%).   + Details about boards - board experience, independence and affiliations, commitments, share trading, committees including composition, policies and review processes (9%).   + Clarity of information concerning remuneration of directors and key personnel, particularly highlighted by private investors (9%).   + A summary statement of whether companies are adopting/exception reporting against the ASX Corporate Governance Council Principles and Recommendations (7%).   Both private investors and organisations/professionals cite financial statements and annual reports as their most important sources of information. Private investors cite 'media' as their most common source, while organisations/professionals rely more heavily on full annual reports and financial statements.  Eighty-eight per cent of respondents use full or concise annual reports as a source of corporate governance information. Of the twelve per cent who do not do so, private investors find the information too complex or too difficult to extract while organisations/ professionals say the information is not timely and too vague or generic and that alternative sources offer greater detail.  **(b) Methodology**  Members of the bodies comprising the ASX Corporate Governance Council participated in an internet survey during November and December 2005 to find out:   * The value users place on corporate governance information and the questions they want companies to answer about their corporate governance practices. * What sources of corporate governance information they use. * How the corporate governance information users find in annual reports helps them understand companies' practices, including the reasons preventing them from using this information. * Improvements that make the content, presentation and timing of corporate governance information in annual reports more useful. * Reasons for not using this information.   There were 729 respondents to the survey. Respondents were asked to answer from the perspective of a private investor, a professional or on behalf of their organization. Of the total, 355 (49%) answered as private investors (all from the Australian Shareholders Association) while 374 (51%) answered as organisations/professionals (from other CGC members).  The survey was commissioned by the ASX Corporate Governance Council and conducted by market research firm Creative Catalyst Insights.  Further information is available on the [ASX website](http://www.asx.com.au/supervision/governance/index.htm" \t "_new).  **1.12 Adoption of Sarbanes-Oxley standards by private organisations as 'best practices'**  On 3 March 2006, Foley & Lardner LLP released its third annual national study, 'The Impact of Sarbanes-Oxley on Private & Non-profit Companies'. The study reveals that US private organisations are continuing to adopt aspects of the Sarbanes-Oxley Act as a set of best practices, despite the fact Congress never intended the Act to apply to non-public companies.  The study also shows that private organisations are consistently self-imposing Sarbanes-Oxley standards and that non profit organisations have been more aggressive in their adoption of corporate governance reforms than their private for-profit counterparts.  **(a) Private organisations have reached "steady state"**  The study reveals substantial consistency in year-over-year results, indicating that private organisations have reached a "steady state" and have already implemented the aspects of corporate governance reform they intend to adopt.  Among the findings:   * 86% of survey respondents felt that SOX and other corporate governance reform requirements have impacted their organisations, consistent with the 87% who responded in this manner in 2005. * Private organisations continue to self-impose corporate governance standards, but are also strongly influenced by their boards and outside auditors. * Private companies tend to adopt the least expensive reforms, as opposed to more costly initiatives such as section 404 audits of internal financial controls. * 84% of private organisations responding to the survey felt that corporate governance reform is "about right," an increase in comparison to 2005, when 78% responded in this manner. * Private organisations responding to the survey estimated an average annual price tag of US$105,000 for corporate governance procedures, representing an estimated increase of approximately 26% over their estimated costs prior to the enactment of the Sarbanes-Oxley Act.   **(b) Non-profit organisations continue to lead the charge**  Consistent with the study's findings in 2005, non-profit organisations continue to adopt more aspects of the Sarbanes-Oxley Act than for-profit companies. Overall, nonprofits were more likely to have implemented or planned to implement whistle-blower procedures, board approval of non-audit services by auditors and restrictions on executive compensation, among other areas of reform.  One reason for increased adoption among non-profit organisations could stem from the fact that a large number of directors who sit on non-profit boards also serve on the boards of public companies. These directors are therefore more familiar with the Sarbanes-Oxley Act and more likely to recommend adoption of similar governance policies by non-profits.  The study is available on the [Foley & Lardner website](http://www.foley.com/features/feature_detail.aspx?featureID=121" \t "_new).  **1.13 APRA releases new "fit and proper" prudential standards**  On 2 March 2006, the Australian Prudential Regulation Authority (APRA) released new and harmonised "fit and proper" prudential standards for authorised deposit-taking institutions and for life and general insurance companies. The new standards have been developed after extensive industry consultation. APRA Chairman, Dr John Laker, said that the onus is on regulated institutions to ensure that their boards, senior management and other responsible persons are fit and proper.  The new standards are aimed at enhancing the calibre of those charged with running APRA-regulated institutions. The standards establish a minimum benchmark for acceptable practice in the appointment of Board directors, senior management, and certain auditors and actuaries. Key elements of the new standards are:   * regulated institutions must have their own policies, and take all prudent steps, to ensure their responsible persons are fit and proper; * the fitness and propriety of a responsible person must generally be assessed prior to initial appointment and reassessed annually; and * additional criteria must be met for the appointment of certain auditors and actuaries.   The standards involve only minimal reporting requirements. APRA's fit and proper framework is in line with its new approach to prudential guidance. The framework consists of principles-based prudential standards and separate prudential practice guides, which provide non-binding guidance on meeting these new standards and on prudent practices in fit and proper matters.  In developing its framework, APRA has harmonised its requirements with ASIC's fit and proper regime for responsible officers, where possible. The prudential practice guides confirm that in assessing a responsible person, an institution can give weight to another regulator's assessment, or information collected for that assessment, where it is current and relevant.  The three new fit and proper standards are APS 520 Fit and Proper (for authorised deposit-taking institutions), LPS 520 Fit and Proper (for life companies) and GPS 520 Fit and Proper (for general insurers). The standards come into effect from 1 October 2006.  APRA itself has powers to remove a responsible person who it considers is not fit and proper.  The standards and their accompanying prudential practice guides are available on the [APRA website](http://www.apra.gov.au/ADI/ADI-Prudential-Standards-and-Guidance-Notes.cfm" \t "_new).  **1.14 FPA adopts principles for managing conflicts of interest**  On 2 March 2006, the Australian Financial Planning Association (FPA) announced the adoption by all FPA members of Principles for Managing Conflicts of Interest from 1 July 2006.  Concerns about non-compliance with the Principles may be brought to FPA's attention by members, regulatory officers and consumers and will be considered by the Professional Standards and Ethics Committee.  The Principles are:  1. The cost of financial planning advice should be separately identified as a financial planning advice fee in the Statements of Advice provided by FPA members to clients, and the total fees paid for ongoing advice should be disclosed to clients on a regular basis.  FPA commentary: Financial planning advice is a service which is valuable in its own right and consumers should be aware of its cost. Separating the cost of advice from other costs highlights the value of the advice.  A financial planning advice fee has the following characteristics:   * It is agreed between the client and their financial planner. * It can be varied by agreement between the client and financial planner. * It must be disclosed to the client separately from any product related costs when the initial advice is provided and regularly thereafter.   The implementation guidelines for the Principles states that where fees or payments cannot be separately identified or cannot be varied or terminated by the client in agreement with their adviser, they must be disclosed as commission. The FPA believes that the regular disclosure of any ongoing commission is best practice.  The requirement to disclose the cost of advice separately from product related costs is effective from 1 January 2007. Regular disclosure of ongoing advice fees paid by a client will be required from 1 January 2008.  2. Where it is appropriate to recommend a product to a client, all FPA members will undertake the due diligence necessary to offer products which suit the needs of the client and do not bring the industry into disrepute.  FPA commentary: Principle 2 addresses the need to ensure that any recommendation of a financial services product is carefully matched to the client's needs. It becomes effective from the date of adoption, 1 July 2006.  3. No remuneration or benefits paid by a FPA Principal Member to one of their financial planners should be biased against or not in the interests of the client.  FPA commentary: Principle 3 seeks to remove any bias in payment methods to advisers from licensees and places responsibility with the licensee to determine that remuneration arrangements are not biased against the client. The principle becomes effective from 1 July 2007.  4. Separate corporate governance arrangements should govern FPA principal members and all or any related financial services provider and/or entity.  FPA commentary: Principle 4 seeks to ensure that those FPA Principal members which are part of a group that also provides financial services products or platform services have in place arrangements which enable the interests of clients to be considered independently of wider group interests. It becomes effective from 1 January 2007.  A copy of the Principles and Guidance material is available on the [FPA website](http://www.fpa.asn.au/" \t "_new).  **1.15 Business Roundtable issues resource on the topic of trade**  On 1 March 2006, the US Business Roundtable released a new resource designed to provide clarity and up-to-date information on the often complex world of international trade. "The Language of Trade" is a reference publication with basic information on international trade agreements and trade terminology, as well as explanations of regional trade alliances and the various negotiating and administrative agencies that oversee and enforce trade policy.  "The Language of Trade" includes three sections:   * Trade Liberalisation Timeline - To help put the recent history of global trade policy in context and illustrate the enormous impact trade liberalisation has had on worldwide economic growth. * Commonly Used Acronyms - Acronyms that come up in day-to-day discussion of international trade and investment policy. * Glossary of Terms - A reference guide to help make complex documents or discussion understandable.   A copy of 'The Language of Trade' publication is available on the [Business Roundtable website](http://www.trade.businessroundtable.org/" \t "_new).  **1.16 Governance rating survey**  On 28 February 2006, GovernanceMetrics International (GMI), the corporate governance research and ratings firm, produced its latest series of governance ratings for 3,400 global companies, including 1,780 US firms. According to GMI, recent corporate governance change has come about through a combination of more vocal and insistent institutional shareholders, newly engaged activist hedge funds and changes initiated by boards of directors and their advisers. Against this backdrop, US companies are about to head into the 2006 proxy season with two major issues at centre stage: majority voting for director elections and executive compensation.  To provide some context to these changes, GMI noted that since its first ratings, released shortly after Sarbanes-Oxley was enacted, the number of independent directors at US companies has risen from 66% to 73% and the average board size has declined by 5%. Added to this is a substantial uptake in board evaluation practices (93% versus 35%) and the departure of "old guard" directors and those no longer willing to serve (more than 2,000 people who served as directors at US companies in 2002 are no longer directors at GMI-rated companies). But many institutional investors see these changes as only the start of needed reform and are focused on more qualitative change. Their chief concerns are the need to change the director election process and to reign in excessive CEO pay. Both issues in their mind go to the very heart of shareholder protection.  The majority vote movement has gained traction. As recently as last July only a handful of US companies allowed some form of majority voting for director elections, but today more than 120 companies tracked by GMI have adopted some variation of majority voting. Further, more than a hundred and forty shareholder proposals are expected to be seen in proxies in the coming months. Considering the speed with which this issue has spread, it is indicative of a new openness at many boards and could signal the more qualitative change that institutional investors are pushing for. In Canada, all six of the big banks and two of the largest insurers have discarded the plurality voting system as has the Toronto Stock Exchange, and a 48-member investor group is seeking to get 50 of Canada's top 100 companies to adopt a form of majority voting by year end.  On the matter of executive compensation, shareholders are supporting the Securities and Exchange Commission's proposal for more detailed disclosure and are pressing boards to more closely tie compensation with performance. Option awards are being scaled back and there are now more instances of risk of forfeiture on option awards when performance targets are not met. Attention is also being focused on the range and amounts associated with all kinds of executive perks. Some US shareholder advocates are asking for an UK-style advisory vote on compensation committee reports and adjustments to "golden parachutes". Among companies that will face some of these kinds of proposals in the next several weeks are Coca-Cola, Pfizer, US Bancorp, Citigroup and Merrill Lynch.  According to GMI, despite these generally healthy developments though, they are by no means universal and there continue to be practices at US and foreign companies that convince shareholders that there is still much work to be done.  GMI lists the following:   * Eight of the eleven member board of AWB (The Australian Wheat Board) are wheat growers, who have the ability to elect a majority of the board. AWB is under investigation in Australia for alleged bribes to the regime of Saddam Hussein to maintain wheat sales to Iraq. The stock has declined by 30% since the official inquiry began. (GMI rated the company 3.0 in September of 2005 and flagged the company for its unusual board structure and restrictions on shareholder rights.) * Apollo Group files no proxy statement with the SEC and does not hold an annual shareholders meeting. Management, insiders and their trusts own all the voting shares and control the board; public shareholders hold non-voting shares. In the last three years insiders have sold US$140 million in stock while at the same time the company has been subject to various legal actions and government investigation. In the recent past, both its auditor and its first non-family CEO have been dismissed. The stock has declined by nearly 20% in the last two years. (GMI rated Apollo 1.0, its lowest rating, in February of 2004.) * Audiovox has a board where executives account for half of the members. There are two classes of voting stock and the CEO controls 55% of the votes. Recent compensation practices have included special payments of $22 million to the CEO and EVP as part of a sale of company assets to a third party. The stock has declined by more than 20% since September last year. (GMI rated Audiovox 1.0 as of September 2005.) * Biovail has a board chair who is a former CEO and who stills holds 14% of the stock. While this fact alone should be enough to focus shareholders' attention on how the company is governed, the company has in the past issued loans to executives and is involved in numerous lawsuits and government investigations of accounting and operating practices in the US and Canada. The generally weak governance profile of the company contributed to the initial low GMI rating of 3.0 in July 2003. Subsequently, earnings collapsed - as a result of a truck accident as claimed by the company - and the investigations began shortly after. The stock is off 50% since GMI's first rating in June of 2003. * Livedoor's CEO was arrested in Tokyo last month and charged with fraud. The company had reported earnings growth of more than 200% in 4 of the last 5 years but the board consisted of the CEO and 5 other non-independent directors, several of whom were employees. Also, the former audit partner at the company's 12-accountant outside audit firm provided consulting services to Livedoor while the audit firm had an ownership stake in the consulting firm which also had as one of its directors Livedoor's CFO. The stock has dropped by 90% in the last few months. (GMI has not rated Livedoor but was conducting research on the company when the scandal broke.)   In contrast to these examples, GMI notes that 6 companies have consistently received GMI's highest rating of 10.0 in either five out of six, or six out of seven occasions (including the latest ratings), depending on when they were first rated, and thus represent companies with high governance standards with little governance risk. These companies are: BCE (Canada), Nexen (Canada), Colgate-Palmolive (US), Pepsico (US), Wisconsin Energy (US) and Westpac Bank (Australia). In contrast to the poorly governed companies highlighted above, the composite total shareholder return over the last three years of these 6 companies through 25 February 2006 was 23.75%.  **1.17 IASB and IASC memorandum of understanding**  On 27 February 2006, the US Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) published a Memorandum of Understanding (MOU) that reaffirms the boards' shared objective of developing high quality, common accounting standards for use in the world's capital markets.  Both boards believe that a common set of high quality accounting standards will enhance the consistency, comparability and efficiency of financial statements, enabling global markets to move with less friction.  The MOU is a further elaboration of the objectives and principles first described in the boards' Norwalk Agreement published in October 2002. While the document does not represent a change in the boards' convergence work program, it does, however, reflect the context of the 'roadmap' for the removal of the reconciliation requirement for non-US companies that use IFRSs and are registered in the United States. It also reflects the work undertaken by the Committee of European Securities Regulators (CESR) to identify areas for improvement of accounting standards.  Both the FASB and the IASB note that removing the current reconciliation requirements will require continued progress on the boards' convergence program. Accordingly, the MOU sets out milestones that the FASB and the IASB believe are achievable.  The roadmap also addresses auditing and enforcement, topics that are not accounting standard-setting issues and will require the co-operation of regulators and auditors. In developing the MOU, representatives of the boards have held discussions over the past year with representatives of the European Commission and the SEC staff, with the boards' respective advisory councils, and with other interested parties.  The boards agreed that trying to eliminate differences between standards that are both in need of significant improvement is not the best use of resources-instead, new common standards should be developed. Consistently with that principle, convergence work will continue to proceed on the following two tracks:   * First, the boards will reach a conclusion about whether major differences in focused areas should be eliminated through one or more short-term standard-setting projects, and, if so, the goal is to complete or substantially complete work in those areas by 2008. * Second, the FASB and the IASB will seek to make continued progress in other areas identified by both boards where accounting practices under US GAAP and IFRSs are regarded as candidates for improvement.   The boards point out that their work programs are not limited to the items listed in the MOU. The FASB and the IASB will follow their normal due process when adding items to their agendas.  **1.18 Survey: majority of US board directors feel Sarbanes-Oxley regulations should be repealed or overhauled**  Just four years after the enactment of Sarbanes-Oxley, 58% of board directors surveyed feel that the regulations have served only to make boards overly cautious, and should be repealed or overhauled, according to the 32nd Annual Board of Directors study, released on 23 February 2006 by Korn/Ferry International.  The Board of Directors Study examines opinions and practices found in boardrooms of major corporations throughout the world. The findings are based on the responses of nearly 1,200 board members from 15 nations in the Americas, Asia Pacific and Europe.  Highlights of this year's study include:   * Effects of Regulation. Rather than being the catalyst for improved governance, 72 percent of responding directors in the Americas believe that Sarbanes-Oxley regulations have served to make their boards more cautious. Almost two-thirds (65 percent) of their peers serving on US-listed Japanese boards hold the same opinion. Sixty-one percent of responding directors in the UK view the Combined Code as having this same effect on governance. More than half (58 percent) of responding directors in the Americas feel SOX should be repealed or overhauled. This is a view shared by 37 percent of surveyed directors in Japan. Twenty-eight percent of responding directors in the UK endorse such action to remedy the Combined Code. * Director Risk. Perceived risk has made directors worldwide more discriminating when accepting directorship invitations. Fifty-nine percent of directors surveyed in the Americas have declined a board seat due to the risk associated. Risk was also characterized as the determining factor in turning down board seats by 83 percent of surveyed directors in Australasia, 77 percent in Switzerland and 68 percent in Non-Japan Asia. * Board Service. Board service commands a significant time commitment, according to respondents around the world. The majority (62 percent) of responding directors in the Americas report they devote 16 to 20 hours each month to board matters. Sixteen percent of directors in the Americas report they devote more than 25 hours a month as do about one quarter (26 percent) of their peers surveyed in Europe and 21 percent of surveyed in Asia Pacific. * Director Compensation. An average annual retainer and per meeting fee of US$76,707 was awarded to directors from FORTUNE 1000 companies. This is a 35 percent increase over that awarded in 2004. For the first time, cash compensation broke the six-figure mark: directors of US$20+ billion organisations received an average of US$115, 375, surging 43 percent from that paid the previous year. (Equity compensation is not included in these figures.)   **1.19 Foreign ownership of Australian equity**  The Australian Bureau of Statistics has published data on foreign ownership of Australian equity. The data covers financial instruments classified as equity, which are mainly listed and unlisted shares as well as units in trust. As at 30 June 2005, foreign ownership constituted 28.1% of total equity in Australian enterprises. Foreign ownership of banks was 24.5% while foreign ownership of non-financial corporations was 32.2%. For the period 2001 to 2005, the highest percentage of foreign ownership was during 2003 and 2004 when it was 31%.  As at 30 June 2005, of the total amount of foreign ownership of Australian equity, 33% was held by investors in the USA while 27% was held by investors in the United Kingdom. 5% was held by investors in Japan.  Further information is available on the [Australian Bureau of Statistics website](http://www.abs.gov.au/Ausstats/abs@.nsf/0/340E1114F6183724CA257122001AC421?Open" \t "_new). |
| **2. Recent ASIC Developments** |
| **2.1 ASIC issues fees and costs disclosure guide**  On 16 March 2006, the Australian Securities and Investments Committee (ASIC) issued a guide for product issuers to help them comply with the [Corporations Amendment Regulations 2005 (No 1)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "Default) (the enhanced fee disclosure regulations) that were made on 10 March 2005.  The guide includes a series of questions and answers and draws together some commonly asked questions about compliance with the enhanced fee disclosure regulations.  The guide incorporates answers to five new questions (see questions A7 to A10 and B3) and earlier guidance given by ASIC on questions about fees and costs (see ASIC Information Release [IR 05-19] ASIC provides answers on some fees and costs questions (10 May 2005), ASIC Information Release [IR 05-28] ASIC compliance guidance on the FSR refinement proposals and fees template regulations (3 June 2005) and ASIC Information Release [IR 05-54] Further answers on some fees and costs questions (26 September 2005)).  ASIC states that it continues to take a reasonable approach to compliance during the first 12 months the enhanced fee disclosure regulations apply. ASIC will not take action over minor and technical compliance issues where issuers have made a genuine effort to comply. ASIC also continues to expect issuers to comply with the spirit and substance of the regulations (see ASIC Information Release [IR 05-28] ASIC compliance guidance on the FSR refinement proposals and fees template regulations).  **Background**  The enhanced fee disclosure regulations include measures on the disclosure of transactions and fees and costs in product disclosure statements (PDS's). These provisions require PDS's for certain investment-linked financial products to include:   * a standardised fee template (with accompanying explanation); * an example of annual fees and costs for a balanced or similar fund; and * a boxed consumer advisory warning.   The regulations apply to PDS's for superannuation products from 1 July 2005 and other financial products, including managed investment products, from 1 July 2006.  The regulations also mandate certain transactional disclosures in periodic statements of product issuers of superannuation (from 1 July 2006) and of managed investment products (from 1 July 2007).  A copy of the guide is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=Enhanced_fee_disclosure_regulations_guide_pdf" \t "_new).  **2.2 New MOU for ASIC and DPP**  On 3 March 2006, Mr Jeffrey Lucy, Chairman of the Australian Securities and Investments Committee (ASIC) and Mr Damian Bugg QC, the Commonwealth Director of Public Prosecutions (CDPP), executed a new Memorandum of Understanding (MOU) to facilitate the working relationship between the two agencies.  The new MOU replaces an earlier memorandum created in 1992. It includes references to ASIC's jurisdiction in relation to financial services and has been amended to pick up other changes in the law and the manner in which the two agencies now operate.  The MOU recognises the need for the fullest collaboration and co-operation between the two organisations at all levels to discharge their respective functions in relation to the investigation and prosecution of corporate and financial services wrongdoing.  It also recognises that timeliness and accountability underpin the effective execution of their respective roles.  Under the agreement, when ASIC believes a criminal offence may have been committed and has gathered sufficient evidence to enable it to support that view, ASIC will refer a brief of evidence to the CDPP in a timely manner. The MOU requires that the CDPP will give appropriate weight to ASIC's views concerning the public interest in prosecuting matters.  In addition, the MOU permits ASIC to prosecute such summary regulatory offences as are agreed from time to time between ASIC and the CDPP at the national level. ASIC may conduct such proceedings where there is a guilty plea without reference to the CDPP and, where agreed, in such proceedings where there is not a guilty plea.  The MOU also requires that ASIC will consult with the CDPP before making an application for a civil penalty order.  Finally, the MOU outlines the liaison arrangements between the agencies, recognising that proper and appropriate communication and liaison at all levels, approached in a spirit of co-operation, is essential to an effective working relationship.  A copy of the Memorandum of Understanding (MOU) is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=mou_dpp_mar_2006_pdf" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 ASIC releases report on ASX**  On 10 March 2006, Mr Jeffrey Lucy, Chairman of ASIC, released the findings of ASIC's most recent assessment of the Australian Stock Exchange (ASX).  'ASIC's assessment shows that the ASX continues to function as an effective and reliable market,' Mr Lucy said.  Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC must conduct an annual assessment of how well the ASX is complying with its obligations to supervise its market. This is the fourth assessment ASIC has undertaken.  ASIC's report to the Government concludes that the ASX has adequate arrangements for supervising the market, including arrangements for:   * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly, and transparent way; * monitoring the conduct of participants; and * enforcing compliance with its rules.   During the assessment period, the ASX initiated a major review of supervision and has announced several projects relating to the review of its operating rules. Other changes include the implementation of a major internal restructure of the supervision area.  The ASX has also announced it will create a separate supervision subsidiary which is expected to be in place from 1 July 2006.  **Background**  A financial market is defined as a facility through which offers to buy and sell financial products are regularly made. Anyone who operates a financial market in Australia must obtain a licence to do so or otherwise be exempted by the Minister. As part of the conditions of a granting a licence to operate a financial market, the licensee must supervise the market in accordance with Part 7.2 of the Corporations Act. Under the Corporations Act, ASIC is required to assess whether a licensee has adequate arrangements to supervise its market. ASIC must do this at least once per year in relation to each licensee.  A copy of the report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=ASX_assessment_report_feb_2006_pdf" \t "_new).  **3.2 Implementation of ASX's integrated trading platform**  ASX has announced acceptance of the software product for the Integrated Trading System (ITS) and proposed implementation dates for each market. Migration Forums have been held to ensure that the broking community and third party suppliers are prepared for the scheduled implementation dates. The first market to migrate to the new trading platform is the derivatives market on 10 July 2006. The Equities market will move to the ITS platform in early October at which time SEATS will be decommissioned.  ASX Market rules and procedures for ITS are available on the [ASX website](http://www.asx.com.au/supervision/rules/changes/index.htm" \t "_new). |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Sydney Gas Limited - Panel decision**  On 9 March 2006, the Takeovers Panel advised that it had made a declaration of unacceptable circumstances and final orders in response to an application from Sydney Gas Limited (Sydney Gas), in relation to a takeover offer by Queensland Gas Company Limited (Queensland Gas) for all the shares in SGL (Offer).  The Panel considers that deficiencies which the Panel has identified in relation to the bidder's statement and supplementary bidder's statement dispatched by Queensland Gas on 28 February give rise to unacceptable circumstances.  The Panel has made orders that:  1. Queensland Gas immediately advise the market:  a. of the information deficiencies identified by the Panel; b. that it will provide a replacement bidder's statement which identifies and corrects the information deficiencies identified by the Panel; c. that no further acceptances on the original Queensland Gas bidder's statement and first supplementary bidder's statement will be valid, and existing acceptances are revoked; and d. that Queensland Gas will extend its offer period to one month after the date of dispatch of the replacement bidder's statement;  2. all current acceptances, and acceptances before the dispatch of the replacement bidder's statement, are revoked;  3. Queensland Gas is to send a replacement bidder's statement, which, to the satisfaction of the Panel, identifies and corrects the information deficiencies identified by the Panel;  4. Queensland Gas extend the offer period of its bid to at least one month after the dispatch of the replacement bidder's statement; and  5. the date by which Sydney Gas must dispatch its target's statement be extended to one week after the dispatch of the Queensland Gas replacement bidder's statement.  The Panel considers that the circumstances:  (a) are unacceptable having regard to the effect of the circumstances on:  i. the control or potential control of Sydney Gas; and ii. the possible acquisition of a substantial interest by Queensland Gas in Sydney Gas; and  (b) are unacceptable because they constitute, or give rise to, a contravention of sections 636(1)(g), 636(1)(m) and 670A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), by causing Sydney Gas shareholders to make decisions whether or not to hold their Sydney Gas shares, accept the Queensland Gas Offer, or dispose of them in other ways, on the basis of misleading and inadequate information and causing the market for control of Sydney Gas Limited shares not to be efficient competitive and informed, and that Sydney Gas shareholders would not have all material information required to be disclosed to allow them to assess the merits of the Queensland Gas Offer. The Panel considers the deficiencies it has identified are material to Sydney Gas shareholders' assessment of the merits of the Queensland Gas Offer.  **4.2 Volante Group Limited - decision**  On 28 February 2006, the Takeovers Panel (Panel) advised that it had declined the application by Commander Corporation Pty Limited (Commander), a subsidiary of Commander Communications Limited, in relation to its takeover offer for all the shares in Volante Group Limited (Volante).  The Panel made its decision following Volante's undertaking to dispatch a supplementary target's statement to its shareholders containing additional information which the Panel considered was required by Volante shareholders to make an informed decision with respect to Commander's offer.  **(a) Background**  Commander's application submitted that there were a number of deficiencies in the Volante target's statement. These largely related to Volante's disclosure relating to that part of the large managed services contract under negotiation for which Volante has been awarded "preferred supplier" status (Preferred Supplier Contract), and the acquisition of another small business which was being settled at the date of Volante's target's statement (Acquisition).  Commander also submitted that an article published in the Australian Financial Review (AFR) on Wednesday, 1 February 2006, which reported an interview with Mr Ian Penman, Volante's chief executive officer, contained information on the Acquisition which was not contained in the target's statement and Commander alleged was selective and misleading.  **(b) Decision**  The Panel declined to make a declaration of unacceptable circumstances in relation to the application as a result of:  (a) Volante undertaking to the Panel to include in a supplementary target's statement the following additional information:  (i) a statement regarding the Volante directors' reasons for considering that adequate disclosure to Volante shareholders did not require inclusion of a FY 2007 forecast excluding revenue for that part of the Preferred Supplier Contract for which Volante had been awarded preferred supplier status.  Volante had disclosed to the Panel that the reason its directors were prepared to include preferred supplier contracts in the forecasts, and did not consider that it was appropriate to include a forecast excluding the revenue from that part of the Preferred Supplier Contract for which Volante had been awarded "preferred supplier" status, was Volante's successful track record in securing contracts where it had been awarded preferred supplier status. Volante also considered it would be unreasonable to disclose the information which Commander had suggested because the disclosure would provide commercially sensitive information to Volante's competitors. These reasons were, however, not included in the target's statement.  The Panel believed that Volante's track record, and a discussion of the other reasons for not including a forecast excluding the revenue from that part of the Preferred Supplier Contract for which Volante had been awarded "preferred supplier" status, was information required by a Volante shareholder to make the investment decision described in section 638(1). Without the directors' reasons, a Volante shareholder would not be able to fully understand why Volante's directors provided a forecast of revenue which included revenue from contracts where Volante has not yet entered into a firm contract but did not provide a forecast of revenue without such contracts;  (ii) a statement of Volante's knowledge of whether or not it is the only preferred supplier for that part of the South Australian Government's Distributed Computing Support Services procurement contract for which it has been awarded "preferred supplier" status;  (iii) a statement explaining, or reconciling, in a consistent fashion the different acquisition prices used in the AFR Article and the media release lodged with the ASX dated 3 February 2006 relating to the Acquisition. In particular, the Panel noted that in the 1 February AFR article Mr Penman stated that Volante was "working towards an acquisition of its own, worth up to $10 million" whereas the 3 February Media Release described the Acquisition as being $5 million (payable in instalments over two financial years) plus additional deferred cash payments dependent on the achievement of various performance hurdles. The Panel believed that such varying statements would likely confuse shareholders;  (iv) a statement explaining that Volante considers that it would not require any material increase in working capital as a result of the new contracts Volante had recently won or had been awarded "preferred supplier" status, or the Acquisition. The Panel required this information to be disclosed to Volante shareholders after Volante included it in its submissions to the Panel in response to Commander's application; and  (b) Lonergan Edwards (which provided an expert's report to accompany the Volante target's statement as to the fairness and reasonableness of the Commander offer) undertaking to the Panel to include, or consent to the inclusion, in a supplementary target's statement:  (i) Lonergan Edwards' basis for considering that a FY 2007 forecast excluding revenue for that part of the Preferred Supplier Contract for which Volante had been awarded "preferred supplier" status was not material information for a Volante shareholder considering Lonergan Edward's report. The Panel was concerned that Lonergan Edwards had not made adequate disclosure in its independent expert report of the enquiries or examinations it had undertaken to establish reasonable grounds for believing the directors' revenue and earnings forecasts and whether these forecasts had been prepared on a reasonable basis; and  (ii) a clear explanation for Volante shareholders of the adjustments Lonergan Edwards made to the FY 2007 forecast to produce the normalised FY 2007 forecast. In the Panel's opinion, Lonergan Edwards' report did not clearly explain the adjustments which Lonergan Edwards made to the Volante directors' FY 2007 forecast in order to produce a normalised FY 2007 forecast. The normalised FY 2007 forecast underpinned the valuation conducted by Lonergan Edwards and that under these circumstances, the Panel considered that shareholders should have a clear understanding of the normalisation process.  As a result of Volante providing the Panel with a supplementary target's statement incorporating the above additional information that the Panel had requested from Volante and Lonergan Edwards, the Panel declined Commander's application. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Unfair preference, uncommercial transactions and good faith-overturning factual findings made by trial court**  (by Tarryn Billings, Phillips Fox)  Sheldrake v Paltaglou [2006] QCA 52, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and Muir J, 3 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/february/2006qca52.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/february/2006qca52.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The respondent, Paltoglou was an unsecured creditor who received funds from the sale of a restaurant to cover rental arrears owed to her. The shareholders in the company, Going Bananas Restaurant (Qld) Pty Ltd, Mr and Mrs Casaretto, (and later Mr Casaretto alone) were the lessees of the premises from the respondent.  The appellants were the liquidators of the company, Going Bananas Restaurant (Qld) Pty Ltd. The appellants argued that the payment made to the respondent from the proceeds of the sale of the business amounted to an unfair preference under section 588FA of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act').  The appellants unsuccessfully sought orders from a single judge of the Queensland District Court, under section 588FF of the Act, for the repayment of the amounts paid to the respondent.  The Full Court allowed the appeal and set aside the judgment of the district court. The Full Court found that the payment amounted to an unfair preference and an uncommercial transaction. It was further held that the respondent, when receiving these payments, had reasonable grounds to suspect that the company was insolvent.  An order was therefore granted under section 588FF of the Act that the respondent pay to the appellants the amount in dispute.  **(b) Facts**  Mr and Mrs Casaretto were the lessees of a restaurant premises from the respondent. The respondent was owed a substantial amount of unpaid rental over which the parties negotiated for an extended period. The respondent was eventually made aware of a contract of sale for the restaurant business. Prior to this the respondent had been unaware that the restaurant business was owned by a company rather than by Mr Casaretto personally.  An agreement was entered into between the company and the respondent whereby she granted a backdated lease and a further assignment of that lease to the purchaser of the restaurant business. This agreement facilitated completion of the sale of the restaurant business.  After the sale, Mr Casaretto informed the respondent that he would disburse $50,000 to the ANZ Bank as a secured creditor, $66,985.68 to the respondent and $28,015 to trade creditors. In reality the amount owed by the company to trade creditors was much higher. The company also owed money to the Australian Taxation Office.  The company was placed under administration on 24 March 2003. The appellants sought orders for the repayment of the amount paid to the respondent.  The trial judge found that the payment to the respondent amounted to an unfair preference under section 588FA of the Act and that those parts of the payment reflecting debts predating 1 March 2002 amounted to an uncommercial transaction under section 588FB of the Act.  The judge held that the appellants had nevertheless not established an entitlement to repayment. The respondent gave oral evidence at first instance which was accepted by the judge and led her Honour to conclude that the respondent was a party to the transaction in good faith and had no reasonable grounds for suspecting that the company was insolvent.  On appeal, the appellants challenged the finding that at the time of the transaction the respondent did not have, and a reasonable person in her circumstances would not have had, reasonable grounds for suspecting the company was insolvent.  The respondent contended that section 588FA was not applicable as the debt was owed by Mr Casaretto and not the company. She further argued that there was nevertheless no unfair preference given under these circumstances due to the benefit to the company of the sale of the business, the completion of which was facilitated by the respondent.  **(c) Decision**  **(i) Was the transaction an unfair preference under section 588FA of the Corporations Act?**  Section 588FA sets out the circumstances in which a transaction will be an unfair preference.  The Court of Appeal rejected the respondent's argument that the debt was owed by Mr Casaretto and not the company. It held that the company assumed the obligation to discharge the arrears for rental by entering into the backdated lease with the respondent.  The court also held that it was enough to give rise to an unfair preference that the respondent received more than she would receive was she left to prove in the winding up. The respondent's argument regarding the balancing element of benefit to the company was rejected.  **(ii) Was the transaction an uncommercial transaction under section 588FB of the Corporations Act?**  Section 588FB sets out the circumstances in which a transaction will be an uncommercial transaction.  Her Honour at first instance held that the company suffered detriment in paying out the debts due to the respondent, and that "a reasonable person in the company's circumstances would not have entered into the transaction given the extent of its indebtedness". The Court of Appeal upheld this finding.  **(iii) Was the transaction avoidable?**  The Court of Appeal held that at the time of the payment in question, the company was insolvent. Accordingly, the transaction fell to be characterised as an "insolvent transaction" under section 588FC because the payment of the amount of the unpaid rental and legal fees accrued prior to 1 March 2002 was an "uncommercial transaction" and the payment of the amount of unpaid rental accrued thereafter amounted to an "unfair preference". The whole transaction was therefore voidable under section 588FE.  **(iv) Section 588FG - grounds for suspecting insolvency**  Section 588FG prohibits the court from making on order under section 588FF materially prejudicing a right or interest of a person if certain matters are proved, including that at the time when the person became a party the person had no reasonable grounds for suspecting that the company was insolvent or would become insolvent, and that a reasonable person in the person's circumstances would have had no such grounds for so suspecting.  The respondent argued that her own experience in the restaurant industry led her to believe that the amount owed by the company to trade creditors would not have been substantial. She further asserted that it was reasonable for her to assume that these debts would be satisfied upon the sale of the restaurant business, and that the company had no further debts of which she was aware.  The Court of Appeal noted the caution with which an appellate court should approach the overturning of factual findings made by a trial court. However, the Court of Appeal agreed with the appellants' submission that her Honour erred in finding that it was not unreasonable for the respondent to believe that the debts of the company would be satisfied upon the sale of the restaurant business.  The court questioned whether the respondent had turned a blind eye as to the company's solvency. In examining the evidence given by the respondent during cross-examination at the hearing, the Court of Appeal focused on a number of concessions made regarding her knowledge of Mr Casaretto's financial position and history of defaults and breaches. It was held that the respondent had reasonable grounds to suspect that the company was unable to pay its debts as and when they fell due and that a reasonable person in her position would have entertained such a suspicion.  The appeal was therefore allowed and the judgment of the District Court set aside.  **5.2 Attempt to set aside a statutory demand**  (by Jonathan Stewart, Blake Dawson Waldron)  C & E Pty Ltd v Corrigan [2006] QCA 47, 3 March 2006, Supreme Court of Queensland, Court of Appeal, Williams and Keane JJA and Muir J, 3 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/march/2006qca47.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/march/2006qca47.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Introduction**  C & E Pty Ltd (C&E) entered into an agreement with CMC Brisbane Pty Ltd (CMC) for the construction of 10 houses for $4.04 million (plus GST) (the Works). CMC's sole director was Andrew Corrigan (Corrigan). Under section 31 of the [Queensland Building Services Authority Act 1991 (Qld)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=13451" \t "Default), Corrigan was the "nominated supervisor" of CMC who was the "licensed contractor". Cottee Parker Architects (CPA) were engaged as the "project superintendent".  Practical completion of the Works was achieved on 22 February 2003. On 13 October 2003, CMC went into voluntary liquidation. C&E terminated the building contract relating to the Works on 6 November 2003. On 28 November 2003, CMC entered into a Deed of Company Arrangement.  In previous proceedings, C&E unsuccessfully attempted to set aside that deed and had costs awarded against it in favour of Corrigan. A statutory demand was made by Corrigan upon C&E for those costs.  C&E brought proceedings in an attempt to set aside the statutory demand by means of an offsetting claim within the meaning of section 459H of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). C&E was unsuccessful at first instance in the Supreme Court of Queensland and appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal with Williams JA and Muir J agreeing with the reasons given and orders proposed by Keane JA.  The appeal involved two issues: 1. a substantive issue in relation to the basis for the alleged offsetting claim; and  2. a procedural issue in relation to the time within which the statutory demand was served.  **(b) Substantive issue - was there a genuine basis for C&E's offsetting claim?**  C&E argued that Corrigan breached a duty of care owed to C&E and, due to that breach, suffered losses of the order of $400,000. However, this claim had not yet been the subject of any proceedings. C&E advanced two alternate legal bases for the duty of care.  Keane JA held that Corrigan did not owe C&E a duty of care at common law. He considered that C&E had "an elaborate contractual charter of rights" with CMC which indicated that C&E was not "vulnerable" to CMC or, therefore, Corrigan. He noted that the contractual relationship did not impose obligations on Corrigan to guarantee CMC's performance or for Corrigan to use his endeavour to ensure that C&E's interests were protected. It was also noted that CPA (and not Corrigan) were engaged as the superintendent of the Works. Finally, Keane JA observed that Corrigan, as sole director of CMC, was duty bound to act in the interests of CMC and not C&E.  The alternative basis for the duty of care was that Corrigan, as a "nominated supervisor" of CMC, owed a duty of care to C&E co-extensive with the statutory duty imposed upon Corrigan by section 43(2) of the Queensland Building Services Authority Act 1991 (Qld). Section 43(2) provides that a licensed contractor (or its nominee) must ensure adequate supervision of building works carried out by the licensed contractor. Keane JA dismissed C&E's argument that this formed the basis for a private right of action. He observed that section 43(2) does not specify to whom such a statutory duty would be owed. Secondly, he stated that, as the Queensland Building Services Authority Act provided a statutory insurance scheme that affords compensation for certain defective building works, it was unlikely that the Act created private rights of action "sub silentio". Keane JA doubted that C&E could found a claim on section 43(2) against Corrigan.  In any event, Keane JA considered that C&E could not show that the losses which it claimed to have suffered were "arguably caused" by a want of reasonable skill and diligence by Corrigan. Keane JA considered that other reasons were more likely to have been the cause of the alleged loss. Accordingly, Keane JA held that C&E's offsetting claim could not be said to be a "genuine" claim as required by section 459G of the Corporations Act.  **(c) Procedural argument - was the demand served out of time?**  The procedural argument revolved around the fact that the application to set aside the statutory demand was not served on Corrigan, due to a "lengthy registry queue", until 4:30pm on the 21st day after Corrigan served the statutory demand in respect of the costs order. Under Rule 103 of the Uniform Civil Procedure Rules 1999 (Qld) a document which is served on a person after 4:00pm is deemed to have been served on the next day. Corrigan argued that, under Rule 103, C&E's application to set aside the statutory demand was served on the 22nd day and, therefore, was after the 21 days permitted under sections 459G(2) and (3) of the Corporations Act.  Keane JA held that the application was served within the time permitted under section 459G, as section 105 of the Corporations Act provides the appropriate method to calculate the applicable time limit and not Rule 103. He observed that there was "no inkling of an intention" in the Uniform Civil Procedure Rules that they are to regulate the service of all documents served under all Queensland and Commonwealth legislation. Keane JA also stated that it was "unlikely" that the Commonwealth Parliament intended that the rights conferred by section 459G could be "cut down" by the procedural provisions of each State. Finally, he mentioned that the construction of Rule 103 advanced by C&E would "give rise to difficulties" under section 109 of the Commonwealth Constitution.  Accordingly, Keane JA held that service after 4:00pm on the 21st day was within time.  **(d) Conclusion**  Though Keane JA held that C&E had served the statutory demand within time, he held that the offsetting claim was not a genuine claim. Accordingly, Keane JA upheld the primary judge's decision and did not set aside the statutory demand upon C&E for the amount that was owed to Corrigan under section 459H of the Corporations Act. Costs were awarded against C&E in favour of Corrigan.  **5.3 When an applicant will be granted leave to manage a corporation after having been disqualified from management**  (by Zoe Bateman, Corrs Chambers Westgarth)  Application of Douglas Victor Chapman [2006] NSWC 99, Supreme Court of New South Wales, Barrett J, 27 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc99.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc99.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiff sought an order under section 206G of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) seeking leave to manage a corporation, The Marketing Store Worldwide Pty Ltd (the Company), notwithstanding that he had been automatically disqualified from management of the Company following his execution of a deed of arrangement under Part X of the [Bankruptcy Act 1966 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default).  The court noted that in such cases, the plaintiff has the onus of establishing that the court should make an exception to the legislative policy underlying the prohibition, namely the protection of the public. In other words, the plaintiff must show that the protection of the public will not be compromised by the grant of the leave sought.  Having regard to the peculiar circumstances that led to the plaintiff's Part X deed, the responsible conduct of the plaintiff in relation to his financial predicament and the sole shareholder's support for the application, the court granted the plaintiff leave to be a director of and to manage the Company.  **(b) Facts**  The plaintiff's disqualification from management of the Company occurred on 15 September 2004. It arose under section 206B(4) of the Corporations Act, upon the plaintiff executing a deed of arrangement pursuant to Part X of the Bankruptcy Act 1966 (Cth).  The reason provided by the plaintiff for executing the Part X deed was that he was under intolerable financial stress, due to the combination of a marriage breakdown and the unexpected calling of a guarantee.  Once the plaintiff realised that he had been automatically disqualified from management of the Company he acted promptly in seeking advice, and in taking steps to give effect to and recognise the disqualification. In order to remedy the situation, the plaintiff executed a deed of composition. The court noted that the deed of composition provided for a much better result for creditors than is usually the case and that the plaintiff had been making regular payments up until the time of the judgment. The plaintiff's application was strongly supported by the ultimate parent of the company who wished to see the plaintiff remain as a director of the local subsidiary.  **(c) Decision**  In his judgment, Barrett J examined the purpose behind the prohibition contained in section 206B(4). He endorsed the views of Austin J in Didovich v Australian Securities and Investments Commission (1998) 29 ACSR 122 at 126, that the legislative policy underlying the prohibition aims to protect the public from "dishonest, unscrupulous, untrustworthy, irresponsible, or merely incompetent, company directors."  He noted that according to the case law on this topic, the plaintiff bears the onus of convincing the court to make an exception to the prohibition and its underlying legislative policy. He emphasized that since the legislative policy is one of protecting the public, the plaintiff must show that the protection of the public will not be compromised by the grant of the leave sought.  Barrett J then examined a number of factors which he considered to be relevant in determining whether leave should be granted under section 206G of the Corporations Act.  (i) First, he considered the peculiar circumstances that brought about the plaintiff's prohibition under section 206B(4). In this case the reason for invoking Part X was the intolerable financial stress suffered by the plaintiff as a result of a marriage breakdown and the unexpected calling of a guarantee. He distinguished the present case from circumstances where financial stress is caused by dishonest endeavours or unlawful conduct. (ii) Second, he noted the fact that the plaintiff's application was supported by a particular United States company which was the parent corporation of, and sole shareholder in, the Company. (iii) Third, he emphasized the responsible conduct of the plaintiff in entering into the composition agreement with his creditors, in response to his status under the Bankruptcy Act.  Having regard to the above-mentioned considerations, Barrett J concluded that the present case was one in which a grant of leave under section 206G was appropriate.  Barrett J held that the plaintiff be granted leave to manage and be a director of the Company. This leave was granted on the condition that at all times while the disqualification under section 206B(4) continues at least one other director reside in Australia and on the further condition that the plaintiff not be the sole signatory on any account maintained by the Company with any bank or financial institution.  **5.4 Application by wife to set aside a deed dismissed**  (by Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Chandran v Narayan [2006] NSWSC 104, Supreme Court of New South Wales, Equity Division, Young CJ, 20 and 21 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc104.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc104.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case, Young CJ dismissed an application by a wife to set aside a deed under which she was liable to pay her husband's debts of $1,965,213.34. The wife (Mrs Narayan) claimed relief from liability under two grounds: general equity and the [Contracts Review Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default). Young CJ found that before signing the deed it was put to Mrs Narayan to a sufficient degree that she would be jointly and severally liable for the debts owed. His Honour held that neither equity nor the Contracts Review Act offered Mrs Narayan opportunity for relief from the obligations of the deed.  **(b) Facts**  Mr Narayan borrowed a large sum of money from Mr Chandran (the plaintiff) to assist with his business operations involving companies that formed The Esen Group. After failing to repay the money, the plaintiff commenced proceedings against Mr Narayan.  The action was later settled on the basis that Mr Narayan owed the plaintiff $1,809,683.84 and would repay $300,000 by 2 November 2004 and provide security for the remaining debt owed.   In October 2004, Mr and Mrs Narayan met with the plaintiff in relation to the payment of debt. The prospect of more time being given to repay the debt was discussed, on the grounds that Mr Narayan would provide as security real estate in New South Wales which was jointly owned by Mr and Mrs Narayan.  On 4 November 2004, Mr and Mrs Narayan met with the plaintiff, and the plaintiff's solicitor and counsel. Mr Narayan stated that he did not wish to have his lawyers present at the meeting. A draft deed of agreement was provided to all attendees. The deed reflected the agreement that judgment would be entered, but that the plaintiff would not execute judgment provided both the Narayan's provided appropriate security. The plaintiff's counsel then explained the terms of the deed, including the concept of joint and several liability. Mr and Mrs Narayan were informed they did not need to sign the deed immediately and had until 16 November 2004 to review the deed or have a lawyer review it. Mr and Mrs Narayan agreed to sign the deed on 4 November 2004 without seeking any external advice on its terms.  **(c) Decision**  The key argument put forward on behalf of Mrs Narayan rested on principles of equity found in Garcia v National Australia Bank (1998) 194 CLR 395. Mrs Narayan provided evidence that she signed the deed without having fully understood its contents, in particular the risk that she would have to repay the amount personally from her own money. It was further put to the court that Mrs Narayan was a member of a culture where profound respect for one's husband was key and Mrs Narayan was acting with respect to her husband and because of her dependence on him.  However, other evidence regarding Mrs Narayan's involvement in The Esen Group indicated that she was not a person ignorant of the companies' affairs. She was the sole director and shareholder of one of the key companies, and was involved in the day to day operations (including negotiating transactions) of another.  Young CJ turned to the credibility of the evidence and determined that evidence provided by Mr and Mrs Narayan was difficult to accept against the "very cogent" evidence provided on behalf of the plaintiff. Upon this finding, his Honour held that the concept of joint and several liability had been adequately explained to Mr and Mrs Narayan.  His Honour also held that due to Mrs Narayan's involvement in the Esen Group, the transaction was not "voluntary" (in the sense that the surety obtained no gain from the contract the performance of which is guaranteed) as the test in Garcia v National Australia Bank required. His Honour held that there was no relief under the principles of equity.  In relation to the argument raised under the Contracts Review Act, Young CJ held that as no technical matter of defence was raised by the Narayan's in relation to the deed, there were no grounds upon which to find the contract "unjust".  **5.5 Right of unit holders to restrain a company due to breach of fiduciary duty by a director**  (by James Williams, Phillips Fox)  Highwater Nominees Pty Ltd v Mead [2006] WASC 17, Supreme Court of Western Australia, Hasluck J, 20 January 2006  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/january/2006wasc17.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/january/2006wasc17.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Highwater Nominees Pty Ltd ("Highwater"), as a unit holder in the Bigwest Corporation Unit Trust ("the Trust"), sought an injunction restraining Seascape Holdings Pty Ltd ("Seascape") from terminating a sublease on the basis that there had been a breach of the fiduciary duties owed by a director of the trustee company, Bigwest Corporation Pty Ltd ("Bigwest"), and the remaining defendants, to the unit holders of the trust.  Hasluck J granted the injunction sought by Highwater, having found that there was sufficient evidence before him to be satisfied that there was a serious issue to be tried, in that the evidence was sufficient to allow a claim for breach of fiduciary duty to be advanced. His Honour held that the balance of convenience favoured the granting of an injunction.  **(b) Facts**  Seascape, the third defendant, operated an oyster bar from premises leased from the City of Fremantle. The first defendant, Mr Mead, as the principal director of Seascape, entered into a partnership of sorts with Mr Neville, the principal investor in the plaintiff company, Highwater. Bigwest was established to act as agent and operator of the business and to hold the relevant assets in trust for the unit holders, Seascape and Highwater, being entities controlled by Mr Mead and Mr Neville respectively.  Bigwest purchased the business and took a sublease of the premises. The City of Fremantle remained as head lessor, Seascape as the lessee and Bigwest became the subtenant. In July 2005, a notice of default was issued by Seascape whereby it sought to terminate the sublease on the basis that Bigwest was in default in paying rent due under the sublease. A second notice of default in relation to the matter of unpaid rent was then served by Seascape on Bigwest on 10 January 2006. The notice provided that if the outstanding amount was not received by 20 January 2006, Seascape was entitled to take possession of the premises.  The plaintiff as a unit holder, rather than Bigwest as sublessee which was the actual target of the proposed re-entry, sought injunctive relief to prevent Seascape re-entering the premises. The plaintiff claimed that Mr Mead had breached the fiduciary duties he owed to the plaintiff as director of Bigwest and as the controlling mind of Seascape and the fourth defendant, Leuka Pty Ltd ("Leuka"), and also cited the knowing involvement in the alleged breaches of fiduciary duty by Seascape and Leuka.  More particularly, the alleged breaches of fiduciary duty were said to be referable to the charging of rent under a sublease entered into by Bigwest and the conduct of Mr Mead in acting and continuing to act in a manner that preferred and continued to prefer his interests to the interests of the plaintiff.  Counsel for defence raised two main arguments in response to the plaintiff's claims. First, counsel argued that the plaintiff was merely a unit holder in the trust, as opposed to the actual sublessee, and therefore did not possess the requisite standing to obtain relief of the kind sought. Secondly, it was argued that the matter in issue was simply a claim by Seascape for unpaid rent, and that for reasons of law Seascape's claim for the unpaid rent precluded relief of the kind sought.  **(c) Decision**  His Honour set out the principles applicable to the grant of an interlocutory injunction. To be successful, the applicant must satisfy the court that the claim is not frivolous or vexatious; in other words that there is a serious issue to be tried: Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148 at 153. If the court deems that there is a serious question to be tried, it must then be determined whether common law damages would constitute an adequate remedy or whether it would be more appropriate to preserve the status quo: American Cyanamaid Co v Ethicon Ltd [1975] AC 396 at 408.  His Honour then considered the two arguments raised by defence counsel. As to the question of standing, his Honour stated that in addition to statutory and common law duties, directors of trust companies also owe fiduciary duties to the company which prevent them from using the power conferred on them to obtain a private advantage: Mills v Mills (1938) 60 CLR 150. Generally, directors are only in a fiduciary relationship with the corporate entity itself: Blakely v Cook [2001] WASCA 208. However, his Honour acknowledged that in special circumstances, in which the director of a trustee company is in a position of knowledge and influence, the director of a trustee company may owe fiduciary duties to unit holders in the trust: United States Surgical Corporation v Hospital Products International Pty Ltd (1981) 148 CLR 457.  His Honour concluded that the plaintiff's claim was theoretically available as a matter of law. The success of the claim depended on whether there was sufficient evidence to establish that Mr Mead and the other defendants, as companies under the control of Mr Mead, owed fiduciary duties to the plaintiff as a unit holder in the Trust.  His Honour then addressed the second argument raised by defence counsel, relating to the question of whether the irregularities complained of were sufficient to give rise to a serious issue to be tried. These irregularities were the alleged breach of fiduciary duties by the defendants and the fact that the figure representing the unpaid rent could allegedly not be substantiated by Seascape. The plaintiff argued that these factors gave rise to an equitable set-off which permitted the claim for rent to be extinguished or considerably reduced.  His Honour then discussed whether an equitable set-off, of the type sought, could be granted even though clause 3 of the sublease required Bigwest to pay the rent to the sublandlord without deduction or set off of any kind. His Honour referred to the decision in Connaught Restaurants Ltd v Indoor Leisure Ltd [1994] 4 All ER 834 ("Connaught"), where the provision in the lease that the rent should be paid without any deduction was insufficiently clear to exclude the tenant's equitable right to set off a claim for damages for a landlord's breach of covenant against the rent due. Despite the fact that the sublease in this case did contain a clear exclusion clause, his Honour distinguished the facts in Connaught from the present case. His Honour found that Connaught related to a set-off in respect of the breach of some other covenant of the lease, whilst the issue in the present case pertained to the relationship between the lesser and the lessee and the question of whether any fiduciary duties were owed.  As to the issue of fiduciary duties, his Honour found that it could be open to the plaintiff to establish that Mr Mead exerted such a high degree of influence over Seascape that it could be said that Seascape itself had acted in a manner which amounted to a breach of a fiduciary duty. His Honour therefore concluded that the question of whether the plaintiff could be granted an equitable set-off in these circumstances constituted a serious issue to be tried.  Having concluded that the plaintiff's claim as a matter of law could potentially succeed, if the relevant matters were proved, his Honour then considered the background facts and the question of whether there was evidence supporting the plaintiff's allegations of breach of fiduciary duty and misconduct. His Honour cited an acknowledgement by Seascape that the accounts, alleged to be defective, needed to be reconstituted and the fact that Mr Mead had acknowledged that a capital contribution of $200,000 made by Mr Neville, which was designed to go to Bigwest as trustee, had gone to him.  His Honour found that there was sufficient evidence to allow a claim for breach of fiduciary duty to be advanced and was therefore satisfied that there was a serious issue to be tried. Hasluck J held that if Seascape was allowed to terminate the lease and evict Bigwest, the business would not be able to be salvaged in the event of the plaintiff's claim ultimately succeeding. Therefore, the balance of convenience favoured the preservation of the status quo. His Honour granted the plaintiff an injunction for ten to fourteen days.  **5.6 Unliquidated contingent liabilities are not relevant in the assessment of solvency**  (by Kristy Zander, Clayton Utz)  Box Valley Pty Limited v Elizabeth Kidd and John David Kidd [2006] NSWCA 26, Supreme Court of New South Wales, Court of Appeal, Bryson JA, Basten JA and Gzell J, 24 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/February/2006nswca26.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/February/2006nswca26.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court held that likely future breaches of a contract to sell and deliver goods, giving rise to a potential claim for unliquidated damages, did not constitute "debts" for the purpose of determining a company's solvency or insolvency under section 95A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). In order to determine whether a company is "able to pay its debts as and when they fall due", the Court can only have regard to present or contingent liquidated debts, regardless of the likelihood that unliquidated contingent liabilities will adversely affect the commercial viability of a company's trading in the short term.  **(b) Facts**  The Claimant, Box Valley Pty Limited (Box Valley), was a creditor of David Kidd Grain Trading Pty Limited (the Company). Box Valley and the Company had entered into an agreement in early June 2001 for the supply of sorghum. Box Valley supplied sorghum to the Company in the first half of June 2001. The cost was approximately $100,000. Box Valley was not paid. The Company subsequently went into voluntary administration and then liquidation.  Box Valley sought orders against two of the directors of the Company pursuant to section 588M(3) of the Corporations Act 2001. It alleged that the directors had engaged in insolvent trading by incurring liabilities to Box Valley at a time when the Company was insolvent.  **(c) Decision**  Box Valley's claim against the directors of the Company for insolvent trading in the District Court of New South Wales was unsuccessful. Box Valley's appeal to the New South Wales Court of Appeal was dismissed with costs.  **(i) Unliquidated contingent liabilities in assessing solvency**  Box Valley had sought to prove that the Company was insolvent at the relevant time by way of an expert accountant's report. The expert's evidence turned on the significance, for the solvency of the Company, of large obligations which the Company had incurred by entering into forward sale contracts for primary products, particularly white cottonseed.  At the time the directors of the Company appointed a voluntary administrator, it was the managing director's assessment that the Company was about to be "completely overwhelmed" by its liabilities. It was highly likely that, when the time for performance of the Company's forward sale contracts came, the Company would be unable to be able to meet its obligations unless the market price of white cottonseed fell dramatically.  On appeal, Bryson JA (with whom Basten JA and Gzell J agreed) held that it was incorrect for the expert accountant to have regard to the unrealised profits and losses on the forward sale contracts when calculating a deficiency of working capital as a means of assessing solvency for the purpose of section 95A of the Corporations Act 2001. The Court found that a "debt", for the purposes of testing solvency, can include a contingent debt only if the amount is liquidated and not if the obligation comes into existence only upon the exercise of an election or is unliquidated: see Shephard v ANZ Banking Corporation Limited (1997) 15 ACLC 1802; Hawkins v Bank of China (1992) 26 NSWLR 562.  The critical factor in the Court's decision was that, if the Company defaulted on the forward sale contracts, it would not be then exposed to a liquidated debt, but instead to a potential claim for unliquidated damages for breach of contract. Such an unliquidated claim is not a "debt" for the purposes of the definitions of solvency and insolvency in section 95A of the Corporations Act 2001. As Basten JA noted, whilst the position of the Company may have become commercially untenable, it was not insolvent.  **(ii) Factors relevant to assessment of solvency**  Bryson JA noted that the "usual" indicators of insolvency were missing in relation to the Company for the relevant period. In particular, there was:   * no evidence of defaults in meeting obligations to pay trading or other debts in accordance with usual payment terms; * no record of any dishonoured cheque; * no other indication of a cash flow difficulty; * no instances of failure or late payment of taxation obligations; * no notices of demand or statutory demands; * no late payment of wages; * no judgments, summonses for debt or attempted levies of execution; * no indications of any difficulties in the Company maintaining its relationship and dealings on overdraft with its Bank; and * no evidence of the signs that usually accompany persistent late payment of suppliers.   **(iii) New trial**  The court found that, putting to one side the unrealised losses of the Company, there was an argument that the Company was insolvent at the relevant time based on its debts to trade creditors. Accordingly, the Court considered that the trial judge erred in failing to consider that alternative basis of insolvency, but noted that the issue was one that could only be decided upon a new trial. The Court concluded that, since the alternative argument had been given little attention or prominence by Box Valley at first instance, it would be procedurally unjust to order a new trial.  **(iv) Present debts payable in the future**  Gzell J also mentioned, by way of obiter, an oddity that arose out of the Harmer amendments to the insolvent trading provsions in 1993.  Gzell J noted that section 556(1)(b)(ii) of the Companies (New South Wales) Code (which was largely identical to s 592(1)(b) of the pre-1993 Corporations Law) had created a liability on the part of a director if a company incurred a debt when there were reasonable grounds to expect that it would not be able to pay all its debts as and when they became due. This allowed the Court to take account of present debts payable in the future.  In contrast, section 588G(1)(b) of the Corporations Act 2001 (which replaced s 592 as part of the Harmer amendments in 1993) creates a liability on the part of a director if the company is insolvent at the time of incurring a debt, becomes insolvent by incurring the debt, or becomes insolvent by incurring debts including that debt. Gzell J noted that, on a literal construction, the only relevant debts for the purpose of section 588G(1)(b) of the Corporations Act 2001 could be debts which are immediately due and payable.  However, Gzell J noted that there was no indication in the extrinsic materials that Parliament intended to change the law in this respect. In the circumstances, although it was not necessary to decide the matter, Gzell J indicated that it was likely that section 588G(1)(b) of the Corporations Act 2001 would be interpreted in the same way that section 556(1)(b)(ii) of the Companies (New South Wales) Code had previously been interpreted.  **5.7 Fixing the remuneration of company administrators prospectively**  (by Richard Hillman, Freehills)  Gidley, in the matter of Aliance Motor Body Pty Limited (Subject to Deed of Company Arrangement) [2006] FCA 102, Federal Court of Australia, Gyles J, 16 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/february/2006fca102.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/february/2006fca102.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Gidley, in the matter of Aliance Motor Body Pty Limited (Subject to Deed of Company Arrangement) was brought before the Federal Court by the plaintiff to resolve a legal controversy as to whether an administrator (whether under a deed of company arrangement or not) can seek to have their scale of hourly rates for future work approved by a resolution at a creditors' meeting. This controversy concerned the interpretation of the requirement in section 449E of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) that remuneration be 'fixed' by a resolution of the company's creditors. On either side of the legal debate were the Insolvency Practitioners Association of Australia (IPAA) and the Australian Securities and Investments Commission (ASIC), who held opposing views as to whether remuneration for future work based on hourly rates was sufficiently objective and certain to meet the statutory requirement that they be 'fixed'.  The plaintiff, Paul William Gidley, was successful in his request for a direction that his remuneration as administrator and as deed administrator, which was based on hourly rates, was properly fixed at a creditors' meeting held on 20 June 2005. Therefore the result of the Gidley judgment is to resolve the controversy, at least for the moment, in favour of the position held by the IPAA.  **(b) Facts**  On 20 June 2005, the board of Aliance Motor Body Pty Limited (Aliance) appointed the plaintiff and Stewart William Free, partners in the accounting practice Lawler Partners, as joint and several voluntary administrators of the company. At a meeting of creditors, held on 15 July 2005, the creditors appointed the plaintiff as the administrator of a deed of company arrangement, to be executed by the company. At the same meeting the creditors passed three resolutions relating to the remuneration of the administrators, all of which determined the remuneration by reference to the Lawler Partners guide to hourly rates. The second and third resolutions were prospective in effect, applying to work to be conducted by the administrators. The amount that the administrators and their staff could charge the company under both these resolutions was capped at a certain monetary sum.  The plaintiff's application for a direction was opposed by ASIC, which appeared as amicus curiae to make submissions as a contradictor. The primary issue before Gyles J was whether the second and third resolutions of creditors at the 15 July 2005 meeting 'fixed' the remuneration of the administrators within the meaning of section 449E of the Act.   **(c) Decision**  **(i) The Stockford decision**  Gyles J referred to the decision of Finkelstein J in Re Korda; in the matter of Stockford Ltd (2004) 140 FCR 424, which also dealt with the meaning of 'fixed' in section 449E of the Act. In that case, Finkelstein J said at paragraph 24 of his judgment that 'remuneration will be fixed if it is stated as a monetary sum, or is based on a formula that is capable of being applied according to some objective standard…'. Finkelstein J noted that all objective elements of the formula must be identified. His Honour referred to the statement of Dixon J in Fraser Henleins v Cody (1945) 70 CLR 100 at 128 that a fixed sum must, at least, be able to be 'calculated or ascertained definitely'.  As in Gidley, Stockford concerned the validity of resolutions at a creditors' meeting that purported to fix the prospective remuneration of company's administrators by reference to hourly rates. These resolutions referred to rates contained in an administrator's report. Those rates allowed different hourly charges to be applied to work performed by persons occupying the same position. Accordingly, there was no fixed criteria by which the hourly charge for work could be determined. Under the circumstances, Finkelstein J concluded that the administrators fixed their remuneration, not the creditors.  **(ii) The Gidley decision**  Gyles J began the substantive part of his decision by reasoning that section 449E of the Act contemplates the fixing of prospective remuneration. His Honour based this conclusion on the circumstances of administration under a deed of company arrangement, discussed at paragraph 28 of his judgment. It followed from this conclusion that remuneration may be fixed by reference to a formula based upon time, so long as that formula was objective enough to comply with High Court authority.  Gyles J noted the strength of the arguments made by ASIC that remuneration by way of hourly rates could lead to abuse, including over-servicing. His Honour considered, nevertheless, that Parliament had provided sufficient safeguards, being that:   * remuneration can only be fixed by a resolution of the company's creditors or by the Court; and * the remuneration resolved upon is subject to full review by the Courts under section 449E(2) of the Act.   The creditors' resolutions in Gidley were, in the circumstances, capable of objective application. Gyles J identified three elements of the formula for remuneration contained within the resolutions: the person doing the work, their position and the period of time spent on the work. His Honour held that all three can be calculated or ascertained definitely. Gyles J also noted that a monetary cap, as contained in the creditors' resolutions, did not fix the administrators remuneration. Since it could not be ascertained whether the cap would be reached, the cap did not create a certain monetary sum. His Honour nevertheless noted that a monetary cap may be relevant to the question whether remuneration was reasonable if the question arose under Court review pursuant to section 449E(2) of the Act.  **5.8 A theoretical conflict of interest will not prevent the appointment of a single liquidator to inter-related group companies**  (by Chris Wighton, Mallesons Stephen Jaques)  ASIC v Westpoint Corporation Pty Ltd [2006] FCA 135, Federal Court of Australia, Siopis J, 16 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/february/2006fca135.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/february/2006fca135.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court considered whether it was inhibited in appointing a single liquidator to deal with the insolvency of more than one company in a corporate group where a number of the group companies subsisted in debtor/creditor relationships. Siopis J followed the principles stated by Lehane J in Re Chilia Properties Pty Ltd (admin apptd) (1997) 154 ALR 179 ('Chilia') and cited with approval the principles identified by Warren J in Sisu Capital Fund Ltd v Tucker [2005] EWHC 2170 (Ch) ('Sisu Capital') in finding that where there is no obvious and real conflict of interest, but merely the possibility of a theoretical conflict, a court should not be inhibited from appointing a single set of liquidators when that would advance the efficiency of the liquidation, and therefore reduce costs, which was in the interests of creditors generally.  **(b) Facts**  **(i) Background to the application**  This case dealt with an application brought by the Australian Securities and Investments Commission ("ASIC") for the winding up of Westpoint Corporation Pty Ltd ("Westpoint Corporation") on the ground that the company was insolvent.  While there was no opposition to the making of a winding up order, there was, however, some controversy as to who should be appointed as liquidators of Westpoint Corporation. The court granted leave to two Westpoint group companies, North Sydney Finance Limited (In Liquidation) ("North Sydney Finance") and Emu Brewery Mezzanine Limited (In Liquidation) ("Emu Brewery Mezzanine") to make submissions only in relation to this controversy.  North Sydney Finance and Emu Brewery Mezzanine had advanced $12.4 million and $25.3 million respectively to other Westpoint group companies and, in respect of these advances, both companies were beneficiaries of guarantees from Westpoint Corporation. On the basis of these guarantees, North Sydney Finance and Emu Brewery Mezzanine claimed to be creditors of Westpoint Corporation.  The controversy arose because ASIC, together with creditors, including the Australian Taxation Office ("ATO"), supported the appointment of a Mr Herbert and a Mr Read ("Herbert and Read") to act as liquidators of Westpoint Corporation. Herbert and Read had already been appointed as provisional liquidators of a related company, Westpoint Management Pty Ltd ("Westpoint Management"). Westpoint Management (in its own right, and in various trustee capacities) was both a creditor and debtor of Westpoint Corporation.  North Sydney Finance and Emu Brewery Mezzanine opposed the appointment of Herbert and Read and instead supported the appointment of Westpoint Corporation's administrators, Mr Francis and Mr Ryan ("Francis and Ryan") who, like Herbert and Read, had both consented to act as liquidators of Westpoint Corporation.  **(ii) Submissions**  Counsel for ASIC and counsel for the receivers and managers of Westpoint Corporation made the following submissions supporting the appointment of Herbert and Read as liquidators:   * Given that the affairs of Westpoint Corporation and Westpoint Management were "substantially intertwined", on-going investigations would be assisted if there was one set of liquidators in respect of both companies. The appointment of one set of liquidators to companies in a corporate group would be more efficient, reduce costs and would be in the best interests of creditors. * There was no real conflict between Herbert and Read's roles as liquidators of Westpoint Corporation and provisional liquidators of Westpoint Management. The authorities are to the effect that it is desirable that where companies in a group go into liquidation, to the extent that it is possible to do so without there being a real conflict of interest, the same liquidator should be appointed to each of the companies in the group. In assessing real conflict a distinction should be drawn between dealings which affected the interests of external creditors and other external interests, and those which did not. * The fact that there might be a theoretical conflict should not prevent the appointment of a single liquidator. Courts will appoint a single liquidator to a group of companies, notwithstanding that there might be some possible theoretical conflict, on the basis that, if a real conflict emerged during the course of the administration, the liquidator could then make alternative arrangements as to how to deal with the real conflict. * A relevant consideration to be taken into account is the expressed position of the creditors. In this case, the secured creditor, represented by the receivers and managers, and ATO both supported the appointment of Herbert and Read as liquidators. * Although Francis and Ryan, in their capacity as administrators, had carried out work in relation to the affairs of the company, there is a difference in the nature of the work performed by an administrator and a liquidator. A substantial amount of the work which was carried out by Francis and Ryan was in discharge of their duties as administrators. * The Court should take into account that Francis and Ryan were appointed as administrators by a director of the company and this could give rise to a perception of lack of independence on the part of Francis and Ryan.   The submissions by counsel for North Sydney Finance and Emu Brewery Mezzanine, in support of the appointment of Francis and Ryan, were as follows:   * There could be no perception of a lack of independence on the part of Francis and Ryan arising from their role as Westpoint Corporation's administrators because it was a common occurrence for administrators who had been appointed by the directors to subsequently become liquidators of the same entity. * The appointment of Francis and Ryan would promote efficiency given that much of the work in respect of the investigation of the company's affairs had already been completed, whereas if Herbert and Read were appointed they would need to undertake additional work to 'catch up' and therefore increase costs and reduce any amount that would otherwise be available to creditors.   **(c) Decision**  Justice Siopis held that Mr Herbert and Mr Read should be appointed as liquidators of Westpoint Corporation.  His Honour agreed that the observations made by Lehane J in Chilia and Warren J in Sisu Capital correctly stated the legal principles to be applied in this case, namely, that in the situation where there is no obvious and real conflict but there is a possibility of a theoretical conflict, a court should not thereby be inhibited from appointing a single set of liquidators when that would advance the efficiency of the liquidation, and result in fewer fees being charged in respect of the liquidations.  On the evidence before him, his Honour found that there was no real conflict in the sense that that concept is recognised in the authorities. Further, there was no evidence that the appointment of Herbert and Read to the position of liquidators of the Westpoint Corporation would adversely affect the interests of external creditors or other external interests. The inter-relationship between Westpoint Management and Westpoint Corporation did not demonstrate any such prejudice. His Honour expressed his confidence that, in the event any real conflict did emerge, the liquidators would approach the Court and seek directions in relation to how to deal with that conflict, as foreshadowed in the authorities.  With respect to the extent of work that had already been done by Francis and Ryan in their capacity as administrators, Siopis J accepted evidence that the amount of work which was still required in the conduct of a liquidation of the size and complexity of the Westpoint liquidation would be substantially more than had already been done. Therefore, the fact that there had been some work done in investigating the affairs of Westpoint Corporation did not operate as a decisive factor in favour of appointing the administrators as liquidators. His Honour also noted that Herbert and Read had undertaken that no fees would be claimed in relation to 'catching up'.  His Honour held that whilst the expressed views of the creditors are not decisive they should be taken into account. However, in this case, the views held by creditors was not a decisive factor in the Court's determination given that there were some creditors who opposed the appointment of Herbert and Read, and some who favoured it.  The court did not accept the Applicant's submission that Francis and Ryan should not be appointed because there would be a perception of lack of independence. In finding no evidence which would cause the Court to question the independence of Francis and Ryan, his Honour noted that it is often the case that administrators are appointed as liquidators, notwithstanding that they are initially appointed as administrators by the directors of the company.  **5.9 The availability of section 1322 to rectify invalid extensions of takeover bids**  (by Rory Maguire, Freehills)  Re Centennial Coal Co Ltd [2006] NSWSC 62, New South Wales Supreme Court, Barrett J, 17 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc62.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc62.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Justice Barrett examined whether the relief offered by section 1322 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) should be granted to a company which had contravened the statutory procedures required to extend an off-market takeover bid outlined in section 650.  His Honour found that the relevant contravention, which was of an essentially procedural nature and did not cause any substantial injustice, could be validated via the jurisdiction created by section 1322.  **(b) Facts**  The plaintiff, Centennial Coal Co Ltd, made an off-market bid for all the issued ordinary shares of Austral Coal Limited (the target) and sought to extend the offer period before the end of the existing offer period, as allowed under section 650C(1). Such an extension of the offer period requires compliance with the steps outlined in section 650D, which include:   * lodging a notice with ASIC; * giving that notice to the target; and * giving that notice to all offeree shareholders.   In this case, the plaintiff notified the target and ASIC within the required time period. However, notices to shareholders were posted eighty minutes after the then current offer period had ended. The actions of the plaintiff were therefore not effective to extend the offer period under the off-market bid as they did not comply with section 650D(1)(c)(ii).  Relief for this non-compliance was sought under section 1322, which enables the court to make orders validating acts done in contravention of the Act.  **(c) Decision**  Section 1322(6) prevents an order being made under section 1322(4)(a) unless the court is satisfied that:   * the act was of a procedural nature; * the person concerned acted honestly; * it is just and equitable to make the order; and * no substantial injustice will be caused.   Justice Barrett made an order declaring that the late notice of the bid extension was valid. His reasoning was as follows:   * the non-compliance was a "contravention" of the Act (as referred to in section 1322(4)(a)) as the plaintiff, having decided to embark on the offer extension process, failed to take all of the prescribed steps; * the contravention was of a procedural nature only as, in all substantive respects, compliance with the statutory procedure had occurred and the plaintiff had intended for all parties to be fully informed and had not acted dishonestly; * a validation of the late notice would not cause substantial injustice to any of the relevant parties, given that:   (i) the plaintiff had notified the Australian Stock Exchange of the extension of the bid, resulting in the market operating on the basis that the offer period had been extended; and (ii) having regard to common knowledge about the postal system, the late notice would have arrived at the same time (or at worst one day later) as if the notice had been posted eighty minutes earlier.  **5.10 Various issues in relation to deeds of company arrangement**  (by Carla Alviano, Blake Dawson Waldron)  Lombe v Wagga Leagues Club Ltd [2006] NSWSC 3, New South Wales Supreme Court, Barrett J, 31 January 2006  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/january/2006nswsc3.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/january/2006nswsc3.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Introduction**  The plaintiff and his partner became administrators of the Wagga Leagues Club Ltd pursuant to a resolution of the directors on 23 July 2003. A deed of company arrangement was executed on 29 October 2003. The parties to the deed were the club, the plaintiff and QCM Limited and Birjo Pty Ltd (the second and third defendants). The deed was terminated on 5 July 2004 after a meeting of the creditors was convened.  The plaintiff became a liquidator of the club.  QCM and Birjo provided financial resources for the purposes of the deed and the creation of the deed fund. The deed fund comprised a number of amounts, including an amount of $285,041.20 and 20% of the approved debts, estimated at $110,000. The first amount is referred to elsewhere in the deed as a "Wages Contribution". The deed allowed the administrators to retain as part of the fund, any cash remaining in the account operated by the administrators. The $110,000 was provided by QCM by means of a bank guarantee.  On 18 June 2004 only a part of the moneys specified had been allocated to the fund. It was the plaintiff's evidence that both QCM and Birjo were required to pay in further amounts. As at the termination date of the deed, certain moneys in the deed fund remained unexpended.  The parties ultimately came to a conditional settlement on or about 4 April 2005 which provided for the payment of $132,470.39 by the second and third defendants on condition that (among other things), the plaintiff receive approval of the Committee of Creditors or court for the conditional settlement, the second and third defendants be granted security to 24 electronic gaming machines, and that the wages contribution receive appropriate priority ranking for any realisations from floating charge assets.  **(b) Relief sought by the plaintiff**  The plaintiff sought various relief with a view to giving effect to a conditional agreement reached with the second and third defendants. Specifically, the relief sought related to: 1. an order that the parties were justified in entering into the settlement arrangement; 2. the Court declares that it is just and beneficial for the plaintiff to give effect to the settlement; 3. an order that the charge given by the club to Birjo is valid; 4. judicial advice (on the footing that the plaintiff is a trustee holding certain moneys) as the proper application of the funds; 5. an order that the fund received in the settlement shall be applied to the deed fund; and 6. clarification of whether either or both of QCM and Birjo is entitled to a priority position in the winding up.  **(c) Decision - relief sought under paragraph 6**  Barrett J first considered paragraph 6 of the originating motion, that is, whether the provision of the wages contribution by the second and third defendants caused a priority position for payment under section 560 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). That section provides that if a payment of a particular kind is made (in relation to (among other things) wages or superannuation) and the payment was made out of monies advanced by a person for the purpose of making the payment, then the person who advanced the money will be deemed to have the same right of priority of payment as the person who received the payment would have had the payment not been made.  Barrett J decided that as the club paid wages during the time it was under administration and before the payment was made, it could not be said that the wages were paid out of the payment made by the second defendant. Accordingly, the two aspects had not been satisfied. Additionally, as the payment was made to the deed fund, it could not be said that the payment has been advanced to the Club.  **(d) Decision - relief sought under paragraph 3**  As background, Barrett J explained that a charge was purportedly created in favour of Birjo over the whole of the club's assets in relation to the deed of company arrangement. However, because the charge was not notified to ASIC within the period specified in section 263 of the Corporations Act, the charge is deemed void as against the liquidator. Barrett J further explained that under the [Gaming Machines Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=59760" \t "Default), a charge is not to be granted over gaming machines unless (among other things) the interest is granted over the whole of a club's assets, including the gaming machines.  The plaintiff argued that under section 266(4) of the Corporations Act, the court should declare the charge to be valid section in respect of only the club's gaming machines, and not the other assets of the club. Barrett J, however, stated that this section can only be used to order an extension of time for lodgement so as to save the security from invalidity. The section cannot be used, as the plaintiff had sought, to create anew a much more limited security to suit the plaintiff's purposes. Further, Barrett J stated that the court did not have the evidence before it to come to a conclusion under this section. Even if the application were to be considered with reference to the "other grounds" referred to in the section, the plaintiff needs to show that the validation of the security is "just and equitable". Barrett J decided that there was nothing in the plaintiff's submissions that addressed the just and equitable perspective. Further a grant of a charge specifically over the gaming machines would be contrary to the Gaming Machines Act. Accordingly, the court could not order that the charge given by Birjo was valid.  **(e) Decision - had a trust been created?**  As the relief sought under paragraphs 3 and 6 of the originating motion had been refused, the conditions essential for the settlement had not been satisfied. Barrett J stated that therefore there was no point proceeding with the plaintiff's remaining claims. Barrett J said, however, that he would discuss paragraph 4 as it raised matters not directly related to the conditional settlement and warranted attention.  Paragraph 4 referred to the proper application of moneys under the control of the deed administrators pursuant to the deed of company arrangement that were unexpended when the deed was terminated. The amount left in the deed fund was approximately $55,000. This was to be applied as a dividend of 10 cents in the dollar to the club's creditors. A report given to creditors before the deed was terminated stated that the dividend payments would be guaranteed to be paid even if the deed was subsequently terminated.  Barrett J stated that to determine how the funds should be utilised requires an analysis of whether the funds are being held on trust. Barrett J reviewed a number of cases and decided that no trust existed because where, in accordance with a deed of company arrangement, funds are provided to a company, those funds become the property of the company and the deed administrator, being an agent and fiduciary of the company, obtains no proprietary interest in the funds and must deal with the funds as the deed provides. This is the case, Barrett J held, even though the deed stated that the deed funds would be held on trust for administrators and creditors of the company. Barrett J said this merely emphasised the fiduciary nature of the deed administrator in respect of the club.  Barrett J then went on to consider whether if he had been wrong and a trust did exist, what was the effect of the termination of the deed. Section 445H of the Corporations Act provides that the termination of a deed of company arrangement does not affect the previous operation of the deed. However, a necessary consequence of the termination of a deed is that it ceases to be binding and in this case, upon termination, there no longer existed any persons who could be described as deed administrators. Having said this, Barrett J stated that at the time of the termination of the deed, the creditors' claims had not been extinguished.  Barrett J ultimately decided that as no trust existed, after the termination of the deed, the remaining property was property of the club no longer affected by the provisions of the deed. Accordingly, the property was to be applied by the plaintiff, as liquidator of the club, in the course of the winding up of the club. Barrett J refused to give judicial advice in terms of paragraph 4 of the originating process but stated that the plaintiff was entitled to a direction.  **5.11 No unreasonable prejudice when payments under a deed of company arrangement were better than in a hypothetical liquidation**  (by Liam Brown, Mallesons Stephen Jaques)   Natarajan v ACIB Accumulus Pty Ltd (in administration) [2006] VSC 22, Supreme Court of Victoria, Mandie J, 10 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/february/2006vsc22.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/february/2006vsc22.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court was asked by a related creditor of ACIB Accumulus Pty Ltd ("ACIB") to set aside, terminate, or declare void a deed of company arrangement ("DOCA"). The plaintiff alleged that the DOCA (and an associated sale of ACIB's main business) unreasonably prejudiced his interests, was unfairly discriminatory, and was defective because of procedural irregularities in relation to notices and other conduct associated with directors' meetings at which it was resolved to sell the business and place the company into administration.  Mandie J held that the plaintiff was in a significantly better position under the DOCA than he would have been had ACIB been placed into liquidation. Accordingly, it could not be said that the DOCA unreasonably prejudiced his interests or was unfairly discriminatory. Further, any procedural irregularities were subject to section 1322(2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") and, therefore, the meeting and any resolutions were not invalidated.  **(b) Facts**  The plaintiff, together with Trevor and Therese Siebel, was a director of ACIB. The Siebels' son, Leon, was the Chief Operations Officer of ACIB. The plaintiff was introduced to the Siebels in June 2003 by mutual business contacts, to discuss the prospect of investing in ACIB's business. In July 2003 an agreement was entered into between the Siebels, the plaintiff and ACIB. Under this agreement the plaintiff, in return for agreeing to contribute $1.25 million in the form of loan and equity payments, was appointed a director and received 30% of the shares in ACIB.  By the middle of 2004 the plaintiff realised that the profitability of ACIB was not as he had anticipated and his relationship with the Siebels began to deteriorate. The plaintiff then attempted to negotiate repayment of monies he had advanced and an exit from the company. By the time a directors' meeting was held on 27 October 2004 it was readily apparent that ACIB was at risk of trading whilst insolvent. The Siebels proposed that the business of ACIB be sold and, accordingly, an advertisement was published in the Age on 30 October 2004. At a meeting of the directors on 9 November 2004 it was generally agreed that the company was insolvent. At this meeting ACIB's accountant advised that the best possible solution would be to sell ACIB's business and place ACIB into liquidation.  Following the meeting there were discussions between the plaintiff and Leon Siebel about the prospect of them jointly purchasing the business, however no agreement was reached. Thereafter Leon Siebel formulated a plan to purchase the business independently of the plaintiff. On 12 November 2004 the directors' meeting resumed and the plaintiff proposed that an administrator be appointed to ACIB. However, the other directors voted against that step. The Siebels informed the plaintiff that they had not agreed to his proposal because they had fixed a meeting to see an alternative administrator on 15 November 2004.  Following the meeting Leon Siebel was asked by the other directors about his intention to purchase the business. Negotiations ensued and on 15 November 2004 ACIB entered a sale of business agreement with a company controlled by Leon Siebel. The consideration for the sale included that the new company would assume responsibility for certain defined liabilities and pay ACIB $30,000. The assumed liabilities included most of ACIB's unrelated creditors. It was a condition subsequent to the agreement that ACIB would immediately appoint an administrator and the administrator so appointed would ratify the sale agreement within 14 days of appointment.  Accordingly, the Siebels convened a purported meeting of directors at which it was resolved that an administrator be appointed. The administrator informed the plaintiff of his appointment and that the business of ACIB had been sold, and invited the plaintiff to provide grounds on which the sale should be overturned.  The administrator reported to the creditors that the sale of the business may have been undervalued by approximately $35,000. However, he decided to ratify the agreement because not doing so would have returned the business to ACIB with little likelihood that the business could have traded profitably and would, in all probability, have further eroded the assets of ACIB. Further, the quantum of the undervalue was not sufficient to justify incurring additional costs associated with trading the business and then on selling it. In any event, there had been no further expressions of interest in the purchase of the business.  A second meeting of creditors was convened on 10 December 2004. At this meeting the administrator tabled a proposal for a DOCA. Under this proposal the Siebels would contribute $150,000, the Siebels and all parties related to them would not seek to participate in any distribution made pursuant to the DOCA and the Siebels would ensure full repayment of ACIB's debt to a financier so that the financier would not find it necessary to participate in any distribution under the DOCA. A resolution approving the DOCA was moved and passed at the meeting by a majority in number and value of creditors. The fund under the DOCA was comprised of the $150,000 paid by the Siebels and the net proceeds of sale of the assets of ACIB.  **(c) Decision**  The originating process was dismissed.  **(i) Section 600A**  Under section 600A of the Act the Court could set aside the resolution that caused the company to enter the DOCA if:   * the resolution would not have passed or would have been decided on a casting vote if the votes of particular related creditors (the Seibels) of the company were disregarded for the purposes of determining whether or not the proposed resolution was passed; and * the passing of the resolution has prejudiced the interests of the creditors who voted against the resolution (the plaintiff and the ATO) to an extent that is unreasonable having regard to:   + the benefits resulting to related creditors; and   + the nature of the relationship between the related creditors and the company; and   + and any other relevant matter.   In Deputy Commissioner of Taxation v Portinex Pty Ltd (2000) 34 ACSR 391 Austin J said "… in such cases, the question of unreasonable prejudice seems to boil down to whether the creditors are better off with the proposed deed or liquidation, as there is no other alternative on the facts." Mandie J was satisfied that the plaintiff and the ATO were, in all probability, substantially better off under the DOCA than they would be in a liquidation of the company. The resolution and subsequent DOCA benefited the Seibels by preventing possible claims in relation to preferences, insolvent trading and uncommercial transactions and avoided a more robust examination of ACIB's affairs by a liquidator. However, His Honour considered that the immunities achieved by the Siebels as a result of the DOCA were justified by the likely return to the creditors from the DOCA.  **(ii) Section 445D**  Under section 445D of the Act the Court could terminate the DOCA if it was satisfied that:   * certain information given, or omitted, to the administrator or creditors of ACIB was false, misleading and would have been material to the creditors in deciding whether to vote in favour of the DOCA; or * the DOCA was unfairly discriminatory against one or more of the creditors; or * for some other reason.   Mandie J was not satisfied, on the evidence, that there was any deficiency in information provided to creditors. Further, the DOCA did not unfairly discriminate against the plaintiff or any other creditors who were to receive a distribution from the fund under the DOCA. It was irrelevant that certain trade creditors taken over by the purchaser of ACIB's business were paid in full because that payment resulted from the sale of the business and the administrator's ratification of that transaction. The payment of the financier's debt and the indemnity given to ACIB by the Siebels under the DOCA was to the benefit of the creditors who were to receive a distribution under the DOCA. Further, the circumstances and terms of the sale agreement were not such as to justify the termination of the DOCA in the public interest. It was unlikely that a better buyer could have been found and, in any event, the administrator ratified the sale.  **(iii) Section 445G**  Under section 445G of the Act the court could order that the DOCA or any provision of it was void on the grounds that it was not entered into in accordance with Part 5.3A of the Act.  Mandie J accepted that section 445G gave the court a wide discretion to be exercised in the interests of creditors as a whole and in the public interest; however, this case did not call for the exercise of that discretion. It was clear that the plaintiff and other creditors had not been given notice of certain relevant meetings. However, the plaintiff knew that the other directors were meeting with the proposed administrator at that time and he chose not to attend. Mandie J held that section 1322(2) of the Act applied to these procedural irregularities and the meetings were not invalidated.  **(iv) Conclusion**  In conclusion, Mandie J commented "the creditors are far better off under the DOCA than they would be in liquidation. For that reason, I would, if necessary, validate the DOCA pursuant to section 447A of the Act, but I do not think that it is necessary to do so." |
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