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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Shareholder litigation seminar – Sydney and Melbourne**  The Centre for Corporate Law and Securities Regulation is hosting two seminars titled 'Shareholder Litigation' in Sydney and Melbourne. The dates of the seminars are 13 June (Sydney) and 14 June (Melbourne). The time of each seminar is 5.30pm – 7.15pm.  Shareholder litigation is in the headlines: "Class action culture spreads across Australia" (The Financial Times, 8 March 2006); "Investors Revolt – More and More Shareholders are Fighting Back with Class Actions" (Business Review Weekly, 9 February 2006). This important seminar brings together leading speakers to discuss key developments in shareholder litigation.  Topics discussed include:   * Shareholder class actions in Australia and comparisons with the US * The role of litigation funders in shareholder litigation * The statutory derivative action – to what extent has it been used by shareholders?   **Speakers**  Ashley Black - Mallesons Stephen Jaques Kathleen Harris - Mallesons Stephen Jaques Professor Ian Ramsay - University of Melbourne John Walker - IMF (Australia) Ltd  **Topics**  **Ashley Black and Kathleen Harris:** Australia has seen a rise in shareholder class actions, although not to the same levels as exist in the United States. The presentation will outline the Australian class action provisions, highlighting important differences between the Australian and United States class action regimes; and discuss current developments and emerging issues in shareholder class actions.  **Ian Ramsay:** In March 2000, a statutory derivative action was introduced into the Corporations Act. It allows shareholders and officers of a company to bring a legal action on behalf of the company, or intervene in legal proceedings to which the company is a party. It can allow minority shareholders to sue on behalf of the company for breaches of directors’ duties. The introduction of the statutory derivative action was opposed by business groups who viewed it as imposing excessive liability on directors. Others saw it as an important remedy for minority shareholders to enforce their rights. Professor Ramsay will outline the results of a study he has undertaken which examines the effectiveness of the statutory derivative action during the 6 years it has been in operation.  **John Walker:** Shareholder claims will increase, but not to the levels in the USA. Practical enforcement utilising our adversarial court processes is time consuming, costly and often commercially unviable. Calls for legislative reform, Court Rule changes and submissions to adopt the "fraud on the market" theory await us in 2006.  Further information and the registration form are available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new).  **1.2 Financial services reform seminar - Melbourne**  The Department of Business Law and Taxation at Monash University is holding a seminar on 14 July 2006 titled "Financial Services Reform Second Anniversary: Where Next?" This full day seminar will be held at the Monash University Law Chambers, 472 Bourke Street, Melbourne.  Further information about the seminar is available on the [Monash University website](http://www.buseco.monash.edu.au/depts/blt/fin_services_reform_workshop.php" \t "_new).  **1.3 ICGN revised principles on institutional shareholder responsibilities**  The International Corporate Governance Network (ICGN) has published a revised draft of its statement of principles on institutional shareholder responsibilities.  The matters dealt with in the revised draft statement include:   * internal governance (including transparency, conflicts of interest and expertise of decision makers); * external responsibilities (including engagement with companies and voting); and * addressing corporate governance concerns.   ICGN has requested comments on the new draft statement of principles on institutional shareholder responsibilities by 23 June 2006.  The revised draft statement is available on the [ICGN website](http://www.icgn.org/" \t "_new).  **1.4 First public report of the Public Interest Oversight Board**  The Public Interest Oversight Board (PIOB) has released its first public report. The PIOB was established by the International Federation of Accountants (IFAC). The objective of the PIOB is to increase the confidence of investors and others that the public interest activities of IFAC (including the setting of standards by IFAC boards and committees) are properly responsive to the public interest. Specifically, the PIOB mandate contemplates the exercise of oversight for all of IFAC’s public interest activity committees which include the work of the International Auditing and Assurance Standards Board, the International Ethics Standards Board for Accountants and the International Accounting Education Standards Board.  The PIOB report is available on the [IFAC website](http://www.ifac.org/" \t "_new).  **1.5 FRC publishes discussion paper on choice in the UK audit market**  On 17 May 2006, the UK Financial Reporting Council (FRC) published a discussion paper, 'Choice in the UK Audit Market'. This follows the publication on 12 April of the report of a study jointly commissioned by the FRC and the Department of Trade and Industry, 'Competition and choice in the UK audit market' and a stakeholder meeting held on 26 April at which the study was discussed.  The Discussion Paper describes the importance of audit to the UK economy. It summarises key features of the competitive environment in the audit market and discusses risks to the public interest that may arise from the level of choice in the market. It then goes on to consider three broad types of opportunities for mitigating any confirmed risks:   * To promote increased choice, such that there would be more audit firms participating in the market for audit of large public companies. * To reduce the risk of an existing large firm leaving the market. * To reduce the costs of disruption in the event of a large firm leaving the market.   The Discussion Paper is available on the [FRC website](http://www.frc.org.uk/" \t "_new).  **1.6 PCAOB announces four point plan to improve implementation of internal control reporting requirements**  On 17 May 2006, the US Public Company Accounting Oversight Board (PCAOB) announced a four-point plan to improve auditors' implementation of the internal control reporting provisions of the Sarbanes-Oxley Act of 2002.  Section 404 of the Sarbanes-Oxley Act requires public companies to annually assess and publicly report on the effectiveness of their internal control over financial reporting. PCAOB Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements, establishes the professional standards for auditors when conducting an audit of internal control over financial reporting.  In a continuation of its efforts to assist with the implementation of Auditing Standard No. 2, the Board will undertake four initiatives:  1. Amend Auditing Standard No. 2. While preserving the principles of Auditing Standard No. 2, the Board plans to consider amendments that would ensure that auditors’ primary focus during an integrated audit is on areas that pose higher risk of fraud or material error. The amendments to be proposed would reinforce the Board's expectation that the integrated audit be conducted in the most efficient manner, while achieving the objectives of the standard, by incorporating key concepts contained in the guidance issued by the PCAOB on 16 May 2005.  The Board also plans to revisit and clarify the auditor's role, if any, with respect to evaluation of the process that a company uses to reach its own conclusion about the effectiveness of company controls.  Additional amendments to Auditing Standard No. 2 being considered by the Board include:   * Clarifying the definitions of significant deficiency and material weakness in internal control; * Reconsidering the "strong indicators of a material weakness" to allow for more judgment in determining whether a deficiency exists; * Guiding auditors to increase their use of the work of others where appropriate; * Clarifying materiality and scoping decisions; * Emphasising the integration of the audit of internal control with the audit of the financial statements; and * Allowing for and promoting auditors' use of experience gained in previous years' audits to focus and make most efficient the work in subsequent years.   The Board will establish an effective date for any amendments that would minimize any unnecessary disruption to on-going audits of internal control and would not hinder auditors’ current efforts to fully implement the 16 May 2005 guidance.  2. Reinforce auditor efficiency through PCAOB inspections. As the Board described in a statement issued 1 May 2006, the Board's 2006 inspections of registered public accounting firms will focus on the firms’ efficiency in conducting internal control audits, as emphasised in the Board’s May 2005 Policy Statement.  3. Guidance and Education for Auditors of Small Companies. The Board plans to develop or facilitate development of implementation guidance for auditors of smaller public companies. In addition, the Board plans to explore various means of facilitating opportunities for auditors of smaller public companies to obtain effective training on auditing internal control over financial reporting.  4. Continue PCAOB Forums on Auditing in the Small Business Environment. As previously announced, the Board will hold a total of eight forums during 2006 for the auditors, directors and financial officers of smaller public companies. In addition to providing general education about PCAOB issues, the Board will use these forums to monitor real-time reaction to the various internal control-related implementation changes that are announced throughout the year.  **1.7 SEC announces next steps for Sarbanes-Oxley section 404 implementation**  On 17 May 2006, the US Securities and Exchange Commission (SEC) announced a series of actions it intends to take to improve the implementation of the section 404 internal control requirements of the Sarbanes-Oxley Act of 2002.  The actions the Commission intends to take include issuing SEC guidance for companies and working with the Public Company Accounting Oversight Board (PCAOB) on revisions of its internal control auditing standard. These actions are based on extensive analysis and commentary in recent months from investors, companies, auditors, and others. The expected actions will also include SEC inspections of PCAOB efforts to improve section 404 oversight and a brief further postponement of the section 404 requirements for the smallest company filers, although ultimately all public companies will be required to comply with the internal control reporting requirements of section 404.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2006/2006-75.htm" \t "_new).  **1.8 UK pre-emption group publishes statement of principles**  On 15 May 2006, the UK Pre-Emption Group published a Statement of Principles that provides guidance to companies and investors on the factors to be taken into account when considering the case for disapplying pre-emption rights. The Statement of Principles replaces the UK Pre-Emption Guideline, which has been in place since 1987.  Pre-emption rights give existing shareholders in a company the right to subscribe for their pro rata share of any new shares in that company issued for cash, providing them with protection against inappropriate dilution of their investments. Pre-emption rights are enshrined in law and, under the UK Companies Act 1985, may be disapplied only by a special resolution of shareholders at a general meeting of the company.  The Statement of Principles has been issued in response to Paul Myners' report to the UK Department of Trade and Industry on pre-emption rights, published last year, which recommended that new guidance be produced which emphasised the need for case by case engagement between companies and their shareholders.  The principles state that:   * While pre-emption rights remain a cornerstone of UK company law and provide shareholders with protection against inappropriate dilution of their investments, a degree of flexibility is appropriate in circumstances where new equity issuance on a non pre-emptive basis would be in the interests of companies and their owners. * Companies have a responsibility to signal an intention to seek a non-pre-emptive issue at the earliest opportunity and to establish a dialogue with the company's shareholders. * Shareholders have a responsibility to engage with companies to help them understand the specific factors that might inform their view on a non-pre-emptive issue by the company. They should review the case made by companies on its merits and decide on each case individually using the usual investment criteria.   Members of the Pre-Emption Group represent listed companies, investors and intermediaries.  Copies of the Statement of Principles are available on the [Pre-Emption Group website](http://www.pre-emptiongroup.org.uk/" \t "_new).  **1.9 APRA releases new prudential standards on governance**  On 5 May 2006, the Australian Prudential Regulation Authority (APRA) released new and harmonised prudential standards on governance for authorised deposit-taking institutions and for life and general insurance companies.  APRA already has a number of governance requirements in place but they do not apply evenly across the industries it supervises. The new standards harmonise APRA's governance standards across these industries (except for superannuation).  The new standards build on existing requirements in two main ways:   * they seek to promote greater independence on the part of the board, its chair and the board audit committee; and * they require boards to have a formal policy on board renewal and procedures for assessing their own performance.   APRA's governance framework consists of prudential standards that set out minimum foundations for good governance, and separate prudential practice guides that provide non-binding guidance on meeting these standards and on prudent practices in governance matters.  In developing its framework, APRA has, where possible, aligned its requirements and definitions with the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and with the Australian Stock Exchange (ASX) Corporate Governance Council’s Principles of Good Corporate Governance and Best Practice Recommendations.  The three new governance standards are APS 510 Governance (for authorised deposit-taking institutions), LPS 510 Governance (for life companies) and GPS 510 Governance (for general insurers). The standards come into effect from 1 October 2006, with transition arrangements available for certain matters.  The standards and their accompanying prudential practice guides are available on the [APRA website](http://www.apra.gov.au/media-releases/06_26.cfm" \t "_new).  **1.10 Amendments to UK Company Law Reform Bill**  A package of measures to amend the UK Company Law Reform Bill was announced on 3 May 2006 by the UK Government. The Bill is currently before Parliament.  The measures include changes to: directors' duties; narrative reporting; and derivative claims. As part of the package, the Government will also clarify the position on liability for disclosures under the Companies Act and for implementation of the EU Transparency Obligations Directive. Draft clauses on a proposed regime for liability have been issued for a short period of public consultation.  On directors' duties, the Government amendments seek to put beyond doubt that the need to have regard to certain factors (including the interest of the employees and impact on the environment) is subject to the overriding duty to act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.  The requirements for narrative reporting have been streamlined so that the requirements for quoted companies are now more closely aligned to those for unquoted companies. The proposed new narrative reporting arrangements include the requirement that all companies, other than small companies, will need to produce a Business Review, as required by the EU Accounts Modernisation Directive. The purpose of the Review is to inform shareholders of the company and help them assess how the directors have performed their duty under section 156 (duty to promote the success of the company).  Quoted companies will need to ensure that, to the extent necessary for an understanding of the development, performance or position of the company's business, their Business Review includes:  (a) the main trends and factors likely to affect the future development, performance and position of the company's business; and  (b) information about -  (i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies. If the Review does not contain information on (i) (ii) or (iii) above, it must state so.  The new system will also mean that for all companies:   * auditors will continue to be required to report on the consistency of the Directors' Report with the annual accounts (as is required by the Accounts Modernisation Directive) but there will not be any additional requirement to check for other inconsistencies; * all companies will be exempted from disclosing in the Business Review information which is seriously prejudicial to the company's interests. This exemption was previously only provided for companies that had to produce an OFR; and * there will be no statutory reporting standards for the Business Review.   The draft clauses on liability cover:   * provision for liability under Part 15 of the Bill for directors' reports, directors' remuneration reports or summary financial statements derived from them; * provision for liability for disclosures under Transparency Obligations Directive implementation; and * liability for untrue or misleading statements or omissions made in bad faith or recklessly or where there is deliberate and dishonest concealment.   The Government is also proposing new powers relating to derivative claims including a requirement for the courts to dismiss non-meritorious applications at an early stage.  The new clauses on narrative reporting, directors' duties and derivative claims will be discussed as part of the House of Lords Report Stage of the Company Law Reform Bill.  Full details of all the clauses and explanatory notes are available on the [Department of Trade and Industry website](http://www.gnn.gov.uk/content/detail.asp?ReleaseID=199124&NewsAreaID=2&print=true" \t "_new).  **1.11 Joint Forum issues paper on funding liquidity risk management**  On 3 May 2006, the Joint Forum released a paper on funding liquidity risk management practices in use by conglomerates engaged in banking, securities and insurance activities. The paper, 'The Management of Liquidity Risk in Financial Groups', is the result of a comprehensive study of liquidity risk management practices among 40 of the largest firms in the financial services industry.  The paper is available on the websites of the [Bank for International Settlements](http://www.bis.org/" \t "_new), the [International Organization of Securities Commissions](http://www.iosco.org/news/pdf/IOSCONEWS95.pdf" \t "_new) and the [International Association of Insurance Supervisors](http://www.iaisweb.org/" \t "_new).  **1.12 Joint Forum issues paper on regulatory and market differences**  On 3 May 2006, the Joint Forum released a paper entitled 'Regulatory and Market Differences: Issues and Observations'. It presents the findings of a review that was prompted by discussions at an industry roundtable in 2003 on differences in the regulatory approaches to risk across banking, securities and insurance sectors.  The Joint Forum determined that cross-sectoral convergence in both market practice and regulatory approaches is occurring naturally and can be expected to continue as a result of a number of trends and developments highlighted in the paper. At the same time, however, the Joint Forum recognises that cross-sectoral convergence in regulatory approaches is not desirable in every instance. There may be good reasons for sectoral differences in regulatory approaches to the same risk.  The paper is available on the websites of the [Bank for International Settlements](http://www.bis.org/" \t "_new), the [International Organization of Securities Commissions](http://www.iosco.org/news/pdf/IOSCONEWS95.pdf" \t "_new) and the [International Association of Insurance Supervisors](http://www.iaisweb.org/" \t "_new).  **1.13 AUASB issues legally enforceable auditing standards**  On 1 May 2006, the Australian Auditing and Assurance Standards Board (AUASB) announced the issue of the AUASB's set of revised Australian Auditing Standards, which will be legally enforceable under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The AUASB has released 35 revised Auditing Standards, together with the Foreword to AUASB Pronouncements and the AUASB Glossary.  The new Auditing Standards:   * Emanate from the implementation of the Federal Government's Corporate Law Economic Reform Program (CLERP 9) initiatives, which were aimed at enhancing the credibility of audited financial reports in Australia and thereby improving investor confidence. * Conform to International Standards on Auditing so as to ensure global best practice, with additional requirements to further strengthen the new Australian Auditing Standards.   The new set of Australian Auditing Standards will apply to audits of financial reports that are conducted for reporting periods commencing on or after 1 July 2006.  Copies of the new Auditing Standards are available from the [AUASB website](http://www.auasb.gov.au/docs/media_releases/AUASB_Media%20release_1-5-06.pdf" \t "_new).  **1.14 United Nations Secretary-General launches principles for responsible investment**  On 27 April 2006, the United Nations Secretary-General Kofi Annan was joined by a group of the world's largest institutional investors at the international launch of the Principles for Responsible Investment.  The heads of leading institutions from 16 countries, representing more than US$2 trillion in assets owned, officially signed the Principles at a special launch event at the New York Stock Exchange. The Principles were developed during a nearly year-long process convened by the UN Secretary-General and coordinated by the UN Environment Programme Finance Initiative (UNEP FI) and the UN Global Compact.  In joining with institutional investors to develop the Principles, the United Nations collaborated with some of the world's most influential institutions – many of them public pension funds – involved in investment activities worldwide. It is estimated that pension funds alone – public and private – account for up to 35 percent of total global investment.  More than 20 pension funds, foundations and special government funds, backed by a group of 70 experts from around the world, held meetings in Paris, New York, Toronto, London, and Boston over an eight-month period to craft the Principles.  The six overarching Principles, which are voluntary, are underpinned by a set of 35 possible actions that institutional investors can take to integrate environmental, social and corporate governance (ESG) considerations into their investment activities. These actions relate to a variety of issues, including investment decision-making, active ownership, transparency, collaboration and gaining wider support for these practices from the whole financial services industry.  Further information is available on the [United Nations website](http://www.unpri.org/files/20060427_press/un-unepfi-gc_press_20060427.pdf" \t "_new).  **1.15 SEC approves PCAOB rules on auditor ethics, independence and tax services**  On 21 April 2006, the US Public Company Accounting Oversight Board (PCAOB) announced that the US Securities and Exchange Commission (SEC) had approved PCAOB ethics and independence rules concerning independence, tax services and contingent fees.  The rules introduce a foundation for the independence component of the Board's ethics rules by establishing a general obligation requiring a registered public accounting firm and its associated persons to be independent of the firm’s audit clients throughout the audit and professional engagement period.  The rules identify circumstances in which the provision of tax services impairs an auditor's independence, including services related to marketing, planning, or opining in favour of the tax treatment of, among other things, transactions that are based on aggressive interpretations of applicable tax laws and regulations.  The rules also treat registered public accounting firms as not independent of their audit clients if they enter into contingent fee arrangements with those clients or if the firms provide tax services to certain members of management who serve in financial reporting oversight roles at an audit client or to immediate family members of such persons.  The rules further implement the Sarbanes-Oxley Act's requirement that auditors' non-audit services be pre-approved by the audit committee by strengthening the auditor's responsibilities in connection with seeking audit committee pre-approval of tax services. Specifically, the rules require a registered public accounting firm that seeks such pre-approval to describe proposed tax services engagements, in writing, for the audit committee; to discuss with the audit committee the potential effects of the services on the firm's independence; and to document the substance of that discussion.  Finally, an ethics rule also codifies the principle that persons associated with a registered public accounting firm (e.g., individual accountants) can be held responsible when certain of their actions contribute to a firm's violation of relevant laws, rules, or professional standards.  The SEC's order approving the Board's rules is available on the [SEC website](http://www.sec.gov/" \t "_new), under **Regulatory Actions, PCAOB Rulemaking**.  Further information about the auditor independence and tax services rules can be found on the [Board website](http://www.pcaobus.org/News_and_Events/News/2006/04-21.aspx" \t "_new).  **1.16 Sarbanes-Oxley section 404 costs and implementation issues**  Deloitte & Touche LLP, Ernst & Young LLP, KPMG LLP, and PricewaterhouseCoopers LLP ("accounting firms") asked CRA International Inc. ("CRA") in March 2005 to facilitate a survey ("Spring 2005 survey") and to review data related to the cost of implementing section 404 of the Sarbanes-Oxley Act of 2002 ("SOX") for a sample of the firms' Fortune 1000 clients with market capitalization over US$700 million ("larger companies"). As a follow up to that report, the accounting firms subsequently asked CRA to survey second-year implementation costs both for the larger companies included in the Spring 2005 survey and for a separate group of smaller public companies with market capitalization between US$75 million and US$700 million ("smaller companies"). That later survey (the "Fall 2005 survey") was released in December 2005.  The current survey dated 17 April 2006, ("Spring 2006 survey") updates the previous surveys with data for year-two section 404 costs and cost drivers, and the number of material weaknesses and significant deficiencies identified. The Spring 2006 survey includes an analysis of total section 404 issuer costs and audit fee information derived from proxy materials. To enhance public understanding, the survey distinguishes between total section 404 costs and total audit fees publicly reported in corporate proxy materials, a portion of which are attributable to the 404 internal control audit and a portion of which are attributable to the audit of the issuer's financial statements (and other "audit services" as defined for proxy disclosure purposes).  In the earlier surveys, year-two implementation cost estimates were based primarily upon projected costs. However, year-two costs in the Spring 2006 survey are based on more accurate cost data as the vast majority of the year-two section 404 implementation work was complete or nearly complete as of the time of the survey.  The Spring 2006 Survey provides, for the first time, data on the companies' total audit fees, which are comprised of fees for the financial statement audit, the section 404 audit of internal control, and other audit services included in "audit fees" as defined for proxy disclosure purposes.  For the surveyed companies ("Subject Companies"), some of the more important findings are:   * While total audit fees in proxy materials were flat or declined slightly, total section 404 costs (including internal costs, third party costs and 404 audit fees) declined substantially, falling 30.7 percent for smaller companies and 43.9 percent for larger companies; * Of the total section 404 costs in year two, section 404 audit fees declined an average of 20.6 percent for smaller companies and 22.3 percent for larger companies; and * Year-two section 404 audit fees accounted for 39 percent of total section 404 costs for smaller companies and 33 percent for larger companies.   The Accounting Firms attribute the rise in non-section 404 audit fees to various factors, including additional audit procedures required by new standards other than section 404, or in response to inspection results; higher salary costs due to increased demand for accounting personnel (including by issuers and regulators); additional costs related to compliance and independence monitoring systems; and higher practice protection costs.  Independent auditors working on subject company engagements attribute the total section 404 cost declines primarily to efficiencies as a result of the learning curve effect, and from first-year documentation efforts that did not need to be repeated in year two. Asked to name the top three primary reasons for cost savings, the auditors provided the following rankings:   * increased efficiencies gained from moving up the learning curve in implementation and the testing of controls from year one to year two was cited by 38 percent of external auditors for larger companies and 49 percent of external auditors for smaller companies as the most important source of cost reductions; * reduced documentation from year one to year two was cited by 32 percent of larger companies' external auditors and 26 percent of external auditors for smaller companies as the most important source of cost reductions; and * a reduction in the subject companies' use of outside parties in readiness activities in year two was cited for 8 percent of larger companies and for 13 percent of smaller companies as the most important source of cost reductions.   Additionally, the Fall 2005 survey found that an expected decline in the number of key controls tested, reflecting the benefits of experience, and greater reliance on the work of others also would tend to reduce costs. For smaller companies, the number of key controls tested by auditors declined more than 21 percent on average from 262 to 206 from year one to year two. For larger companies, the average number of key controls tested by the auditor fell more than 19 percent from 669 in year one to 540 in year two. Both smaller and larger companies’ management also reduced their own testing of key controls.  Auditors for smaller companies said they relied on the work of others for 22 percent of audit evidence in the second year, up from 11 percent in the first year. For larger companies, reliance on others’ work rose to 25 percent from 15 percent.  The Spring 2006 Survey data indicates that for the subject companies the number of material weaknesses and significant deficiencies identified by the issuer or the auditor declined from year one to year two. The Accounting Firms believe this indicates a general improvement in internal controls over financial reporting at the subject companies.  For smaller companies, the number of material weaknesses and significant deficiencies combined fell from an average of 5.3 in year one to 1.3 in the second year.  For larger companies, the number of material weaknesses and significant deficiencies combined declined from 5.0 on average in year one to 2.5 on average in year two.  The survey is available on the [CRA International website](http://www.s-oxinternalcontrolinfo.com/pdfs/CRA_III.pdf" \t "_new).  **1.17 Report on stock market 'short-termism'**  On 3 April 2006, the US Conference Board issued a report titled, 'Revisiting Stock Market Short-Termism.' The report identifies the costs of short-termism and proposes ways to deal with short-termism.  **(a) Quarterly short-termism takes the focus away from long-term corporate growth**  The study notes that short-termism has many negative effects including focusing investor and corporate attention on near-term quarterly earnings to the possible detriment of longer-term corporate growth. The pressure to meet short-term quarterly earnings numbers can cause undue market volatility. This may, in turn, cause management to lose sight of its strategic business model which would compromise its global competitiveness as well as its ability to make investments in such critical long-term focused areas as research and development and environmental controls.  **(b) Among the key factors compelling change**  1. Both the business and investor communities, now more than ever, recognize the need to restore investors' confidence and the credibility of the international capital markets, which have been undermined by the recent wave of corporate scandals.  2. Institutional investors, including large public and private pension funds and certain asset managers, have been taking unprecedented steps to monitor the management of their portfolio companies. They have done so by advocating accountability, the enforcement of shareholders' rights, and the adoption of higher standards of business integrity, as well as by investigating the possibility of directing assets toward investments with a greater long-term focus.  3. Institutional investors are now, more than ever, revisiting the "pay-for-performance" issue, and encouraging companies to devise compensation schemes based on a more balanced combination of financial and extra-financial indicators of performance.  4. There has been an unparalleled process of international convergence of accounting principles, especially with regard to initiatives to design a new model of corporate reporting based on true value drivers and inclusive of extra-financial measures of performance (i.e. data on customer satisfaction and registered patents, indicators of employees' professional development, and other intangible assets used by businesses to pursue their strategic goals).  5. Major empirical research projects have recently reported results supporting the linkage between sustainability (i.e. environmental, social and corporate governance) factors and improved stock prices and shareholder value.  6. Regulators, intermediaries and institutional investors have undertaken unprecedented efforts to focus financial sell-side research on long-term corporate value. In addition, for the first time, a major group of institutional investors in the Enhanced Analytics project have agreed to allocate a minimum of broker commissions to long-term securities analysis that effectively incorporates extra-financial measures of performance and corporate intangible measures of success.  **(c) Suggestions for future action**  **(i) To unlock the corporate link**  Widespread adoption of an enterprise risk management (ERM) framework should be encouraged as an effective process to assess and respond to strategic and operating risks, not only to bring clarity to the long-term strategic direction a business should take but also to clearly communicate such long-term strategy to the market.  Further studies should be undertaken regarding the deployment of "intangible assets" (such as quality, customer and employee satisfaction, environmental compliance). Research should be diversified by type of industry and geographical region, so as to develop a set of sector-specific financial and extra-financial performance metrics.  Proposed disclosure frameworks to enhance corporate transparency on intangible assets and extra-financial measures of performance should be supported by empirical research on their application.  Research on intangible assets and extra-financial measures of performance should be based on voluntary trial programs where, in addition to filing their regular annual reports, participating companies provide financial analysts and large investors with a more comprehensive set of information on their value drivers.  **(ii) To unlock the investor link**  Pension fund trustees should develop internal governance practices consistent with a long-term investment outlook.  The transition from antagonism to engagement of certain long-term investors - especially regarding long-term strategic discussions - should be fully explored. Cases should be identified where companies have successfully discussed their long-term strategies with investors and where those investors have acted to support these long-term strategies by eschewing the lure of short-term price fluctuations.  Additional legal research would help understand the extent to which an investment manager may push for a long-term strategic agenda consistent with observing fiduciary duties.  The motivations for the activism of hedge funds and other alternative investment vehicles should be investigated to ensure that their impact on certain market trends (i.e. short-termism versus long-termism) is fully understood.  **(iii) To unlock the analyst link**  Studies should be promoted to identify a viable business model to profit from the sale of high-quality investment analysis regarding how to build a durable, long-term portfolio.  Efforts undertaken to enhance disclosure and long-term analysis by organizations such as United Nations Environment Programme Finance Initiative (UNEP FI), the Enhanced Analytics Initiative (EAI) and the American Institute of Certified Public Accountants (AICPA) should be reinforced to develop a new cadre of securities analysts and financial intermediaries focused on long-term corporate valuation.  Enterprise risk management (ERM) frameworks should include a set of enterprise-wide procedures to better communicate extra-financial indicators of performance to the investment research community.  The research report is available on [The Conference Board website](http://www.conference-board.org/utilities/pressDetail.cfm?press_ID=2848" \t "_new).  **1.18 International Financial Reporting Standards: survey**  In April 2006, KPMG published a report which summaries interviews with standard-setters, regulators, CFOs, analysts and auditors on International Financial Reporting Standards (IFRS). Many of those interviewed have been surprised at how smoothly the implementation of IFRS has gone to date. However, the report highlights some critical issues ahead, including: US convergence - how will the US Securities and Exchange Commission (SEC) react to the first full IFRS results as they are issued?  Some of the key issues identified in the report are:   * Consistency of interpretation: how can the financial community ensure that IFRS is adopted and interpreted in a consistent manner across borders and between different industry sectors? * Rules versus principles: IFRS is a principles-based system but will the need for consistency result in a movement towards a more rigid rules-based (US-style) approach? * Fair value: some preparers are still uncomfortable with the direction that fair value accounting is taking, and question the relevance of some of the numbers it produces. * Complexity of accounts: accounts are meant to serve investors and yet they are becoming more difficult to read. However, some of those interviewed believe that the greater complexity more accurately reflects reality, and that the numbers bring greater rewards once they are understood.   The full report is available on the [KPMG website](http://www.kpmg.com/" \t "_new).  **1.19 Sarbanes-Oxley Act: consideration of key principles needed in addressing implementation for smaller public companies**  On 13 April 2006, the US General Accountability Office (GAO) released a report on the costs of Sarbanes-Oxley for smaller companies. The US Congress passed the Sarbanes-Oxley Act to help protect investors and restore investor confidence. According to the GAO, while the Act has generally been recognized as important and necessary, some concerns have been expressed about the cost for small businesses. In the report, GAO (1) analyzes the impact of the Sarbanes-Oxley Act on smaller public companies, particularly in terms of compliance costs; (2) describes responses of the US Securities and Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB) to concerns raised by smaller public companies; and (3) analyzes smaller public companies' access to auditing services and the extent to which the share of public companies audited by mid-sized and small accounting firms has changed since the Act was passed.  The GAO states that regulators, public companies, audit firms, and investors generally agree that the Sarbanes-Oxley Act of 2002 has had a positive and significant impact on investor protection and confidence. However, for smaller public companies (defined in the report as US$700 million or less in market capitalization), the cost of compliance has been disproportionately higher (as a percentage of revenues) than for large public companies, particularly with respect to the internal control reporting provisions in section 404 and related audit fees.  Smaller public companies noted that resource limitations and questions regarding the application of existing internal control over financial reporting guidance to smaller public companies contributed to challenges they face in implementing section 404. The costs associated with complying with the Act, along with other market factors, may be encouraging some companies to become private. The companies going private were small by any measure and represented 2 percent of public companies in 2004. The full impact of the Act on smaller public companies remains unclear because the majority of smaller public companies have not fully implemented section 404.  The report is available on the [GAO website](http://www.gao.gov/" \t "_new).  **1.20 CEO pay in the US**  The Wharton Business School has published an article titled "CEO Pay: A Window into Corporate Governance". The following is extracted from the introduction to the article:  "Once again, the proxy season has revealed some eye-popping numbers in executive compensation packages, generating heat from shareholders, labor organizations and some analysts who contend the links between CEO pay and performance are frayed.  "Among the most-talked about compensation reports this year is the $1.6 billion option package for UnitedHealth Group CEO William McGuire at a time when more than 40 million Americans lack health insurance. Former Exxon CEO Lee Raymond retired with a $400 million package as consumers face soaring gasoline prices. AFL-CIO members hired a plane to fly over Pfizer's annual meeting in Lincoln, Neb., in April with a banner reading: "Give it back Hank!" -- a reference to CEO Hank McKinnell's $83 million pension plan set to take effect in 2008. McKinnell has already earned $65 million since he became CEO in January 2001. At the time of the meeting, Pfizer shares had dropped 46% in value under McKinnell's watch."  The article provides data on CEO pay and discusses conflicts of interest in determining remuneration and poorly designed remuneration plans.  The article is available on the [Wharton Business School website](http://knowledge.wharton.upenn.edu/article/1481.cfm" \t "_new).  **1.21 New research paper - enhancing corporate accountability through contextual ethical exercises**  Recent corporate collapses highlight a perceived decline in corporate ethical accountability. Some of these events it has been argued featured lawyers behaving unethically or otherwise inadequately in a broad social context. Realistic ethics education of law students, many of whom will become future corporate officers and directors, offers harm minimisation in response to rising standards of corporate accountability.  This paper explains how it is possible to successfully expose law students to the reality of ethical conflict within corporate environments. On-line simulation of corporate ethical dilemmas allows students and trainee officers to anticipate what they will encounter in the corporate workforce and prepare them to apply alternative ethical models in deciding how to respond to those dilemmas.  Monash University Law School and Melbourne University Law School are collaborating in producing two online exercises to introduce students to ethical pitfalls in directors' duties and corporate tax evasion. The simulations are analysed in the context of initial student evaluations and the paper concludes with a brief exploration of the potential for future ethical education initiatives.  The research paper is written by Adrian Evans and John Howe. It is available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm" \t "_new).  **1.22 Use of derivatives following the Glencore litigation**  (By John Elliott, Partner, Clayton Utz)  Notwithstanding the Glencore case, caution should still be used when considering the use of derivatives in takeovers. Much of the media commentary after Justice Emmett's latest decision gave the impression that it was a green light to use derivatives to build a stake in a target company. The reality is quite different.  In this article, I concentrate on two important aspects of the Glencore case that seem to have been forgotten. They are of crucial importance to anyone contemplating a tactical use of derivatives or even whether to "do a Glencore" by trying to involve the court in a takeover dispute.  **(a) The zombie bid**  It has to be remembered that the Takeovers Panel examined Glencore's use of derivatives three times. Each time, it concluded that the non-disclosure of the derivatives had constituted unacceptable circumstances. In any other dispute in the Panel that would have been the end of the matter. The "loser" would have taken its medicine and everyone would have moved on.  Glencore bucked the system by appealing to the Federal Court. The Federal Court ultimately upheld Glencore's challenge. What made this result significant was that Glencore appeared to have found a way around the bar on using the courts in live takeover battles (one of the 2000 amendments to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)).  Glencore exploited a small constitutional "loophole" in the Act. Although the Act prevents courts' intervening during takeovers, there is a specific exemption for the High Court. Glencore used this to lodge what was effectively an appeal against the Panel's decisions.  Some commentators have seen this as opening the floodgates, such that every Panel decision is now subject to being "second-guessed" by the court. In fact, having a right to appeal doesn't mean that you're guaranteed of getting a hearing when you want it. That's where Glencore got lucky - with a little help from its opponent, Centennial Coal. To see why, it's necessary to go back to the start of this dispute.  In late March 2005, Centennial was bidding for Austral Coal and had accumulated acceptances totalling just under 20 percent of Austral. On 4 April, Glencore announced that it had 7 percent of Austral and, since 21 March, had taken cash-settled equity swaps equating to a further 6.5 percent. The counterparties to these swaps had acquired sufficient Austral shares equal to hedge their exposure.  Centennial did not appear to react to this announcement. It let its bid run on. By early June it had accumulated 85 percent of Austral. That was when it decided to complain to the Panel about Glencore's non-disclosure of the swaps in late March/early April.  In terms of the bid itself, little changed from that point onwards. By the time the matter got to court, Austral was effectively owned by Centennial, Glencore and the two counterparties to the swaps.  This was of crucial importance to the court. Justice Emmett said that, although he had jurisdiction to hear Glencore's appeal against the Panel, he also had to take account of the fact that the policy of the Corporations Act was that courts should not intervene in live takeovers. However, what he was facing was not a live takeover battle in any real sense:  "Having regard to the clear policy evinced by the privative provisions of s 659B of the Act, the Court should be slow to interfere with a decision of the Panel, in circumstances where the market is significantly volatile by reason of the currency of takeover offers. However, in the present case, while Centennial’s bid is still current, there is probably unlikely to be any significant volatility in the market since Centennial already has a relevant interest in more than 85 per cent of the shares in the Company and the combined holding of [Glencore], CSFB and ABN Amro exceeds 11 per cent of the shares."  The warning here is quite clear: courts will not rush to interfere with Panel decisions while a bid is still before the market. In other words, it may be difficult to use the courts to secure some tactical advantage during a takeover battle.  This was not, of course, a matter of great concern to Glencore, since it was not a rival bidder to Centennial. However, in the vast majority of takeover disputes, where timing is crucial, there appears to be a good chance that the court will not be in a hurry to get involved while the outcome of the takeover is still undecided.  If that is the case, M&A players may be faced with the prospect of a Panel decision that, for all practical purposes, is the last word. That last word may not necessarily be that the use of derivatives is acceptable.  **(b) Relevant interests**  When Justice Emmett overruled the two Panel findings against Glencore's use of derivatives, he did not give the green light to derivatives. Commentators who have claimed that there is now carte blanche for derivatives have overlooked some very important points.  What they appear to have missed is section 657A(2)(b) of the Corporations Act.  The Panel's decisions against Glencore were made under section 657A(2)(a). That provision allows the Panel to declare circumstances to be unacceptable because of their effect on the control of (or the acquisition of substantial interests in) a company. Justice Emmett overturned the Panel's findings against Glencore because the Panel had not demonstrated that Glencore's use of derivatives had had any such effect. That effectively means that section 657A(2)(a) cannot be used to restrict the use of derivatives during a takeover.  However, there is still section 657A(2)(b):  "The Panel may ... declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:  ... (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C."  The Panel in the second Glencore decision explored two routes towards section 657A(2)(b):   * by entering into the derivative agreements, Glencore may have acquired a direct relevant interest in the hedge shares held by the counterparties; or * the circumstances surrounding the derivative agreements were such that Glencore and the counterparties may have become associates.   A finding against Glencore on either ground could have led to the conclusion that Glencore had acquired a substantial holding in Austral Coal. A failure to disclose a substantial holding to the market is a contravention of Chapter 6C, which would allow the Panel to make a declaration of unacceptable circumstances.  So, how close did the Panel come to finding that Glencore had a substantial holding? As noted above, there were two routes that the Panel explored.  The first of these was the relevant interest route. Boiled down to its essentials, the question here was whether the derivative agreement gave Glencore control over the hedge shares held by the counterparties. The Panel found that there was some degree of de facto control, but not enough to give Glencore a relevant interest. The reason was that the counterparties were merchant banks, and the numbers of hedge shares they held were too small to make them beholden to Glencore:  "[I]t was always within their power to dispose of their hedge shares at any time during the Non-disclosure Period and they would have disposed of them, had they perceived it as being in their own interest to do so."  Interestingly, when it looked at a similar issue last year, the UK Takeovers Panel said that the crucial issue for a counterparty was not necessarily the size of the parcel of hedge shares: "a counterparty will usually know the derivative investor's likely wishes and therefore it would be naïve to assume that the counterparty ... who does have an ongoing client relationship with the investor ... will act without having some regard to those wishes."  **(c) Associates**  The other way in which a substantial holding may arise is by aggregating the relevant interests of a direct shareholder and its associates. The Panel looked closely at whether Glencore and the counterparties were associates, under either section 12(2)(b) or 12(2)(c) of the Corporations Act.  It decided that there was no association under section 12(2)(b). The counterparties and Glencore were not "parties to a relevant agreement for the purpose of controlling or influencing the composition of the board or the conduct of the affairs of Austral Coal" - because, at the relevant time, Glencore didn't intend to bid for Austral.  Under section 12(2)(c), parties will be associates if they are "acting in concert in relation to the affairs of" a company. Were the banks and Glencore "acting in concert in relation to the affairs of" Austral Coal? The Panel in the second Glencore decision apparently interpreted this as meaning that the parties must share the same objective. It concluded:  "The evidence is in the end insufficient to establish that [a counterparty] shared Glencore's inferred objective, namely to block compulsory acquisition. It was aware of Glencore's objective and that its provision of hedged swap exposure contributed materially to achieving that objective, but there is no direct evidence that [the counterparty] agreed to assist, agreed or accepted instructions to hedge the swap with Austral Coal shares, or otherwise stepped outside the ordinary course of its business to oblige Glencore."  However, later in its reasons, the Panel returned to this question, and issued a warning:  "For future reference, we note that the difference between two parties having a common purpose and one party being aware of the other's purpose is less clear than it might at first seem, for two reasons. Although parties A and B do not act in concert because A pursues interests or objectives which merely happen to coincide with those of B, without any agreement or consent, the lines are blurred where A agrees with B in terms which, although they do not refer to B's objective, nonetheless entail that it will thereafter be in A's interest to achieve the same objective as B, or an objective which will in fact facilitate B's achievement of B's objective."  This can be read as a Panel warning that its holding in the Glencore case should not be taken as a precedent for other fact situations involving derivatives.  Because the Panel made no finding against Glencore on the issue of relevant interests or associates, the Federal Court did not have to consider whether the Panel's conclusions or approach were correct. Accordingly, whether swaps might give rise to a substantial holding in a different fact situation is still very much up in the air.  **(d) Conclusion**  There is no denying that the two Federal Court decisions will cause problems for the Panel's day-to-day operations. If the Panel can't find a contravention of the Corporations Act, it may sometimes have difficulty satisfying Justice Emmett's requirement that conduct can only be found to be unacceptable if the Panel can identify what actual effect the conduct will have.  The fact that ASIC has decided not to appeal against the Federal Court ruling may suggest that it now shares the Court's interpretation of the Act. That means that the calls in the media for the Federal Government to amend the Corporations Act may simply be echoing what's already being said in the corridors of power.  It would nevertheless be a considerable stretch to say that, pending those amendments (if any), the Panel is a lame duck, either in relation to derivatives or in relation to takeover disputes in general.  [Editor's Note: There is a case note in this issue of the Bulletin on the second Federal Court decision involving Glencore – see Item 5.9]. |
| **2. Recent ASIC Developments** |
| **2.1 Increased budget funding for ASIC**  On 9 May 2006, the Treasurer, the Hon Peter Costello MP, announced that the Australian Securities and Investments Commission (ASIC) had received a significant funding boost of $234.6 million over four years in the 2006-07 Budget. The additional funding will ensure that ASIC has sufficient funding to maintain its current regulatory focus, develop its presence in relation to non-exchange based market trading, enhance IT security and risk management, establish a new electronic registration system for company charges and undertake enforcement activities associated with the investigation and litigation of exceptional matters of significant public interest.  Additional funding of $71.3 million over four years will be provided to ensure that ASIC has sufficient funding to maintain its current regulatory focus with respect to the supervision and oversight of expanding financial markets and financial sector entities.  ASIC will receive $29.1 million over four years to increase its surveillance of the financial services sector and to develop its presence in non-exchange based market trading, including in the areas of bond markets, hedge fund activities and contracts for difference. Funding will also be provided for electronic surveillance tools to monitor these transactions.  Funding of $14.2 million over four years will be provided to support ASIC's IT infrastructure. ASIC's core systems are under pressure as a result of increasing demands from the public for company information. The additional funding will enable ASIC to upgrade its IT infrastructure, enhance security tools and software protecting ASIC's core systems, establish a disaster recovery facility and implement a risk management strategy.  ASIC will receive $2.0 million in 2006-07, to be offset by ASIC over four years, to establish a new electronic registration system to enhance the convenience of registering company charges with ASIC. The new system will enhance the efficiency of registering company charges and will significantly reduce regulatory complexity and cut red tape for companies seeking to register a charge.  The additional funding includes $30 million per annum over the next four years to enable ASIC to undertake enforcement activities associated with the investigation and litigation of exceptional matters of significant public interest. This additional funding will ensure that ASIC is well resourced to investigate and litigate exceptional matters of significant public interest and will ensure that high profile defendants are unable to avoid prosecution by attempting to 'price out' the regulator.  **2.2 ASIC outlines better regulation initiatives**  On 3 May 2006, the Australian Securities and Investments Commission's (ASIC) Chairman Mr Jeffrey Lucy released ASIC's 'Better Regulation' initiatives. The document outlines a number of regulatory enhancements ASIC intends to deliver over the coming months.  The priority areas for ASIC over this period are:   * improved transparency about how ASIC works, makes decisions and approaches its legislative functions; * better accessibility for industry and stakeholders, to enable an improved mutual understanding of decisions and policies; * engaging with business to identify and reduce areas where there is regulatory duplication or overlap; * more fully understanding the impact on business of ASIC's regulatory decisions, by seeking more reliable and relevant information from business on the quantifiable impact of those decisions; * helping clients deal more efficiently with ASIC by streamlining and where possible reducing paperwork through better use of electronic communications; and * more comprehensive engagement with the financial industry and businesses through more effective consultation and a better understanding of stakeholder views of ASIC decisions.   A copy of the publication 'Better Regulation' initiatives is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=Better_regulation_pdf" \t "_new).  **2.3 Industry embraces early notification of breaches**  On 2 May 2006, the Australian Securities and Investments Commission (ASIC) indicated that a doubling in breach of licence notifications by the financial services industry shows that the industry is taking its obligation to notify ASIC of breaches seriously.  In the first nine months of this financial year, ASIC received 690 breach notifications, or between 28 and 50 a fortnight, which is twice the number received before the October 2004 publication of ASIC's guide to reporting breaches.  Australian financial services licensees are required to report any significant breaches, or likely breaches to ASIC, within five business days of becoming aware of the breach.  ASIC has reissued its guide to reporting breaches, Breach Reporting by AFS Licensees: An ASIC Guide, which includes a new section explaining how it handles breach notifications.  Fifty percent of reported breaches to ASIC are received from licensees providing financial planning advice and general insurance products. Superannuation trustees, in recent months, have made up to 25 per cent of the total breach notifications received. Operators of various types of managed investment schemes, if taken collectively, also represent a large part of notifications received.  Since 1 July 2005, ASIC has received 690 notifications including:   * 258 breach notifications from the general insurance and superannuation sectors; * 35 breach notifications from deposit taking institutions; * 33 breach notifications from life insurers; and * 37 breach notifications from stockbrokers.   The most common types of notifications were breaches involving disclosure obligations, financial viability, incorrect fees and charges, statements of advice and unit pricing.  Of the breach notifications received since 1 July 2005:   * licensees ultimately addressed the causes and consequences of the breach in a manner acceptable to ASIC in 431 cases; * ASIC continues to monitor licensees' progress in properly addressing the causes and consequences of the breach in a further 63 cases; * six licenses have been varied; * 30 licensees remain under surveillance; and * formal investigations are underway in the case of 25 breaches.   **Background**  Since December 2003, ASIC has received more than 1600 breach notifications from licensees.  Breach reporting forms an important part of the financial services regulatory framework. Aside from helping ASIC identify and rectify problems within individual financial service businesses, timely breach reporting can assist ASIC to identify and address emerging risks and issues.  In September 2005, ASIC published the 'Unit Pricing – Guide to good practice' jointly with the Australian Prudential Regulation Authority, partly in response to the number and nature of unit pricing errors reported to ASIC.  **ASIC's approach to breach notifications**  A new section of 'Breach Reporting: An ASIC Guide', explains how ASIC handles breach notifications and what ASIC takes into account in deciding what, if any, further action to take. Importantly, it explains what licensees can do to reduce the need for ASIC to take further action.  Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.4 New calculator helps consumers consider risk**  On 27 April 2006, the Australian Securities and Investments Commission (ASIC) launched a simple online calculator to help people consider the potential risks of different investment choices.  Some examples of how the calculator works follow:   * A return too good to be true. The calculator will compare an advertised return with a recommended upper limit for well-diversified investments of the same type. If it looks too high, the calculator warns 'Your expected return sounds too good to be true. If the return is this high, it means the risk is also very high and you could well lose some or all of your investment. Schemes that advertise returns this high often include dangerous scams you should avoid'. * Short-term money in long term investments. Would it be a good idea to put money you will need to buy a home next year into the share market today? The calculator says 'You plan to invest for only one year. In that time, your investment could experience volatile, even negative earnings. Consider a longer time, say at least five years, or a less risky, lower growth type of investment.' * Long-term savings in cash. Suppose you have a nest egg you can leave untouched for seven years or so. What is the risk in keeping it all in a bank deposit or cash management trust? The calculator says 'Your expected return seems reasonable. But you plan to invest in cash for seven years. Consider adding some higher-growth assets to beat inflation and to meet your future needs'.   ASIC will continue to monitor user feedback over coming months, and make improvements as necessary.  ASIC's Risk and Return Calculator is available the [FIDO website](http://www.asic.gov.au/fido/fido.nsf/byheadline/Calculators?openDocument" \t "_new).  **2.5 ASIC guidance on use of administrative powers in enforcing financial services laws**  On 26 April 2006, the Australian Securities and Investments Commission (ASIC) issued guidance to help financial services industry participants better understand ASIC's administrative powers in the enforcement of financial services laws.  ASIC has a range of remedies available to it, broadly classified as criminal, civil and administrative actions in performing its regulatory responsibilities. These remedies can be used on their own or in combination.  The guide, titled 'Licensing: Administrative action against financial services providers', outlines how ASIC will use administrative remedies to enforce compliance of Australian financial services (AFS) licensees, and their representatives, with these laws.  The guide indicates the matters ASIC takes into account in determining whether administrative action is the most appropriate regulatory response. It also provides some indicative guidance on the kinds of factors ASIC will consider when determining the length of a banning order, including examples of relevant misconduct for illustration.  While each matter is assessed on a case-by-case basis, these non-prescriptive factors and examples are intended to provide transparency around how ASIC determines the most appropriate regulatory response.  A copy of the guide is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=Licensing_administrative_action_pdf" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 Significant improvement in corporate governance reporting**  On 22 May 2006, ASX announced that its latest review of compliance with the ASX Corporate Governance Council's principles and recommendations has revealed listed companies are continuing to improve their corporate governance reporting. Overall reporting levels – the aggregate of adoption of recommended practices and of 'if not, why not' exception reporting – were higher in 2005 than in the previous year.  Key improvements in corporate governance reporting in 2005:  **(a) Overall reporting levels**   * The overall reporting level for all Recommendations (being the aggregate of actual adoption of the Recommendations and the 'if not, why not' exception reporting) increased to 88% from 84% in 2004. * 14 out of 28 recommendations had reporting levels over 90%. * An additional 9 out of 28 Recommendations had reporting levels over 80%. * This compares with the 2004 review where 8 out of 28 Recommendations had reporting levels over 90% and an additional 9 out of 28 Recommendations had reporting levels over 80%. * The overall reporting level increased at a faster rate among companies outside the Top 500.   **(b) Adoption reporting levels**   * The adoption reporting level for all Recommendations increased to 74% from 68% in 2004.   **(c) If not why not exception reporting levels**  There were continued high levels of 'if not, why not' exception reporting in relation to:   * Recommendation 2.1 (A majority of the board should be independent directors) - 47% 'if not, why not' exception reporting. * Recommendation 2.4 (The board should establish a nomination committee) - 57% 'if not, why not' exception reporting. * Recommendation 9.2 (The board should establish a remuneration committee) - 38% 'if not, why not' exception reporting.   The findings emerge from ASX's review of annual reports of 1162 companies that reported with a 30 June 2005 balance date. Listed trusts, not included in this review, will be the subject of a separate review which will also include stapled entities and listed managed investment schemes.  The findings are available on the [ASX website](http://www.asx.com.au/supervision/governance/index.htm" \t "_new).  **3.2 S&P and ASX to review index treatment of foreign-domiciled companies; two new resource indices announced**  On 18 May 2006, Standard & Poor's (S&P) and Australian Stock Exchange (ASX) released a consultation paper detailing proposed changes to the index treatment of foreign-domiciled companies traded on ASX. S&P and ASX will seek market feedback on the proposal, including potential transitional arrangements, until June 14 2006, after which a final announcement will be made to the market.  The proposed changes are:   * The S&P/ASX index treatment of foreign-domiciled companies will be altered so that foreign companies listed on ASX may be considered for inclusion in the S&P/ASX indices based upon their Australian capitalisation and liquidity, and under a more transparent and consistent index methodology. * The S&P/ASX 50 index will no longer be included in the S&P Global 1200. It will continue as part of the Australian index suite. * Specifically for the S&P Global 1200, S&P will develop a new index that will list Australian and New Zealand-domiciled companies and exclude foreign-domiciled companies. This index will be called the SPANZ 50.   The key implications of these changes, subject to the results of the market consultation are:   * Significant ASX-listed foreign-domiciled companies may, subject to meeting Australian capitalisation and liquidity tests, qualify for entry into the S&P/ASX indices with an index weighting based on their Australian market capitalisation. The timetable for the potential future inclusion and transitional arrangements of foreign-domiciled companies is also a matter for consultation. * ASX foreign-domiciled companies will be treated consistently for index purposes and will no longer be affected by the listing/quotation status of the company.   The changes are proposed for three primary reasons:   * The current index rules can result in large Australian companies being removed from the indices if they choose to re-domicile to another market. The proposed changes will mean such companies can remain in the index if their Australian market capitalisation reaches the index-inclusion thresholds and they have sufficient liquidity in the Australian market. While index qualification and weighting will be based upon companies' Australian capitalisation and liquidity, their index ranking (i.e., whether they are listed in the S&P/ASX 20, 50, 100, 200, or 300) will be based on the total size of the company, not just their Australian listing. This ensures comparable-sized companies are grouped together, as well as ensuring significant foreign companies are not inadvertently added to the mid- or small-cap indices. * Inconsistencies currently exist in the index treatment of foreign-domiciled companies, due to the different listing/quotation structures. The proposed changes are designed to remove these inconsistencies. * The new index arrangements will increase the attractiveness of an ASX listing to foreign companies that acquire significant ASX-listed companies, creating further investment opportunities for Australian investors.   At the same time, S&P and ASX are proposing the launch of two new, real-time indices:   * The S&P/ASX Metals & Mining Index; and * The S&P/ASX Gold Index.   The development of these new indices is a response to market requests for the Australian indices to better reflect these sectors' importance and significance to the equity market and the Australian economy in general.  Papers detailing the proposed new treatment of foreign-domiciled companies and the design of the new real-time indices will be circulated to key index stakeholders, and will be available to other interested parties.  Copies of the consultation papers are available on the [Standard and Poor's website](http://www.standardandpoors.com.au/" \t "_new) and [ASX website](http://www.asx.com.au/" \t "_new).  Market feedback will be sought until 14 June 2006, with final arrangements announced to the market in late June. Any change would not take effect before the September index rebalance. |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Alinta Limited 01R — Panel decision**  On 8 May 2006, the Takeovers Panel advised that it had made a decision in relation to the application by Alinta Limited for review of the Panel's decision in the Alinta 01 proceedings. The Panel published a media release on 23 April 2006 (TP06/41) setting out its decision in the Alinta 01 proceedings. In those proceedings the Panel (Initial Panel) made a declaration of unacceptable circumstances and final orders in relation to one of two applications dated 3 April 2006 from The Australian Gas Light Company in relation to the bid by AGL for Alinta (AGL Offer) and the bid by Alinta Group Holdings Pty Limited for AGL (Alinta Offer).  The Panel (Review Panel) considers that the very significant events which have occurred since the Initial Panel's decision mean there is no current basis for the continuation of a declaration of unacceptable circumstances. Therefore, the Review Panel has decided to revoke the declaration of unacceptable circumstances and the orders made by the Initial Panel.  The Review Panel noted that parties may return to the Panel if the currently proposed arrangements between Alinta and AGL do not come to fruition and the concerns which were raised before the Initial Panel become enlivened again.  In its decision, the Review Panel noted that it had not been required to make, and had not made, any decision or finding in relation to the Initial Panel's decision, because of the different circumstances before it compared to the circumstances before the Initial Panel.  **(a) Recent events**  After the decision of the Initial Panel on 23 April 2006, Alinta and AGL announced on 26 April 2006, that they had entered into a binding Heads of Agreement (HoA) to work together to draft and sign a Merger Implementation Agreement (MIA). Under the MIA, Alinta and AGL will each propose schemes of arrangement to their respective shareholders to transfer assets between Alinta and AGL so as to practically give effect to a large part of the demerger scheme which Alinta had proposed to AGL, and the demerger which AGL had proposed to its shareholders earlier this year. The HoA includes terms requiring each of Alinta and AGL to advise their shareholders not to accept the takeover offer from the other, and to advise shareholders of the other company not to accept the takeover offer that each of them had made to the other's shareholders. Both companies have now provided that advice to their, and to the other's, shareholders.  The Review Panel considers that the HoA, and the subsequent advice that has been provided to Alinta and to AGL shareholders pursuant to the terms of the HoA, have materially changed the circumstances before it, compared to the circumstances which came before the Initial Panel.  **(b) Decision**  Given the change of circumstances, and after considering the submissions and rebuttals in the Alinta 01R proceedings and the Alinta 01 proceedings, the Review Panel, under section 657EA(4)(b) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), determined to set aside the decision of the Initial Panel to make a declaration of unacceptable circumstances. The Review Panel consequently also revoked the orders which the Initial Panel made to address the unacceptable circumstances identified by it.  The Review Panel's power to make decisions under its review power in section 657EA is a de novo review power. In undertaking review proceedings, the Panel looks anew at the decision of the original application, based on the circumstances before the Review Panel at the time it makes its decision. Where, as in this case, the circumstances before the Review Panel are materially different from the circumstances before the Initial Panel, the decision of the Review Panel may be as different to that of the Initial Panel as are the two different sets of circumstances which originally confronted the Initial Panel and, now the Review Panel, respectively.  In this case, the changes in the circumstances before the Review Panel as a consequence of the recommendations of the two boards, and the other aspects of the 26 April announcements are of critical significance. As a consequence of those changes, the Review Panel did not consider that there existed, at the time of its decision, any real likelihood of the uncertainty for Alinta and for AGL shareholders, which the Initial Panel found would have an effect on their decisions in respect of the offers, and therefore an effect on control or potential control of one or both of Alinta and AGL.  Similarly, the Review Panel did not consider that there is an ongoing information deficiency in the two bidder's statements as to the potential for a Conflicting Control Scenario described below.  **(c) Alinta 01 circumstances**  AGL described the primary issue before the Initial Panel as being:  a. "if AGL were to receive sufficient acceptances to give it a relevant interest in more than 50% of Alinta's Shares;  b. Alinta's Offer is unconditional; and  c. a takeover contract under Alinta's Offer completes so that AGL Shares are transferred to Alinta, then any purported transfer of the AGL Shares to Alinta under Alinta's offer would be void under section 259C. Alinta would be precluded from processing acceptances received from AGL shareholders because of section 259C (Conflicting Control Scenario)."  The Initial Panel required that both Alinta and AGL include defeating conditions in their offers which required them to acquire more than 50% of the shares in their target, and the rival bidder to have acquired less than 50% of them, before their offers could become unconditional. These conditions could not be waived without the consent of the Initial Panel.  **(d) Current circumstances**  The Review Panel considered that there is no evidence that Alinta and AGL shareholders are currently concerned at present about the possibility of a Conflicting Control Scenario, because their directors have advised them to take no action in relation to either takeover offer. The directors of both companies have advised their shareholders that they have entered into a legally binding HoA which is intended to make the two takeover offers redundant and of no effect.  Their directors have made clear and definite public statements of their intentions to work towards the achievement of the MIA and have set out the benefits to both Alinta and AGL shareholders of their achieving the MIA on behalf of their shareholders. Thus, the Review Panel considered that the possibility of a Conflicting Control Scenario has no current effect on the decisions of Alinta's or of AGL's shareholders, and therefore it has no current effect on control or potential control of either Alinta or AGL.  On that basis, the Review Panel considered that the material change in circumstances since the Initial Panel's decision meant that the unacceptable circumstances identified by the Initial Panel do not currently exist.  **(e) Possible future unacceptable circumstances**  In their submissions to the Review Panel, the parties raised the possibility of negotiations between them failing in relation to the Merger Implementation Agreement. If that occurred, the parties advised the Review Panel, both companies would likely seek to pursue their respective offers, in a similar manner as before the entry into the HoA. On that basis, it is possible that the same concerns which were brought before the Initial Panel could arise again. In the latter case, any person would be free to apply to the Panel for a declaration of unacceptable circumstances in relation to the then existing circumstances and the Panel would consider the circumstances then prevailing and the interests of Alinta and of AGL shareholders anew. The decision of the Review Panel does not preclude any such future application to the Panel, which would be determined on the circumstances which exist at the time.  **(f) Undertakings**  The Panel noted that AGL and Alinta each voluntarily offered undertakings to the Panel that, in the event that the MIA is not entered into, they will not free their takeover offers from defeating conditions without giving the Panel and the other company, 7 days notice of their intention to do so. The Panel noted that this sensible suggestion eliminates the possibility of a Panel decision acting to affect the terms of offers which had earlier crystallised into complete contracts. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Requirements for exoneration under sections 1317C and 1318 of the Corporations Act and civil penalties for insolvent trading**  (By Portia Morgan, Freehills)  ASIC v Edwards [2006] NSWSC 376, New South Wales Supreme Court, Barrett J, 5 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc376.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc376.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**  This decision was a civil penalty proceeding subsequent to Justice Barrett's judgment on 24 August 2005: Australian Securities and Investments Commission (ASIC) v Edwards (2005) 220 ALR 148, in which his Honour made a declaration of contravention pursuant to section 1317E(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') for insolvent trading under section 588G(2) of the Act.  Justice Barrett examined the penalty that should apply to the defendant for insolvent trading. The plaintiff contended that the court should, under section 206C(1) of the Act, make an order disqualifying the defendant from managing corporations for a period of twelve years or more. The defendant submitted that the court should exercise its discretion under sections 1317S or 1318 to relieve the defendant from the liability to which the making of the section 1317E declaration exposed him, including the liability to suffer a disqualification order.  His Honour held that as the defendant had not acted honestly, the court would not make an exonerating order under sections 1317S or 1318. Further, this lack of honesty coupled with the defendant's past conduct contributed to the court order, pursuant to section 206C(1) of the Act, that the defendant be disqualified from managing corporations for the period of ten years commencing on and from 2 June 2006.  **(b) Facts**  Edwards was a director of Murray River Ltd (MRL), a vehicle for a joint venture for the construction of an apartment hotel. Construction was commenced on the site in early February 1999. From late 1998 - August 1999 the company attempted, but was unsuccessful, in obtaining finance for the project. The company went into voluntary administration on 18 October 2000 and liquidation on 14 November 2000. ASIC commenced proceedings against the defendant and another director seeking declarations that they had breached section 588G of the Act.  On 28 October 2005, Justice Barrett made six declarations of contravention pursuant to section 1317E(1) of the Act. His Honour held that Edwards, whilst being a director of MRL, contravened section 588G(2) of the Act by failing to prevent MRL from incurring over $3 million of debts in circumstances where MRL was insolvent, there were reasonable grounds for suspecting that MRL was insolvent, and the defendant knew that there were reasonable grounds for suspecting that MRL was insolvent.  In this proceeding, Justice Barrett had to determine whether Edwards should benefit from a section 1317S or section 1318 order, and hence relieve him from potential liability and if not, what penalty should apply for the defendant's wrongdoing.  **(c) Decision**  **(i) Exoneration of Edwards under sections 1317S and 1318**  Under sections 1317S and 1318, a court can relieve a person wholly or partly from a liability for contravention of a civil penalty provision if:   * the person acted honestly; and * having regard to all the circumstances of the case the person ought fairly to be excused for the contravention.   Justice Barrett repeated his findings from the earlier judgment in discussing whether Edwards should be exonerated. These were that:   * Edwards knew that at each time a debt was incurred there were reasonable grounds for suspecting MRL was insolvent; * the defendant could, at any time, have stepped in and required that building work cease; * the defendant never warned his co-directors of the reality that MRL did not have the funds to undertake the project; and * the message he communicated, both directly and indirectly, was always that the various elements necessary to ensure the necessary funding were within grasp.   His Honour considered that these findings precluded any conclusion that the defendant acted honestly as there were elements of unconscionability and moral turpitude in what the defendant allowed to happen. Edwards' conduct was not straightforward and by allowing the building to proceed his conduct was morally wrong and led to the benefit of the interests that the defendant represented as well as his personal interests. As such, Justice Barrett concluded that there was sufficient evidence to dispose of the defendant's claim to exoneration under sections 1317S and 1318.  **(ii) Penalty for insolvent trading**  Edward's lack of honesty as well as the fact that in three other corporate contexts his past conduct had attracted adverse reports from liquidators and receivers, was the basis for Justice Barrett's reasoning that, in order to protect the public, the defendant should be prohibited from being engaged in the management of corporations.  In determining the length of Edwards' disqualification, Justice Barrett affirmed the series of fifteen propositions formulated by Justice Santow in Re HIH Insurance Ltd; ASIC v Adler, that outline appropriate periods of disqualification in light of a defendant's conduct. In particular, he considered the following factors that make a 7 – 12 year period of disqualification appropriate:   * serious incompetence and irresponsibility; * substantial loss; * the defendant had engaged in a deliberate course of conduct to enrich themself at others’ expense, but with lesser degrees of dishonesty; * continued, knowing and wilful contraventions of the law and disregard for legal obligations; and * lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.   In deciding on the length of the defendant's penalty, his Honour considered the evidence and concluded that the first, third, fourth and fifth matters referred to by Justice Santow had been determined adversely to the defendant. In regards to whether there was 'substantial loss', Justice Barrett reasoned that there was loss but the court did not have evidence to characterise the loss as 'substantial'. His Honour also compared Edwards' conduct with Plymin's actions in Elliot v ASIC, for which Plymin was disqualified for seven years, and decided that Edwards' actions attracted a greater blame.  His Honour concluded that the defendant's conduct warranted disqualification for a period towards the upper end of the scale referred to by Justice Santow and made an order pursuant to section 206C(1) of the Act that the defendant be disqualified from managing corporations for the period of ten years commencing 2 June 2006.  **5.2 Liability of companies and employees - fashioning the rule of attribution**  (By Tarryn Billings, Phillips Fox)  ABC Development Learning Centres Pty Ltd v Wallace [2006] VSC 171, Supreme Court of Victoria, Bell J, 3 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/may/2006vsc171.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/may/2006vsc171.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**  After a child escaped from a child care centre into the surrounding suburbs, an action was brought by the Department of Human Services (DHS) against ABC Development Learning Centres Pty Ltd (ABC) under section 26 of the [Children's Services Act 1996](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=2038" \t "Default) (the Act).  An acting magistrate found that the child escaped because ABC's staff failed to observe and prevent him from scaling a playground fence and that ABC was responsible for the failures of its staff.  ABC raised an appeal on a fundamental question of law: should the failures of ABC's staff have been attributed to the company? ABC contended that, as there was no allegation of systemic failure against the company, the staff were entirely to blame. ABC also contended that the acting magistrate erred in law by taking impermissible materials into account.  Justice Bell, in the Supreme Court of Victoria, considered the correct approach to answering the question of whether or not the failures of ABC's staff should have been attributed to the company. He reviewed and applied the approaches taken to this question in the relevant case law. In doing so he found that the acting magistrate did not err in law in finding ABC guilty of the offences. His Honour further held that the acting magistrate did not take impermissible materials into account in making his decision.  The appeal by ABC was therefore dismissed.  **(b) Facts**  ABC was charged in the Magistrate's court with two offences against the Act. The charges were the result of a child, aged nearly three, scaling a playground fence and escaping into the nearby streets while staff of the child care centre were not looking.  The DHS prosecuted ABC. It could also have prosecuted the staff of the ABC child care centre in question, but it did not.  The acting magistrate found that the child escaped because ABC's staff failed to observe him and prevent him from doing so. He held that ABC was ultimately responsible for the failures of its staff, regardless of whether the staff were also responsible. The company was fined without conviction on the inadequate supervision charge. The second charge, of taking every reasonable precaution to protect the child from any hazard likely to cause injury, was dismissed.  ABC brought an appeal on a question of law: should the failures of ABC's staff have been attributed to the company?  **(c) Decision**  **(i) The correct approach to answering this question**  His Honour considered the Privy Council decision in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (Meridian), which sets out an approach for determining when, in the criminal law context, the actions of employees can be attributed to a company. This decision has been followed or cited with approval in a number of Australian cases.  Lord Hoffman, in Meridian, stated that there was no one answer to this question of attribution. In some cases a special rule of attribution will need to be developed. The scope of the rule will depend on:   * the court's interpretation of the terms of the offence; and * the policy of the enabling statute.   The actions of both high level and low level employees can be attributed to the company depending on the circumstances. Actions of high level employees may be identified with the company because they represent its mind and will. Actions of low level employees can be identified with the company if the terms of the offence require this and identification achieves the policy objectives of the offence's enabling statute.  The cases that apply this approach have a common feature – they all concern regulatory offences. Offences such as these generally operate to regulate areas of social or economic activity that are in the public interest. In this case the legislation was designed to ensure that children in child care services were properly cared for. His Honour made the point that this standard of behaviour, made in the public interest, could only be observed by the company through its human agents. In a case such as this, if the employees of the company failed to observe the standards imposed, it would frustrate the objectives of the legislation if the company could not be held liable.  ABC argued that as there was no systemic failure, and no knowledge by the company that the standard was being breached, it should not be held liable. His Honour held that circumstances such as this would be irrelevant unless the legislation stipulated a specific statutory defence. If no defence was available then the legislation will expect the standard to be strictly performed, as it acts to protect a public interest.  **(ii) The terms of the offence and the policy of the Children's Services Act 1996**  ABC was charged under section 26 and 27 of the Act. These sections dealt respectively with the protection of children from hazards and inadequate supervision of children.  His Honour noted that the offences were expressed in terms of a mandatory standard for the protection and supervision of children. This standard was enforced by a penalty for breach, and the 'proprietor' referred to in the section included the owner of the service, in this case, ABC. Intention was not an element of the offence.  His Honour examined the policy of the legislation, finding it to be the protection, supervision and care of children by children's services with whom the children are entrusted. This examination led his Honour to form the view that 'the terms of the offences and the policy of the legislation are such that the actions of such persons done within the scope of their work can be attributed to the company’.  ABC argued that the staff of a children's service can also be liable under the relevant sections of the Act. It was submitted that this showed that the legislation was not intended to make a company liable for the failures of its staff without something further, such as a systems failure. This submission was rejected by his Honour who held that both the staff and the company could be prosecuted at the discretion of the prosecutor. Counsel for ABC also made a number of other submissions, which Bell J considered and rejected.  His Honour concluded that the acting magistrate had been correct in deciding that ABC could be found guilty through the failures of its staff. He also upheld the finding by the acting magistrate that the two child care workers had failed to take reasonable precautions to protect the child from hazards and to adequately supervise him, and that these failures could be attributed to the company. There was therefore no error of law in the decision of the acting magistrate.  **(iii) Did the acting magistrate take impermissible materials into account?**  Certain materials were tendered by consent in the Magistrate's Court hearing. These materials were intended to be used for background and were not legally relevant to the criminal liability of ABC. If the acting magistrate had taken these materials into account in finding the charges against ABC proven, he may have committed an error of law.  His Honour considered the decision of the acting magistrate and concluded that these materials were not taken into account. Rather, he found that the acting magistrate had clearly confined himself to the case put by the prosecution. His Honour tested this by reference to the acting magistrate's approach to sentencing, which was very lenient. Had the acting magistrate taken the impermissible materials into account it would be likely that the penalty would have been higher.  **(iv) Conclusions**  Based on the above reasoning, his Honour concluded that a company operating a child care centre, with staff that fail to perform their obligations under the Act, can be held accountable. The staff do not bear the potential liability alone. Bell J held that the acting magistrate had applied the Act and the relevant legal principles correctly when he decided that ABC as a company was liable. No impermissible materials were taken into account in reaching this decision. The appeal by ABC was therefore dismissed.  **5.3 Reinstatement of a deregistered company – who can apply?**  (By Svetlana Zarucki, Clayton Utz, Sydney)  In the matter of Piccoli Tesori Pty Ltd (Deregistered) Ex parte: Bertuol [2006] FCA 462, Federal Court of Australia, Lee J, 26 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca462.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca462.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**  Piccoli Tesori Pty Ltd ("Piccoli"), a company involved in the sale of goods and the provision of professional services, was deregistered by the Australian Securities and Investments Commission ("ASIC") on 17 July 2005 for failure to pay a "review fee" under section 601AB(1A) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") within the prescribed 12 month period. Notice of the proposed deregistration of the company was not received by the directors of Piccoli.  At the time of deregistration, the accounts of Piccoli showed that the net worth of the company would have been $53,748.72, of which $47,884.63 represented undistributed profits.  Section 601AH(2)(a)(i) of the Act provides that "a person aggrieved" may apply for an order that the registration of a company be reinstated. Piccoli made an application for such an order pursuant to section 601AH(2)(a)(i) of the Act. Mr Bertuol, a director of Piccoli, subsequently sought to be substituted for the company as plaintiff.  Lee J was satisfied that it was appropriate for Mr Bertuol to be substituted for Piccoli as plaintiff in the matter and found that it was just to order ASIC to reinstate the registration of Piccoli and to order that anything done between the deregistration of Piccoli and reinstatement be validated having regard to the fact that the company was not insolvent, could meet outstanding fees due to ASIC and that there did not appear to be any third party who could be adversely affected by the reinstatement.  **(b) Facts**  Piccoli was registered in Western Australia on 25 February 2000 and deregistered by ASIC on 17 July 2005. On deregistration Piccoli ceased to exist and all of its property vested in ASIC.  The two directors (Mr and Ms Bertuol) appointed on the date of registration of Piccoli were the owners of the two shares that had been issued by that company. They remained the directors of Piccolo until its deregistration. At all times, the residential address of the directors was in Canberra.  From the date of registration the registered principal place of business of Piccoli was in Canberra.  From 17 March 2000, the registered office of Piccoli was at the office of a firm of accountants carrying on business in Western Australia. That firm prepared Piccoli's accounts and filed returns on its behalf with ASIC.  Annual returns were filed with ASIC for the years 2000, 2001 and 2002. Thereafter a firm of accountants in Canberra took over the preparation of the accounts for Piccoli. No change of registered office was filed with ASIC.  Material was placed before the Court showing that a taxation return for the year ended 30 June 2004 and accounts for the years ended 30 June 2004 and 30 June 2005 had been prepared for Piccoli. The accounts showed that as at the date of deregistration the net worth of Piccoli was $53,748.72, of which $47,884.63 represented undistributed profits. Further, business activity statements were filed with the Australian Taxation Office each quarter.  On 17 July 2005, deregistration of Piccoli was effected by ASIC pursuant to section 601AB(1A) of the Act for the reason that a "review fee" in respect of a "review date" (being the anniversary of Piccoli's registration) had not been paid within 12 months of the "due date" (being two months after the "review date"). Payment of a "review fee" is tied by the Act to the resolution the directors must make annually as to the solvency of a company.  Mr Bertuol deposed that notice of the proposed deregistration did not reach the directors (who had changed their residential address in Canberra in about January 2003) despite the fact that the post box in Canberra, to which Mr Bertuol had directed the accountants in Western Australia to forward mail, remained in operation at all material times. Mr Bertuol further deposed that Piccoli continued to operate as a going concern and that it was not until February 2006 that the directors became aware that the company had been deregistered.  **(c) Decision**  Lee J noted that:   * under section 601AH(2) of the Act, the Court may make an order that ASIC reinstate the registration of a deregistered company if satisfied that it is just to do so; * under section 601AH(2)(a)(i) of the Act "a person aggrieved" may apply for an order that the registration of a company be reinstated; * under predecessor legislation to s 601AH a company that had been struck off the register of companies could apply to the Court, within a specified period of years, for an order that the company be restored to the register; * section 601AH(5) of the Act provided that if a company is reinstated it is taken to have continued in existence as if it had not been deregistered; * section 601AH(5) suggested that the Act continued to recognise that a deregistered company has sufficient existence for the purpose of making an application under section 601AH(2) as a "person aggrieved" notwithstanding that under section 601AD(1) of the Act a company ceased to exist upon deregistration; and * the Act contemplated that an order under section 601AH(2) would have a retrospective effect that makes good the deregistered company's standing to make the application.   In the absence of any material suggesting that the legislature identified and sought to remedy a mischief that had arisen out of the predecessor legislation's allowing a deregistered company to apply for reinstatement of its registration there seemed to Lee J to be no reason to apply a restrictive interpretation of the term "person aggrieved" as used in section 601AH(2)(a)(i) of the Act.  However, to avoid doubt as to whether Piccoli had the capacity to make the application under section 601AH(2)(a)(i) of the Act, Mr Bertuol sought to be substituted for Piccoli as plaintiff in the matter. Lee J accepted that the fact that a person is a shareholder or a director of a deregistered company did not in itself establish that the person was a "person aggrieved" for the purpose of section 601AH(2) of the Act. However, Lee J stated that a shareholder who is a creditor of a company who could have expected payment of a debt in whole or in part, or who had an expectation of a distribution from surplus assets or a dividend from retained profits would be a person prejudicially affected by deregistration of the company and therefore "a person aggrieved". Lee J was satisfied that it was appropriate that Mr Bertuol be substituted for Piccoli as the plaintiff in the matter.  As to what was "just" in the circumstances, the relevant issues identified by Lee J were:   * first, Piccoli was not deregistered as a consequence of insolvency and had moved reasonably promptly to obtain reinstatement. If reinstatement were ordered, Piccoli would have ample funds from which it could meet outstanding fees due to ASIC and would be able to resume a profitable business; * second, it did not appear on the material before the Court that a third party could be adversely affected by an order for reinstatement.   Lee J noted that ASIC had advised the solicitors for Piccoli that it had no objection to the order for reinstatement of registration.  In the circumstances, it was just to order that ASIC reinstate the registration of Piccoli and validate anything done between deregistration and reinstatement.  **5.4 Operating an unregistered managed investment scheme and carrying on a financial services business without holding an Australian financial services licence**  (By James Williams, Phillips Fox)  Australian Securities and Investments Commission v McDougall [2006] FCA 427, Federal Court of Australia, Young J, 20 April 2006  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca427.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca427.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 Australian Securities and Investments Commission ('ASIC') brought proceedings against the Defendants, BTS Management Pty Ltd ('BTS') and BTS' sole director, Stephen McDougall, for operating an unregistered managed investment scheme and carrying on a financial services business without holding an Australian Financial Services ('AFS') licence in contravention of sections 601ED(5) and 911A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') respectively. Young J held that the Defendants had contravened the relevant sections of the Act and made several restraining and cost orders against the Defendants.  **(b) Facts**  BTS conducted a managed investment scheme ('the Scheme') under the business name 'Chargeitcards' known as the 'FullTank' card scheme, which purported to offer its investors discount fuel. The Scheme was marketed on a website. Investors would pay a subscription fee and in return would be issued with a credited debit card, which could be used to purchase fuel and other items at petrol stations. The scheme came into effect on 10 October 2005 and on 25 October 2005 the scheme had 134 investors.  The money paid to BTS was then invested by the Defendants in a foreign exchange trading account with Forex Capital Markets LLC ('Forex'). Mr McDougall allegedly believed the expected returns from the investment in Forex would enable BTS to meet its obligations to the Scheme's investors. However, after accumulated trading losses of $2649, only $27,303 of the $30,000 invested in Forex was ultimately recoverable by the receivers.  Money invested in the Scheme was also used by Mr McDougall and BTS to purchase various items which were unrelated to the operational costs of the Scheme itself. Substantial amounts of money were used to pay debts Mr McDougall had incurred through his children's school fees and motor vehicle expenses. Five fuel cards were also issued by BTS to various members of Mr McDougall's family, which were credited despite the fact no membership fees had been paid in respect of them.  The receivers reported that the Scheme had an estimated deficiency before receivers' costs of $41,162. BTS itself was reported to have an estimated deficiency of liabilities of $118,561. Merkel J granted interim and interlocutory relief on 25 October 2005.  However, after this date Rob McMillan, an investor in the Scheme and associate of Mr McDougall, sent an email to the Scheme's investors. The email instructed the investors that they could either choose to be reimbursed by the receivers, or terminate their memberships with BTS and become members under a new Scheme. Investors choosing to take the second option were also required to return a letter to BTS, which said the investor forgave BTS of any debt incurred through participation in the Scheme. There were also telephone calls allegedly made by an investor on behalf of Mr McDougall telling the investors that new debit cards were to be reissued and that the Scheme would recommence.  **(c) Decision**  Young J held that the Scheme did fall within the definition of a 'managed investment scheme' under section 9 of the Act and that none of the exclusions for various entities, funds or schemes applied. Thus, the Scheme clearly contravened section 601ED(5), which provides that a person must not operate a managed investment scheme that is required to be registered under section 601EB unless the scheme is so registered.  His Honour identified Mr McDougall as the person who formulated and directed the Scheme and as the directing mind and will of BTS in the company's everyday operations relating to the Scheme. Therefore, Young J held that Mr McDougall and BTS had both operated the Scheme and in turn, were both guilty of contravening section 601ED(5).  Young J then turned his attention to the question of whether the Defendants had carried on an unlicensed financial services business. Section 911A of the Act requires a person who carries on a financial services licence to hold an AFS licence. A financial services business is defined in section 761A as a business of providing financial services. His Honour held that in promoting, offering and issuing memberships in the Scheme, BTS had provided a financial service. The fact that BTS did not possess the requisite AFS licence meant BTS had contravened section 911A(1) of the Act.  His Honour also held that Mr McDougall in his capacity as sole director and controller of BTS and one of the registered owners of Chargeitcards had also carried on an unlicensed financial services business in contravention of section 911A(1).  Under section 1324(1) of the Act, Young J permanently restrained the Defendants from further operating or promoting the Scheme. His Honour also restrained the Defendants under sections 1101B and 1324(1) of the Act from carrying on business in relation to financial products or services without holding the requisite AFS licence. The Defendants were also prohibited from ever carrying on business in relation to a managed investment scheme.  Young J ordered the Scheme to be wound up pursuant to section 601EE(1) of the Act. The Defendants were ordered to pay the Liquidators $80,000 and the Plaintiff's costs for the proceeding.  **5.5 When the court will make an order for termination of the winding up of a company under section 482(1) of the Corporations Act**  (By Brooke Lanarus and Justin Fox, Corrs Chambers Westgarth)  Vero Workers Compensation v Ferretti [2006] NSWSC 292, Supreme Court of New South Wales, Austin J, 13 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/april/2006nswsc292.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/april/2006nswsc292.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 liquidator of Ferretti Pty Ltd ("the Company") applied for an order under section 482(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), terminating the winding up of the Company.  Termination of the winding up was sought under the terms of a deed of company arrangement ("DOCA") which was unanimously accepted by creditors, and which (if fully performed) would have provided for priority creditors to receive a dividend of 100 cents in the dollar and for ordinary creditors to receive a dividend of 95 cents in the dollar.  Under the DOCA, the directors of the Company agreed to make certain contributions to fund creditors' claims, and to defer their own claims against the Company, on the basis that the winding up would be terminated. The directors also made undertakings to the court in relation to the proposed deferral of their claims.  The court found that there were certain technical difficulties associated with the proposed deferral arrangements which meant that there was a risk that the claims of future creditors may not be adequately addressed if the Company were to be allowed to trade on. The court considered that, on balance, the risk to future creditors outweighed the interest of present day creditors in receiving payment under the DOCA. Accordingly, the application for termination of the winding up was refused.  **(b) Facts**  On 22 September 2005, the court ordered that the Company be wound up in insolvency, on the application of Vero Worker's Compensation (NSW) Ltd. The Company had two shareholders, who were also the directors of the Company.  The directors' report as to affairs identified that the Company had ordinary unsecured creditors of $1,094,041.51, of which $993,335.34 was owing to the directors.  Following the order for winding up, the directors developed a proposal for a DOCA under which the directors would make certain instalment contributions to the Company to fund creditors' claims. The directors' proposal was made on the basis that an application to terminate the winding up would be made after the DOCA had been executed.  The administrator recommended that the creditors approve the DOCA on the grounds that the unsecured creditors would receive a dividend of approximately 95 - 100 cents in the dollar, whereas in liquidation their dividend was likely to be nil. The creditors of the company unanimously resolved that the Company should enter into the proposed DOCA.  Upon approval of the DOCA, the directors entered into a deed of deferral which had the effect of preventing the directors from making any claims against the Company in respect of the amounts owing to them until the termination of the DOCA.  In addition, the directors gave undertakings to the court (the "deferral undertakings") under which they undertook, among other things, not to seek payment of their deferred debts until all other creditors had been paid.  **(c) Decision**  Section 482(1) of the Corporations Act provides that the court may, on application, make an order staying winding up either indefinitely, or for a limited time, or terminating the winding up on a day specified in the order. Subsection (1A) permits such an application to be brought by the liquidator.  Austin J noted that in such applications, the court has discretion as to whether the winding up should be terminated and that in exercising its discretion the court should consider the interests of:   * creditors of the company (including future creditors); * the liquidator, particularly with respect to costs; * the contributories; and * the public, including the public interest in matters of commercial morality, and the public interest that insolvent companies should be wound up.   Austin J had little difficulty in concluding that the interests of present day creditors, the liquidator and the contributories were adequately protected if the winding up was terminated, given that:   * the DOCA had been unanimously accepted by creditors; * creditors would receive an unusually high dividend under the DOCA; * the liquidator had brought the application (and his costs were adequately provided for in the DOCA); and * the contributories consented to the application and had voluntarily agreed to enter into the DOCA and the deferral deed and to give the deferral undertakings.   The court was concerned however that the interests of future creditors of the Company may not be adequately protected if the winding up was terminated. Austin J noted that unless adequate arrangements were put in place to effectively defer the director's claims to all subsequent claims, the directors' large claim would dilute any subsequent creditors' claim in a future external administration to such an extent "as to be tantamount to eliminating any prospect for the creditors to recover their debts".  The court concluded that the deferral deed and deferral undertakings given by the directors were not sufficient to adequately ameliorate this risk.  Specifically, Austin J noted that the deferral deed would be enforceable only by the Company and the administrator, and not by future creditors (who are not parties to it). He pointed out that in all probability, any questions regarding the efficacy of the deed would arise well after the termination of the DOCA and the retirement of the administrator, and at a time when the company would probably be under the control of the directors.  While the court accepted that a future creditor could make an application to the court to enforce the deferral undertakings given by the directors, Austin J was concerned that the issue may arise well in the future, at a time when there would be little likelihood that a future creditor would be aware of the existence of the undertakings. Austin J also raised some technical issues about the form of undertakings given, which made it difficult to determine the exact scope and meaning of those undertakings.  Accordingly, Austin J concluded that the interests of future creditors would be significantly prejudiced if the winding up was terminated.  Austin J did acknowledge that the court was required to carry out a balancing exercise and to weigh the advantages to present creditors, the liquidators and contributories in having the DOCA performed, against the risk of prejudice to future creditors and the public interest in companies trading solvently.  On balance however, Austin J held that the problems with the directors' attempt to defer their claims, coupled with the fact that the directors' claims were for a very large amount and the Company has no assets, outweighed the advantages to existing creditors, the liquidator and contributories that would be obtained by implementing the scheme as proposed. The court therefore held that the application for termination of the winding up should be refused.  **5.6 What is a contingent debt in the context of section 553C of the Corporations Act?**  (By Kylie Lane, Blake Dawson Waldron)  Chadmar Enterprises Pty Limited (in liquidiation) v IGA Distribution Pty Ltd [2006] ACTSC 32, Supreme Court of the ACT, Crispin J, 13 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/act/2006/april/2006actsc32.htm](http://cclsr.law.unimelb.edu.au/judgments/states/act/2006/april/2006actsc32.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, a costs order had been granted in favour of a company in liquidation (the plaintiff). The plaintiff sought enforcement of the costs order against the defendant. The defendant argued that the costs order was a contingent debt that could be set-off against the debt it alleged was owed to it by the plaintiff. The plaintiff argued that the costs order was not a contingent debt at the time it entered administration and therefore was not a debt which could be the subject to set-off under section 553C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Crispin J followed the High Court's statement in Gye v McIntyre that the section be given the "widest possible scope" and that there was an arguable case that the costs order was a contingent debt and therefore capable of set-off. A stay of execution was granted.  **(b) Facts**  On 7 September 2004, IGA issued a notice of statutory demand purporting to require payment from the plaintiff for the sum of $1,275,425.66. The plaintiff applied for an order setting the demand aside and the application was heard in November 2004 with judgment being reserved. On 15 March 2005, an administrator was appointed to the plaintiff. On 10 May 2005, judgment was delivered ordering that the statutory demand be set aside and the plaintiff's costs of the application (in the sum of $42,136.49) paid. A writ to enforce payment of the costs was issued on 7 November 2005 by plaintiff.  It was assumed by the parties that the winding up of plaintiff be taken to have commenced upon the appointment of the administrator on 15 March 2005.  The defendant argued that the execution of the writ should be stayed because the plaintiff is in debt to it in the amount that was (unsuccessfully) claimed in the statutory demand and that it is entitled to a right of set-off.  **(c) Decision**  Crispin J considered whether the right to set-off arose under section 553C of the Corporations Act 2001. His Honour stated that the section was enacted with a view to adopting the concepts underlying section 86 of the [Bankruptcy Act 1966 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) and that it was therefore appropriate to have regard to the principles in Gye v McIntyre (1991) 171 CLR 609 which discussed that section.  The following two elements of section 553C were the subject of argument.  **(i) What is meant by "mutual dealings"?**  Section 553C requires that, for a right to set-off to occur, mutual credits, mutual debts or other mutual dealings must have occurred between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company.  It was not disputed that the debt claimed by the defendant had arisen from mutual dealings between the parties. In dispute was whether the costs order was also to be regarded as having arisen from those mutual dealings.  In Gye v McIntyre the High Court stated that "dealings" had been used in the section in a non-technical sense, however it was construed as having a commercial or business flavour. Crispin J indicated that litigation concerning a claimed debt, said to have been incurred during the course of commercial dealings between the parties, should also be regarded as having a commercial or business flavour.  **(ii) At the relevant date, was the debt a contingent debt?**  The plaintiff argued, citing various authorities, that as the costs order had not been made prior to the commencement of the winding up, it was not a contingent debt and therefore was not a debt against which the defendant could set-off the debt allegedly owed to it by the plaintiff.  The defendant pointed to various authorities to the contrary, arguing that a costs order will be a contingent debt if the act or omission of the company underlying the substantive relief occurred prior to winding up (in this case the application to set aside the statutory demand which occurred prior to 15 March 2005).  Crispin J did not decide this point. Instead, his Honour noted the statement of the High Court in Gye v McIntyre that the section be given the "widest possible scope", and stated that there was an arguable case that at the relevant date a contingent claim against which the defendant could set-off the debt allegedly owed to it by the plaintiff did exist.  Crispin J considered that the balance of convenience favoured the granting of a stay of execution.  **5.7 Fiduciary duties: proscriptive not prescriptive**  (By Kate Johnson, Mallesons Stephen Jaques)  P & V Industries Pty Ltd v Anthony Porto [2006] VSC 131, Supreme Court of Victoria, Hollingworth J, 7 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/april/2006vsc131.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/april/2006vsc131.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 plaintiffs appealed a decision of Master Kings to strike out certain paragraphs of their statement of claim. It was alleged that the defendant used his position as an employee and director to exploit property development opportunities. The plaintiffs sought to include an additional pleading in their statement of claim to the effect that the defendant was under a fiduciary duty to disclose his previous wrongdoings.  Hollingworth J of the Supreme Court of Victoria dismissed the appeal and held that fiduciary duties in Australia are proscriptive. The no conflict and no profit rules specify what a fiduciary must not do. However, there is no positive obligation upon a fiduciary to disclose a previous breach of their duty.  **(b) Facts**  The plaintiffs were property developers and investors. The first defendant (Anthony Porto) was an employee of the first plaintiff and was also a director and company secretary of some of the plaintiff companies. The plaintiffs claimed that Porto exploited his position as an employee and director to appropriate property development opportunities which he was "introduced to in the course of his various roles with the plaintiffs", and that he consequently breached his employment contract and various statutory and fiduciary duties.  In a judgment on 27 October 2005, Master Kings ordered that a number of paragraphs be struck out from the plaintiffs' statement of claim because they disclosed no cause of action. The plaintiffs appealed the decision and sought to include an additional allegation in their statement of claim that as a fiduciary Porto owed a duty to disclose conduct which breached his duties.  The question before Hollingworth J was whether the law of Australia recognises a fiduciary duty to disclose past wrongdoings, and if so, whether such a duty continues to exist after the termination of the fiduciary relationship.  **(c) Decision**  The plaintiffs alleged that Porto was a fiduciary because of his position as a director and employee of the plaintiffs, and that he was under various fiduciary obligations by reason of that relationship. The plaintiffs argued that one of those fiduciary duties was an obligation to disclose previous breaches of duty. Although Porto was a director (and would have been subject to general law and statutory directors' duties), this application concerned Porto's obligations arising from fiduciary duties, rather than from directors' duties.  The defendants denied that a fiduciary is under a duty to disclose previous wrongdoings and argued that fiduciary duties are imposed as prohibitions on what the fiduciary must not do, rather than as requirements to perform.  **(i) The Australian position**  The defendants relied upon the High Court decisions of Breen v Williams (1996) 186 CLR 71 ("Breen") and Pilmer v Duke Group (2001) 207 CLR 165 ("Pilmer") to support their proposition that there is no fiduciary duty to disclose previous wrongdoings.  Hollingworth J agreed with the defendants' argument and held that a fiduciary is bound by two proscriptive duties. The first is a duty to avoid a conflict between duty and personal interest (the "no conflict rule"). The second is a duty not to make a profit from the position of trust (the "no profit rule"). Hollingworth J cited the statement of Gaudron and McHugh JJ in Breen and agreed that "the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed" (1996) 186 CLR 71 at 113.  Her Honour concluded that the High Court decisions of Breen and Pilmer confirm that fiduciary duties under Australian law are "limited to proscriptive duties of loyalty". Her Honour held that the no conflict and no profit rules are the "whole content" of fiduciary obligations in Australia, and while fiduciary duties prohibit certain conduct, they do not impose positive obligations upon fiduciaries.  Her Honour acknowledged that although a number of cases refer to circumstances in which a fiduciary must make disclosure, disclosure in those circumstances is for the purpose of obtaining the consent of the beneficiary to avoid a breach of duty, and not because of the imposition of a positive obligation.  **(ii) The English position**  The plaintiffs sought to rely upon the English Court of Appeal decision of Item Software (UK) Limited v Fassihi [2004] IRLR 928 ("Item Software") to support their argument that a fiduciary owes a duty to disclose previous wrongdoings. In that case, the English Court of Appeal held that a fiduciary does not owe a duty to disclose misconduct. However, on the basis of policy and economic efficiency arguments, the court held that on the facts the defendant's duty of loyalty could not be fulfilled unless he disclosed his misconduct.  Hollingworth J disagreed with the reasoning in Item Software and noted that "whilst acknowledging that there is no separate duty of disclosure, the court effectively went on and imposed one". The English Court of Appeal also did not make reference to Breen, Pilmer or any other Commonwealth authority, and Hollingworth J therefore concluded that Item Software does not represent the law in Australia.  Item Software was cited by Gray J in Trevorrow v State of South Australia (No 2) (Unreported, 26 September 2005, Supreme Court of South Australia per Gray J, BC200507294) ("Trevorrow"). However, Gray J's decision was subsequently appealed and decided on the basis of legal professional privilege. The Full Court of South Australia in Trevorrow therefore did not consider the correctness of Item Software. Accordingly, Hollingworth J held that Trevorrow was not applicable to the present case.  **(d) Conclusion**  There is therefore no fiduciary duty to disclose previous wrongdoings under Australian law. Hollingworth J consequently did not have to consider whether such a duty would survive termination of the fiduciary relationship.  The appeal was accordingly dismissed.  **5.8 Option to purchase defaulting participant's interest under a joint venture agreement when control of participant changes**  (By Yin Kuan Ho, Freehills)  Pauls Trading Pty Ltd v Norco Co-operative Ltd [2006] QCA 128, Supreme Court of Queensland Court of Appeal, McMurdo P, Williams JA and Jerrard JA, 3 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/april/2006qca128.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/april/2006qca128.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 of Appeal of the Queensland Supreme Court considered the proper construction of an option to purchase a defaulting participant's interest in a joint venture agreement (JVA).  The court held that the correct approach to the construction of the option to purchase is firstly to reach the conclusion that the clause was ambiguous and then resort to the perceived commercial purpose of the JVA in order to resolve the ambiguity.  **(b) Facts**  On 27 June 1996, the first and second appellants, Pauls Trading Pty Ltd (PT) and Dairyfields Pty Ltd (DF), entered into a JVA with the respondent, Norco Co-operative Ltd (NC), for the purpose of operating and expanding each of their existing businesses involving the processing, packaging and marketing of milk in Queensland and New South Wales.  Clause 9 of the JVA contained an option for the non-defaulting participant to purchase the defaulting participant's interest. Under clause 9.1(a)(15) a participant became a defaulting participant if 'effective control of that participant … is altered without the prior written consent of the other participants from that subsisting at the commencement date and in this paragraph effective control alters where any person together with their associates:  (a) becomes entitled to exercise (directly or indirectly) voting power at any general meeting of a participant…in excess of 50 per cent of the votes which may be cast; or  (b) acquires the capacity to appoint at least half of the number of directors of a participant…'.  The commencement date is stated to be 1 July 1996.  In 1998, the effective control of each of the appellants altered because of a change in the major shareholding of DF and a change in the major shareholding of PT's holding company. The respondent consented to the changes, and therefore did not have the right to exercise the option to purchase the defaulting participants’ interest under clause 9 of the JVA.  Events then occurred in 2005 which changed the major shareholding of PT's ultimate holding company. At first instance it was held that the change in ownership of the ultimate holding company constituted an alteration in the effective control of each of the appellants (if effective control of PT had altered, the same conclusion applied to DF because DF, as of 1998, was wholly owned by PT). As NC had not given prior written consent to the change in effective control the primary judge held that it was entitled to exercise its option to purchase the appellants’ interests.  The issue before the Court of Appeal involved the proper construction of the phrase 'if … effective control of a participant … is altered … from that subsisting at the commencement date' in clause 9.1(a)(15).  The appellants contended that there could only be one alteration in the effective control of a participant from that existing at the commencement date because of the words 'from that subsisting at the commencement date', with the result that there could only be one opportunity to exercise the option to purchase the defaulting participant’s interests. On that approach, any subsequent alteration in the effective control of a participant would be a change from that existing immediately beforehand, not a change from that existing at the commencement date. Accordingly, the appellants claimed that clause 9.1(a)(15) was exhausted by reason of the alterations in the effective control of the appellants in 1998, to which the respondent had consented, and therefore the respondent could no longer exercise the option to purchase the appellants’ interests, even though the changes occurring in 2005 would have rendered the appellants defaulting participants.  The contrary contention advanced by the respondents was that the option to purchase comes into effect each and every time there is an alteration in the effective control of a participant. The respondents contended that such a situation is encompassed by the words of the clause; after each and every alteration the position must be that there has been an alteration from that which existed at the commencement date.  The judge at first instance held that on the proper construction of clause 9.1(a)(15) the option to purchase comes into effect each and every time there is an alteration in the effective control of a participant because this interpretation accords considerably more with the commercial purpose of the JVA.  On appeal, the appellants raised the following arguments:   * that the primary judge should not have had regard to the commercial purpose of the JVA unless the clause was itself ambiguous; and * the plain and unambiguous meaning of clause 9.1(a)(15) is that there could only be one alteration in the effective control of each participant from that subsisting at the commencement date.   **(c) Decision**  The court held that the primary judge erred by looking to the commercial purpose of the JVA without first considering whether clause 9.1(a)(15) had a plain and unambiguous meaning which ought to be applied regardless of its commercial effect. The correct approach to construction is firstly to reach the conclusion that clause 9.1(a)(15) is ambiguous and then resort to the perceived commercial purpose of the JVA in order to resolve the ambiguity.  The court held that, if nothing else, the very carefully prepared arguments submitted by each side demonstrated an obvious ambiguity in clause 9.1(a)(15) and if one concentrated on the words of the clause alone, not placing it in the context of the overall JVA, it would be possible to write a logical and reasoned judgment supporting either of the proposed constructions. Thus, it was appropriate for the primary judge to consider the commercial purpose of the JVA in construing the clause.  The court held that the primary judge correctly identified the commercial purpose of clause 9.1(a)(15) in the context of the JVA as being to protect a participant against the risk that its partners in the joint venture might change, against its wishes, by the acquisition of their shares by a third party, or by a third party acquiring control over the joint venture by acquiring the shares in its holding company. Further, the court held that when clause 9.1(a)(15) is read in the context of the commercial purpose of the JVA and the essential nature of joint ventures more generally, its ambiguity is resolved: if the clause is designed to ensure that a participant is not forced to work with an entity against its wishes, then the clause must be construed so that the option to purchase is enlivened every time there is a change in the effective control of a participant. The commercial purpose of clause 9.1(a)(15) would be defeated if it could only operate on the first occasion there was a change from the control existing at the commencement date.  While the court acknowledged that there was an error at first instance in that the primary judge construed clause 9.1(a)(15) in the context of the commercial purpose of the JVA without first considering whether the clause was ambiguous, the court held that the conclusion reached at first instance as to the proper construction of the clause was correct. Accordingly, the court rejected the appellants' argument that the option to purchase the defaulting participant's interest only operated once for each participant. The more obvious and natural construction of clause 9.1(a)(15) is that the option to purchase comes into effect each and every time there is an alteration in the effective control of a participant.  Jerrard JA offered the following analogy to illustrate the court's construction of clause 9.1(a)(15) as meaning the state against which any subsequent alteration is to be compared:  "For example, one might write that the design and degree of mechanical sophistication of a standard Ford sedan has been altered many times from that subsisting as at the period of production of the Model T. The comparison made in the sentence is between each altered version of a standard Ford sedan and the Model T."  **5.9 Equity derivatives and the Takeovers Panel's jurisdiction**  (By Jason Lang, Mallesons Stephen Jaques)  Glencore International AG v Takeovers Panel [2006] FCA 274, Federal Court of Australia, Emmett J; 22 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca274.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca274.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**  Equity derivatives and the Takeovers Panel's jurisdiction were the subject of a landmark Federal Court decision handed down on 22 March 2006. The Federal Court's decision was a judicial review of an administrative decision made by the Panel concerning the use of equity derivatives by Glencore International AG during the course of a takeover bid for Austral Coal Limited.  The Panel's jurisdiction to make a declaration and orders against Glencore relied on Glencore having a acquired a "substantial interest" in Austral Coal. Emmett J found that the equity derivative arrangement into which Glencore had entered did not give rise to a "substantial interest" within the meaning the legislature must have intended for that term and, therefore, that the Panel did not have a basis upon which to make the declaration and orders.  **(b) Facts**  On 23 February 2005, Centennial Coal Company Limited announced a takeover bid for Austral Coal Limited. During the course of the bid, Glencore International AG accumulated (through a subsidiary) a stake of 4.9% in the target. Glencore subsequently entered into equity swaps with two separate investment banks, being derivative contracts under which the banks were to pay Glencore a return equivalent to the return on a notional number of Austral Coal shares over the term of the contract (although the contract did not oblige any party to hold or deliver physical Austral Coal shares). These equity swaps related to notionally approximately 6.5% of Austral Coal shares. Between 21 March 2005 and 4 April 2005 the banks progressively acquired physical Austral Coal shares to eliminate their financial risk under the swap contracts. On 4 April 2005, Glencore announced its physical and derivative position to the market.  Centennial subsequently acquired control of Austral Coal under its bid; however, with more than 10% of shares held between Glencore and the banks, it was unable to achieve the 90% threshold necessary for compulsory acquisition under Part 6A.1 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). It subsequently brought an application to the Panel alleging that Glencore should have made disclosure to the market as soon as the aggregate of its holding of physical Austral Coal shares and the shares held by the investment banks to hedge their exposure under the swaps reached 5%.  The Panel made a declaration of unacceptable circumstances against Glencore. It stated that the banks' economic incentive to hold Austral Coal shares for the life of the swap to hedge their risk under that arrangement gave Glencore a "degree of de facto control" over those shares. Glencore's failure to disclose its control over these shares meant that the market was uninformed between 21 March 2005 and 4 April 2005. The Panel therefore ordered Glencore to compensate persons who had sold shares during the uninformed market.  Glencore sought review of this decision by the Federal Court under the [Administrative Decisions (Judicial Review) Act 1977](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) and the [Judiciary Act 1903](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default), arguing that the Panel's declaration and orders were beyond the power which had been conferred on it under the Corporations Act.  **(c) The Panel's jurisdiction**  The decision of Emmett J turned on the meaning of two concepts used in Chapter 6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) - "substantial interest" and "relevant interest".  The Panel's power to make a declaration of unacceptable circumstances emanates from section 657A of the Corporations Act. Under that section, without a breach of the black letter provisions of Chapter 6, the Panel is only empowered to make a declaration if circumstances are unacceptable having regard to their effect on the control or potential control of the target or the acquisition or proposed acquisition of a "substantial interest" in the target. On the other hand, Glencore's legal obligation to disclose its Austral Coal holding under the substantial holding disclosure provisions of the Corporations Act (being Chapter 6C) depended on whether it or an associate had a "relevant interest" in the shares held as a hedge by the banks.  Emmett J considered the meaning of substantial interest and concluded that an "interest" equated to a relevant interest as defined in section 608 or some "positive power or right in relation to voting shares"; and that a "substantial interest" is an interest sufficiently large to constitute an initial step towards acquiring control of the target.  The Panel had found that while no relevant interest existed, and the banks were not associates of Glencore, the only means by which the banks could effectively hedge their exposure to Glencore under the swaps was to hold physical Austral Coal shares. Accordingly, the Panel had concluded that Glencore had sufficient de facto control over the hedge shares to warrant the conclusion that Glencore had acquired a substantial interest, so as to enliven the Panel’s power to make a declaration.  Emmett J found it "difficult if not impossible" to reconcile the Panel's findings that:   * Glencore had a degree of control over the disposal of the hedge shares so as to cause it to acquire a substantial interest in Austral Coal, and * Glencore's control (directly or through an associate) did not come within what is a very wide and all-encompassing concept of relevant interest.   Emmett J was of the view that the extent of control over Austral Coal shares which the swaps gave to Glencore was not such as to give rise to a substantial interest in Austral Coal. Emmett J, therefore, concluded that the Panel had made an error of law insofar as its decision was based on Glencore’s acquisition of a substantial interest.  The Panel relied in the alternative on the effect of Glencore's non-disclosure on Centennial's control of, and acquisition of a substantial interest in, Austral Coal as a basis for its jurisdiction. In essence, the Panel found that the failure of Glencore to disclose its position resulted in Centennial's bid being successful sooner, to a greater extent and, possibly, at lower consideration than would otherwise have been the case.  Emmett J found that the Panel erred in making these conclusions. As to Centennial's bid being successful sooner, the Panel did not say why that was unacceptable. In relation to the effect on the extent of acceptances or price offered under the bid, the Panel had failed to make necessary findings, including findings of fact, upon which to base those conclusions.  As neither of the grounds on which the Panel had sought to invoke its jurisdiction had been correctly applied, Emmett J made orders quashing the Panel's decision. Importantly, however, Emmett J did affirm the general principle that the Panel is able to make a declaration even where the impugned conduct is lawful and consistent with market practice.  **(d) Panel's orders**  On the subject of the Panel's power to make orders, Emmett J ruled that there must be a nexus between, on the one hand, the harm addressed by the orders and, on the other, the effect of the circumstances on control or the acquisition of a substantial interest in the target. It is not sufficient that a person merely suffer harm as a result of the unacceptable circumstances.  Emmett J did, nevertheless, find that the Panel's failure to consult with former Austral Coal shareholders before making its compensation order against Glencore did not invalidate that order.  **(e) Comment**  The decision places emphasis on whether the holder of an equity swap has a relevant interest or voting power in respect of the shares held as a hedge by the counterparty. If the holder has a relevant interest, or if the counterparties are associates of the holder, then disclosure obligations follow automatically.  However, if the holder has no relevant interest in underlying shares, and the counterparty is not an associate of the holder, the result of this decision is that the swap arrangement falls outside of the Panel's jurisdiction; the effect of this is that there is no discloseable interest in the shares held by the counterparty.  The decision also has important implications for the Panel's jurisdiction. While the Eggleston principles in section 602 of the Corporations Act are the guiding principles by reference to which the Panel is to exercise its jurisdiction, the outer limits of that jurisdiction, including the concept of "substantial interest", are to be ascertained by reference to the black letter provisions of Chapter 6.  **5.10 Failure to provide written consent for the appointment of a director does not render the appointment invalid under the Corporations Act**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Collins v Zernike Australia Pty Ltd [2006] WASC 67, Supreme Court of Western Australia, Le Miere J, 22 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasc0067.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasc0067.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**  This dispute arose from events at a meeting of the three directors of Zernike Australia Pty Ltd ("Zernike") on 15 December 2005. During the meeting, the chairman ("Mr Why") would not acknowledge the validity of one director ("Mr Collins") and defeated all resolutions by using his capacity as chairman to cast a casting vote. The court held that although Mr Collins had not provided written consent at the time of the meeting, this did not make his appointment invalid. Accordingly, it was held that all resolutions put forward, taking into consideration Mr Collins vote, were legally passed at the meeting.  **(b) Facts**  During a meeting on 31 March 2005 the attendees discussed and agreed that both Mr Collins and Mr Huissen would be appointed as directors of Zernike. Mr Collins consented orally to this appointment at the meeting. The relevant forms (Form 484 - Change to Company Details) were prepared by Mr Collins and signed by Mr Why, who also passed a resolution as director of Zernike that it had been resolved and consented to by both Mr Collins and Mr Huissen that they be appointed directors. However, Mr Collins did not sign and provide Zernike with a written consent to act as a director of a company. He gave evidence that he did not recall ever being provided with documents regarding that consent.  At the meeting on 15 December 2005, Mr Why stated that Mr Collins was not a director as he had not signed the relevant consent. Mr Why refused to recognise Mr Collins’ vote and used his position as chairman to cast a deciding vote against all resolutions put to the meeting.  **(c) Decision**  The two issues considered in this case were:  1. whether it was necessary that a written consent for appointment as director be lodged with Zernike prior to the appointment taking effect; and  2. at what date, if any, were directors validly appointed to Zernike.  Le Miere J considered that section 210D(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) is contravened if a signed consent to act as director is not provided to the company before being appointed. However, his Honour considered that the legislation did not intend that failure to provide consent would affect the validity of appointment. This was supported by section 210M(1) which states that an act done by a director is effective even if their appointment is invalid because the company or director did not comply with the company's constitution or a provision of the Corporations Act. His Honour noted that the penalty for failing to have a signed consent was that the company be liable to a penalty, not that the appointment be deemed invalid.  Le Miere J determined that Mr Collins was appointed as director upon consenting to act as director, which he did orally on 31 March 2005. In any event, Mr Collins provided a written consent prior to the 15 December 2005 meeting. His Honour held that Mr Collins was a properly appointed director at the time of the 15 December 2005 meeting. His Honour noted that there was no basis to challenge the appointment of Mr Huissen, who provided written consent to act as director on 15 May 2005.  His Honour made a further comment that Mr Why's subjective intention as to when appointment should take place was irrelevant in the proceedings and did not detract from actions where Mr Why executed the relevant forms to appoint directors and made a company resolution.  His Honour found that Mr Why acted wrongly in disregarding the votes made by Mr Collins and that the resolutions be passed in accordance with all three directors having one vote.  **5.11 The registration of foreign judgments in Australian courts and applications for Mareva orders in the case of unregistered judgments and third parties**  (By Bronwyn Thomas, Blake Dawson Waldron)  Celtic Resource Holdings Plc v Arduina Holding BV [2006] WASC 68, Supreme Court of Western Australia, Hasluck J, 21 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasc68.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasc68.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 courts will not register a foreign judgment in an appropriate court under the [Foreign Judgments Act 1991 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7536" \t "Default) where the foreign judgment is not enforceable in its original jurisdiction.  The aim of a Mareva injunction is to prevent the abuse of court process by preventing the frustration of its remedies and is a power used sparingly by the courts. Although Mareva injunctions are typically sought against defendants, Mareva injunctions may also be issued against third parties where the third party has power or control over the disposition of the assets of the defendant.  In addition, where a defendant has assets in Australia and a foreign judgment has been, or will be, obtained, Australian courts have an inherent jurisdiction to order a Mareva injunction in relation to those assets, however in exercising such a power courts must, "endeavour to act consistently with the procedural and substantive requirements in the country of the original Court".  **(b) Facts**  Celtic Resources Holdings Plc ("Celtic"), a public company incorporated in Ireland, entered into a Framework Agreement ("Agreement") with Arduina Holdings BV ("Arduina"), a company incorporated in the Netherlands, in November 2002. The Agreement was designed to require Celtic to (in specific circumstances) encourage the transfers of shares by a third party entity to Ardunia and to operate as a condition precedent in respect of certain loan assignments.  Arduina later brought an action against Celtic, claiming pre-contractual misrepresentation and breach of the Agreement for a failure to encourage the transfer of third party shares to Arduina. This action became the subject of an arbitration hearing in London in July 2005 and Arduina's claims were unsuccessful. In February 2006, the arbitrator made a final award in Celctic's favour ordering that Arduina pay Celtic the sum of £916,338.28 for legal and arbitration costs.  **(i) Registration of a foreign judgment under the Foreign Judgments Act 1991 (Cth)**  Under the Arbitration Act 1996 (UK) (UK Act), Celtic applied to have the award registered in the High Court of Justice, Queen's Bench Division and the application was granted by Justice Coleman. The UK Act provides that an arbitration award made by a Tribunal may be registered and enforced in the terms of the award in the same manner as a judgment or order of the court. As permitted under the UK Civil Procedure Rules (Rules), the order was made without notice to Arduina, however at as 20 March 2006 (the date of the Supreme Court hearing in Western Australia), the order had not been served on Arduina. Under the Rules, an order of this type only becomes enforceable at the expiration of a 14 day period after serving the order on the other party or after the conclusion of an unsuccessful challenge to the order lodged within the 14 days period. Consequently, at the time of the hearing in Western Australia, the judgment of the court in the UK was not enforceable.  Celtic brought an ex parte action to have the judgment registered in the Supreme Court of Western Australia ("Supreme Court") under section 6(1) of the Foreign Judgments Act 1991 (Cth) ("Cth Act"). Under section 3 of the Cth Act, a foreign judgment is eligible to be registered in an appropriate court if (among other things) it constitutes "a final or interlocutory judgment made by a court in civil proceedings." Whilst the legislation clearly extended to the UK court and Western Australia (WA) constituted an appropriate court in this case, section 6(6) of the Cth Act provides that, "a judgment is not to be registered if at the date of the application … it could not be enforced in the country of the original court".  In reaching a decision, Hasluck J considered that whilst section 6(3) of the Cth Act does appear to suggest that a court is obliged to register a foreign judgment, section 6(6) was "explicit" that judgments not enforceable in their original jurisdiction could not be registered under the Cth Act. As the judgment was not enforceable in the UK, Hasluck J rejected Celtic's application to have the judgment registered in the Supreme Court of Western Australia.  **(ii) Mareva injunction**  In addition to its application to have the judgment registered, Celtic applied for a Mareva injunction against Arduina and a third party, Austock.  Celtic sought the Mareva injunction on the grounds that there was a risk that the assets of Arduina would be disposed prior to the enforcement of the judgment against it and would therefore frustrate the judicial process. Evidence was placed before the court to the effect that as at 3 August 2004 Arduina held 23,753,406 shares in Emperor Mines Limited (Emperor Mines), a listed company registered in Queensland, constituting a substantial shareholding valued at £8,672,093 as at 31 December 2004.  Further evidence was placed before the court to the effect that, as of 16 November 2004, Austock's interest in Emperor Mines increased from nil to 23,753,406 shares. There was evidence to suggest that Austock was not holding the shares beneficially and that the shares were being held by Austock for Arduina. Consequently, it was on the basis of this information that Celtic sought the Mareva injunction against Austock, an otherwise seemingly unrelated party to the issues.  Celtic sought the Mareva injunction to prevent Arduina from disposing of any or all of its interest in Emperor Mines without the prior consent of Celtic and similar orders were sought in respect of Austock. Celtic claimed that there were a number of factors which indicated a real risk that the assets of Arduina would be dissipated in order to frustrate the judgment of the court.  In reaching his decision Hasluck J canvassed both case law and legislation and made the point that, "the rationale for the grant of a Mareva injunction [is] to prevent the abuse of the process of the Court by the frustration of its remedies" he went on to note that, "the power of a court to grant orders of the Mareva type is as much to be found in [a courts] inherent power to prevent the abuse of its process as in any statutory power to grant such relief as just or convenient."  Hasluck J made it clear that the power of the court to make an order of the Mareva type, was to be "exercised sparingly" and only where a party could demonstrate that in the absence of such an order there was a real and genuine risk that the assets of the defendant would be dissipated and judgment therefore frustrated. His Honour emphasised the fact that a Mareva injunction constitutes an "ancillary remedy" and is, "a limited exception to the general rule that a plaintiff must obtain his judgment and then enforce it". A court, "cannot prevent the defendant from disposing of its assets merely because he fears that there will be nothing against which to enforce his judgment".  As to whether it was possible for a court to order a Mareva injunction against a third party against whom judgment is not sought (in this case, Austock), Hasluck J noted that on the authority of Aspermont Ltd v Lechmere Financial Corp (2002) 27 WAR 1 and the High Court in Cardile v LED Builders Pty Ltd (1999) 198 CLR 380 (Cardile) such an order was in fact possible. In Cardile, it was held that restraint of the third parties activities would be justified where, "the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets of the defendant."  The question as to whether a Mareva injunction could be ordered against a party despite the fact that the proceeding was not registered in the jurisdiction in which the order was sought, was given relatively detailed consideration by Hasluck J resulting in the conclusion that, "Australia's superior courts have at least an inherent jurisdiction to grant Mareva relief in relation to assets in Australia in aid of foreign proceedings."  Hasluck J looked at the High Court's approach to Mareva injunctions and surmised that it has "refined" the Mareva order in recent years by holding that Mareva order is not an injunction and holding that superior courts have "inherent jurisdiction to make freezing orders to prevent the frustration of the process and the view is open that those processes include the enforcement of a foreign judgment when obtained in an Australian Court."  Whilst Hasluck J accepted that Australian courts did have an inherent jurisdiction to grant a Mareva order in relation to assets in Australia where foreign judgment had been obtained, he declined to make such an order in this case on the basis that, "it would circumvent and be inconsistent with the prescribed procedure in the country of origin if a Mareva order was made…which indirectly had the effect of enforcing the judgment in question." Given that the judgment had not yet been registered in the Supreme Court of Western Australia, Hasluck J was of the view that there was no abuse of process or likely abuse of process to protect.  Consequently, in the exercise of his discretionary power Hasluck J dismissed the application for the Mareva order against both Arduina and Austock. |
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