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[View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [odify My Newsfeed](http://my.lawlex.com.au/default.asp?goto=news_sub) [earch Newsfeed Archive](http://my.lawlex.com.au/default.asp?goto=news) [iew user guide](http://my.lawlex.com.au/content/static/LawlexGeneralUserGuide.pdf) [earch the law](http://my.lawlex.com.au/default.asp?goto=search_leg) [bout legislative alert](http://www.lawlex.com.au/content/view/69/0) [bout SH&E Monitor](http://www.lawlex.com.au/content/view/94/146/)[bout Lawlex](http://www.lawlex.com.au/content/view/42/0) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with Lawlex's licence agreement and the relevant licence fee paid by your organisation. 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The arrangements must either be approved by the Australian Securities and Investments Commission (ASIC), or satisfy the requirements specified in the regulations.  The proposed regulation will specify that section 912B is satisfied if licensees have professional indemnity insurance in place. Certain bodies which are regulated by the Australian Prudential Regulation Authority will be exempt from this requirement.  The regulation is expected to have particular impact where inappropriate financial advice has been given and the retail client loses money as a consequence. The regulation will operate in tandem with existing provisions in the Act that provide avenues for retail clients who have suffered loss due, for example, to a defective advice document, to claim compensation from the licensee.  Licensees which provide services to retail clients are already required to have an internal dispute resolution procedure and be a member of one or more external dispute resolution schemes, such as the Financial Industry Complaints Scheme. There are also existing common law avenues of redress that allow investors to claim compensation in circumstances where financial advice has been negligent.  The regulation will be supplemented by ASIC guidance. The draft guidance note, which will assist licensees to put appropriate arrangements in place, will be released by ASIC for public consultation at the time the regulation is made. An earlier draft regulation was released for public consultation in November 2006.  The consultation paper and published submissions can be reviewed on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1181" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.2 ASX share ownership study**  The retail share investors of today are more active and sophisticated than ever before, according to the 2006 Australian Share Ownership Study (the 'Study') released on 17 May 2007 by the Australian Securities Exchange (ASX).  In 2006, approximately 7.3 million people, or 46% of the Australian population aged 18-years or more, participated in the Australian share market, either directly via shares or indirectly via a managed fund or self-managed superannuation fund. In terms of direct share ownership, 6 million people or 38% of the Australian population were direct investors.  The Study was conducted nationally in November 2006 among a randomly selected sample of 2,405 adult Australians. It highlights the incidence of share ownership among the population and offers insights into the investment behaviour and attitudes of retail investors towards the share market. This is the tenth Study in a series dating back to 1991.  The key findings of the study are:   * 46% of Australia's adult population, or 7.3 million people aged 18-years or more, own shares either directly or indirectly through a managed fund or self-managed superannuation fund. In terms of direct share ownership, 6 million people or 38% of the Australian population are direct investors. * In comparison to previous years there has been a decline in share ownership. From 1999 total share ownership hovered at around 50% peaking at 55% in 2004. Total direct share ownership appears to have stabilised at around 40%, after peaking in 2004 at 44%. Those participating indirectly in the share market appear to have decreased from 1999. * Those leaving the share market tended to be inactive investors who typically acquired their shares passively via large public floats or the listing of once member-owned mutual organisations. They were largely uninterested in the market. They exited to fund debts, namely mortgages and residential property investment. * Today's share investors are more sophisticated. 2006 saw an increase in those owning overseas shares, up from 7% in 2002 to 19% in 2006. * Share holders hold on average more companies in their share portfolio. In 2006 they held on average 9 companies, an increase from 6 in 2004, 7 in 2003 and 6 in 2002. Their portfolio also contains a mixture of large and small companies (50% in 2006, up from 44% in 2004) across more than one sector (75% spread their share portfolio across two or more industry sectors). * Share holders are more active. The average number of shares bought or sold increased to 8 in 2006, up from 5 in 2002, 6 in 2003, and 7 in 2004. The average share parcel traded also rose - $14,200 in 2006 against $11,150 in 2004, $10,650 in 2003 and $8,830 in 2002. * Overall attitudes towards share investing remain positive. The Australian share market is still perceived to be well regulated and investors prefer to invest in 'companies that are socially and environmentally responsible'. They rely 'very much on the advice of experts' 'when it comes to investing in shares' and 'thoroughly enjoy managing their investments'. * Investors were less likely to say shares will 'never be a major part of their investments', to be 'confused' or unsure of 'where to start', and are more confident that they know how to trade. * Knowledge about the share market has improved with 59% claiming to be 'very' or 'somewhat knowledgeable' about shares in 2006 up from 50% in 2004. * Sources that most influence investment decisions continue to be newspapers, friends and family, and financial planners. * A typical share owner was just as likely to be male as female, aged at least 35-years-old with tertiary qualifications, and have a household income of at least $100,000. Direct share owners were equally likely to be from any Australian state (yet to a lesser extent from Queensland) and tend to be from a capital city. * Compared to 2004, the decline in direct share ownership appears to be consistent across all age groups, education levels, household income and states, yet more evident among males and those from regional areas. * Future share market activity remains positive with 58% planning to increase the proportion of money invested in the share market in the next 12 months.   The complete report is available on the [ASX website](http://www.asx.com.au/media.htm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.3 Sarbanes-Oxley compliance costs decrease by 23%**  On 16 May 2007, Financial Executives International (FEI) announced the results of its sixth Sarbanes-Oxley compliance survey, which found that compliance costs associated with section 404 of the Sarbanes-Oxley Act cost US companies less in year three of adoption than in each of the first two years. FEI surveyed 200 companies to gauge experiences in complying with section 404. Responding companies have average revenues of US$6.8 billion.  According to the FEI survey, which included 172 "accelerated filers" - companies with market capitalizations above US$75 million - total average cost for section 404 compliance was US$2.9 million during fiscal year 2006, which represents a 23 percent decrease from 2005 totals. The data also shows reductions in internal and external costs of compliance, with internal staff time decreasing by 10 percent. The lower costs can be attributed to companies' increased efficiencies in complying with section 404.  **(a) Lowering of costs & fewer internal and non-auditor external hours**  In year three of section 404 compliance, accelerated filers reported a continued drop in both internal and external people hours. Notably, while companies have achieved double-digit decreases in both internal and external hours (other than external auditor) spent on section 404 compliance, auditor attestation fees have remained flat.   * Companies said that they required an average of 18,070 people hours internally to comply with section 404 in 2006, a 10 percent decrease from the previous year. * Companies said that they required an average of 3,382 external people hours (other than external auditor) to comply with section 404 in 2006, a 14 percent drop from the year before. * Auditor attestation fees for section 404, paid in addition to annual financial statement audit fees by accelerated filers, averaged US$1.2 million in 2006, only slightly less (0.8 percent) than in 2005.   As expected, the survey found that respondents with centralized operations had significantly lower total costs of compliance in 2006 than did those respondents with decentralized operations.   * Total average 2006 compliance costs for companies with centralized operations were US$1.7 million. * Total average 2006 compliance costs for companies with decentralized operations were US$4.0 million, 58 percent higher than for those with centralized operations.   **(b) The benefits and costs of section 404**  For each benefit, the survey revealed a direct correlation between the benefit and the size of the company, with a greater percentage of larger companies on average agreeing with the value of the benefit.   * When asked whether the benefits of compliance with section 404 have exceeded their costs, 22 percent, on average, agreed, with 78 percent saying instead that the costs have exceeded the benefits. * The number of respondents agreeing that benefits have exceeded costs saw a slight increase from last year's 15 percent. * 60 percent of accelerated filer companies agreed that compliance with section 404 has resulted in more investor confidence in their financial reports. * 46 percent agreed that financial reports are more accurate. * 48 percent agreed that financial reports are more reliable. * 34 percent agreed that compliance with section 404 has helped prevent or detect fraud.   The full survey results, including costs by company size, historical cost comparisons and an executive summary are available on the [FEI website](http://www.fei.org/eweb/DynamicPage.aspx?site=_fei&Webcode=ferf_404survey" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.4 2007 US national money laundering strategy released**  On 3 May 2007, the US Departments of Treasury, Justice, and Homeland Security joined together in issuing the 2007 National Money Laundering Strategy, a report detailing continued efforts to dismantle money laundering and terrorist financing networks. The 2007 Strategy addresses the priority threats and vulnerabilities identified by the Money Laundering Threat Assessment released in 2006.  The report is available on the [US Treasury website](http://www.treas.gov/press/releases/docs/nmls.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.5 Australia's financial markets 2007**  On 2 May 2007, Axiss Australia published "Australia's Financial Markets 2007". The report discusses the strength of Australia's equity, debt, derivatives and foreign exchange markets, as well as specialised markets such as hedge funds, electricity derivatives and renewable energy certificates, and briefly discusses the regulatory and business environment.  The report includes the following information:   * The nation's equity, debt, foreign exchange and derivatives markets have doubled in size in the past five years to reach A$100 trillion in turnover. * Australia's equity market is now the largest in Asia by free-float market capitalisation (ex Japan), and its interest rate listed derivatives market is the most liquid. * The Australian dollar/US dollar pair is the world's fourth most actively traded currency pair, while turnover in Australian non-government bonds has tripled over the past four years.   The report is available on the [Axiss Australia website](http://www.axiss.gov.au/assets/documents/axissinternet/Australia%27s%20Financial%20Markets%20200720070430085040.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.6 Practice statement on share buy-backs released**  On 2 May 2007, the Australian Taxation Office (ATO) released a practice statement providing guidance to ATO staff on share buy-backs.  The statement outlines the existing processes that staff must follow when considering the consequences of on-market and off-market share buy-backs.  The practice statement will also assist with the Board of Taxation's review of off-market share buy-backs as announced by the Treasurer in October 2006. One of the Board's terms of reference are the administrative practices of the Tax Office relating to share buy-backs. However, the practice statement should not be seen as predetermining any recommendations arising from the Board's review.  Practice statement PSLA 2007/9 is available from the [ATO legal database](http://www.ato.gov.au/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.7 Debate on future EU policy on retail financial services**  On 2 May 2007, the European Commission set out, in the form of a Green Paper, its vision for future EU policy on retail financial services, which are financial products such as bank accounts, loans, mortgages, investments and insurance provided to individual consumers. The Green Paper aims to strengthen the Commission's understanding of the problems faced by consumers and industry in this area, to set out the Commission's overarching objectives and to highlight areas where more work may be needed. The Commission welcomes comments on the Green Paper by 16 July 2007.  Retail financial services are an essential part of the everyday lives of EU citizens. However, despite significant progress in recent years, studies show that retail financial services integration appears not yet to have reached its potential and that competition seems insufficient in some areas, leaving EU consumers unable to take full advantage of the benefits of the Single Market.  The Commission seeks to develop integration in retail financial services markets in three main ways:  First, the provision of products that meet consumers' needs, offering choice, value and quality, can be ensured through properly regulated open markets and strong competition.  Second, European consumers need confidence to make the right choices. This can be achieved by ensuring that consumers are properly protected where appropriate, and that providers are financially sound and trustworthy.  Third, consumer confidence in seeking out the best deals to meet their needs, regardless of the location of the financial services provider, can be promoted by empowering consumers to make the right decisions for their financial circumstances. Empowerment can be developed through financial literacy, clear, appropriate and timely information provision, high-quality advice and a level playing field between products perceived as having similar characteristics.  Responses should be sent to: [markt-retail-consultation@ec.europa.eu](mailto:markt-retail-consultation@ec.europa.eu" \t "_new). Responses will be placed on the Commission's website unless explicitly indicated otherwise.  The Green Paper and information on how to participate in the hearing is available on the [Europa website](http://ec.europa.eu/internal_market/finservices-retail/policy_en.htm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.8 Financial market preparedness and pandemic planning**  On 1 May 2007 the US Government Accountability Office (GAO) published its third report since the 11 September 2001 terrorist attacks that assesses progress that market participants and regulators have made to ensure the security and resiliency of the US securities markets. This report examines (1) actions taken to improve the markets capabilities to prevent and recover from attacks; (2) actions taken to improve disaster response and increase telecommunications resiliency; and (3) financial regulators efforts to ensure market resiliency. GAO inspected physical and electronic security measures and business continuity capabilities using regulatory, government, and industry-established criteria and discussed improvement efforts with broker dealers, banks, regulators, telecommunications carriers, and trade associations.  To improve the readiness of the securities markets to withstand potential disease pandemics, the GAO recommends that securities and banking regulators should consider taking additional actions; including providing formal expectations that market participants' plans address even severe pandemic outbreaks and setting a date by which such plans should be completed. Banking and securities regulators indicated they believe organizations are adequately addressing this risk, but will consider taking the recommended actions if progress lags. GAO believes that giving greater consideration now would better assure market readiness.  The report is available on the [GAO website](http://www.gao.gov/new.items/d07399.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.9 UK FRC publishes finalised strategic framework and plan for 2007/08**  On 30 April 2007, the UK Financial Reporting Council (FRC), the independent regulator responsible for promoting confidence in corporate reporting and governance, published its finalised Strategic Framework and its Plan for 2007-2008.  **(a) Strategic framework**  The Strategic Framework sets out the outcomes that the FRC believes contribute to confidence in corporate reporting and governance. It defines these outcomes in relation to six key areas: corporate governance, corporate reporting, auditing, actuarial practice, the professionalism of accountants and actuaries and the FRC's own effectiveness as a regulator.  It is in the nature of the FRC's role that while some of the elements set out in the Framework are principally the responsibility of the FRC, most depend principally on market participants or other agencies. The FRC sees the Framework as a way of facilitating co-operation between its wide range of stakeholders to promote well-founded confidence in corporate reporting and governance in the UK.  **(b) Plan for 2007-2008**  The activities and projects which the FRC propose to undertake in 2007/08 are derived from its Strategic Framework. They are intended to contribute to the achievement over the medium term of the outcomes set out in the Framework.  The key themes of the FRC's Plan for 2007/08 are that it will:   * Lead public debate in the UK on the major issues affecting confidence in corporate reporting and governance. * Monitor corporate reporting and governance practices in the UK and take enforcement action where appropriate. * Increase participation in the development of international standards and co-operation with international regulatory organisations. * Contribute to modifying the UK regulatory regime to take account of changes in European and UK legislation.   Further information is available on the [FRC website](http://www.frc.org.uk/press/pub1311.html" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.10 Internal control survey**  Three-quarters (75%) of respondents - comprising some of the world's largest organizations - plan to invest more in internal control after seeing significant business benefits, according to a new survey published by Ernst & Young on 30 April 2007.  However, despite investments already made, the Ernst & Young "Internal Control Survey 2007" - conducted among non-SEC company registrants with a turnover in excess of ?1bn in 17 countries - shows that many CFOs and Heads of Internal Audit still believe some internal controls are ineffective, with the biggest 'blind spots' being controls over expansion into international markets, post-acquisition integration, and real estate and construction projects.  Controls over IT program change management and user access and security were also singled out as areas of concern.  The survey investigates whether those organizations not subject to Sarbanes-Oxley are investing in internal control; the effectiveness of controls in financial, operational, and IT areas; and whether business benefits are being derived from these investments.  **(a) Survey findings**  With international investors increasingly demanding more transparency and "no surprises", an interesting point to note from the survey is that 50% of respondents cite "positive influence over investor confidence" as a key business driver for future investments in internal control. Other drivers for future investments were also business benefit related, focusing mainly in enhancements to processes and the underlying control structure (89%) and better understanding of major risk areas (86%).  However, many respondents were also aware of control weaknesses or "blind spots" to potential areas of significant risk.  For financial controls, areas of potential concern were in contract accounting (48%), deferrals (37%) and tax (37%). In all cases, the proportion of respondents claiming that financial controls were "very effective" was relatively small.  In non-financial control areas there is significant scope for improvement in almost every category (between 20-40% saying "room for improvement"). The main business and operational areas with opportunities for improvement are:   * Expansion into new international markets (59%); * Post-acquisition integration (58%); * Real estate/construction projects (55%); * Business continuity planning (54%) and * IT implementation/upgrades (51%).   One notable absence for companies in the survey is the existence of a formal fraud prevention program - 68% do not have one in place, despite over one-third of respondents rating this as important or very important to have in place.  Analysis also suggests that the perception of the status of internal control differs according to an individual's role. While 36% of CFOs responding to the survey say that their risk assessment covers operational and business areas, only 19% of Heads of Internal Audit believe that these risk areas are assessed in their companies.  Other key findings of the survey are:   * 75% plan additional investments to strengthen internal controls in next 12-24 months, including key business/operational risk areas (51%); IT (49%); better alignment of internal controls to company strategy and key risks (44%); strengthening company-level controls (42%). * Over one-third (35%) do not conduct an annual risk assessment. * Despite 72% assessing risks in strategic, compliance, operational, and financial areas, only 57% have a monitoring program focused on financial and operational controls, with 21% focusing monitoring on financial controls only. * 40% of Audit Committees are active in making sure effective internal controls exist and are operating effectively, with 16% having a limited involvement.   Further information is available on the [Ernst & Young website](http://www.ey.com/global/content.nsf/International/Home" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.11 Report on audit choice**  On 24 April 2007, the UK Financial Reporting Council (FRC) published the interim report of the Market Participants Group that is advising the FRC on its choice in the UK audit market project.  **(a) Background**  The Market Participants Group was established in October 2006 to provide advice to the FRC on possible actions that companies, investors and audit firms could take to mitigate the risks arising from the characteristics of the market for audit services to public interest entities in the United Kingdom.  **(b) Findings**  The Group noted that due to the level of concentration in the audit market there is a high degree of concern amongst market participants over the uncertainty and costs that could arise in the event of one or more of the Big Four audit firms leaving the market. This risk could be mitigated through increased choice of auditors. However a number of current market characteristics, when taken together, reduce the propensity of non-Big Four firms to offer to audit public interest entities and also reduce the propensity of public interest entities to select non-Big Four firms as auditors.  **(c) Provisional recommendations**  The Group believes that its 15 provisional recommendations could, when taken together, enhance the efficiency of the market and in so doing mitigate the risks associated with a firm leaving the market.  The main objectives of the recommendations are to:   * Make investment in the supply of audit services more feasible. * Reduce the perceived risks to directors of selecting a non-Big Four firm. * Improve the accountability of boards for their auditor selection decisions. * Improve choice from within the Big Four. * Reduce the risk of firms leaving the market without good reason. * Reduce uncertainty and disruption costs in the event of a firm leaving the market.   The provisional recommendations set out actions that could be taken by companies, investors and audit firms working collectively, some of which require support from regulators, to allow the market to work more efficiently. The Group believes that its package of provisional recommendations could result in individual market participants having greater incentive to act in ways that could, in the long term, lead to increased choice of auditors.  The Group considers that agreement over market-based measures in the UK would make a useful contribution to the wider international debate on audit market concentration. A wide degree of market support would be needed to ensure the success of market-based actions and the Group will therefore consider responses to the consultation before finalising its recommendations.  List of recommendations:   1. The FRC should promote wider understanding of the possible effects on audit choice of changes to audit firm ownership rules, subject to there being sufficient safeguards to protect auditor independence and audit quality. 2. Audit firms should disclose the financial results of their work on statutory audits and directly related services on a comparable basis. 3. In developing and implementing policy on auditor liability arrangements, regulators and legislators should seek to promote audit choice, subject to the overriding need to protect audit quality. 4. Regulatory organisations should encourage appropriate participation on standard setting bodies and committees by individuals from different sizes of audit firms. 5. The FRC should continue its efforts to promote understanding of audit quality and should promote greater transparency of the capabilities of individual audit firms. 6. The accounting profession should establish mechanisms to improve access by the incoming auditor to information relevant to the audit held by the outgoing auditor. 7. The FRC should provide independent guidance for audit committees and other market participants on considerations relevant to the use of firms from more than one audit network. 8. The FRC should amend the section of the Smith Guidance dealing with communications with shareholders to include a requirement for the provision of information relevant to the auditor re-selection decision. 9. When explaining auditor selection decisions, Boards should disclose any contractual obligations to appoint certain types of audit firms. 10. Investor groups, corporate representatives and the FRC should develop good practices for shareholder engagement on auditor appointment and re-appointments and should consider the option of having a shareholder vote on audit committee reports. 11. Authorities with responsibility for ethical standards for auditors should consider whether any rules could have a disproportionately adverse impact on auditor choice when compared to the benefits to auditor objectivity and independence. 12. The FRC should review the Independence section of the Smith Guidance to ensure that it is consistent with the relevant ethical standards for auditors. 13. Regulators should develop protocols for a more consistent response to audit firm issues based on their seriousness. 14. Every firm that audits public interest entities should comply with the provisions of the Combined Code on Corporate Governance with appropriate adaptations or give a considered explanation if it departs from the Code provisions. 15. Major public interest entities should consider the need to include the risk of the withdrawal of their auditor from the market in their risk evaluation and planning.   Further information on the work on Choice in the UK audit market is available on the [FRC website](http://www.frc.org.uk/about/auditchoice.cfm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.12 SEC announces next steps relating to International Financial Reporting Standards**  On 24 April 2007, the US Securities and Exchange Commission (SEC) announced a series of actions it intends to take relating to the acceptance of financial reporting in International Financial Reporting Standards (IFRS) as published by the International Accounting Standards Board (IASB).  The Commission anticipates issuing a Proposing Release this year that will request comments on proposed changes to the Commission's rules which would allow the use of IFRS in financial reports filed by foreign private issuers that are registered with the Commission. The approach in the proposed rule would be to give foreign private issuers a choice between IFRS and US GAAP. In addition, the Commission plans a Concept Release relating to issues surrounding the possibility of treating US and foreign issuers similarly in this respect by also providing U.S. issuers the alternative to use IFRS.  The Commission's rules currently require that foreign private issuers who report in IFRS, or any other non-US GAAP, provide a reconciliation of those financial statements to US GAAP. The Commission's planned proposal would address eliminating that reconciliation requirement with respect to financial statements filed in IFRS beginning in 2009.  Because the elimination of the reconciliation requirement will permit some, but not all, registrants to have a choice between IFRS and US GAAP, it raises the question whether all registrants should be able to report under either IFRS or US GAAP. The planned Concept Release will permit the Commission to gather more information on this subject.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2007/2007-72.htm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.13 Principles based regulation**  On 23 April 2007, the UK Financial Services Authority (FSA) published a paper setting out its current thinking on its move towards a more-principles-based regulatory regime. The paper, entitled 'Principles-based Regulation - Focusing on the Outcomes that Matter', accompanied a conference at which FSA senior management, financial services industry leaders and other interested parties debated the challenges and opportunities presented by a move away from more detailed rules to a principles-based environment.  To help firms the FSA will provide, either directly or through confirmation of industry guidance, a greater range of clearly sign-posted information to enable firms to plan their business processes and controls with confidence.  A copy of the paper 'Principles-based Regulation - Focusing on the Outcomes that Matter' is available on the [FSA website](http://www.fsa.gov.uk/pubs/other/principles.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.14 US House of Representatives passes legislation requiring shareholder advisory vote on executive compensation**  On 20 April 2007, the US House of Representatives passed H.R. 1257, the "Shareholder Vote on Executive Compensation Act" by a vote of 269 to 134, to allow shareholders of public companies to approve or disapprove of a company's executive compensation plans. H.R. 1257 will not set any limits on pay, but will ensure that shareholders have a nonbinding and advisory vote on their company's executive pay practices. The legislation passed by the House also contains a separate advisory vote if a company gives a new, not yet disclosed, "golden parachute" while simultaneously negotiating to buy or sell a company. Advisory votes on compensation have been used in the United Kingdom and Australia. The legislation has not been considered by the US Senate.  Further information on H.R. 1257, the "Shareholder Vote on Executive Compensation Act," is available on the [House Committee on Financial Services website](http://financialservices.house.gov/ExecutiveCompensation.html" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.15 US CEO remuneration survey**  Chief executive officers at the largest US companies saw their annual bonuses increase 13 percent and the value of their equity-based compensation holdings grow nearly 50 percent last year, according to an analysis of proxy statements conducted by Watson Wyatt Worldwide, a global consulting firm.  According to the analysis, median annual bonuses for CEOs increased 13 percent to US$2.2 million last year. At these same companies, the median growth in earnings per share was 14 percent. Earnings per share are a commonly employed performance metric in annual incentive programs. Base salaries also grew by a more modest 4 percent to a median US$1.1 million. The proxy analysis is based on 92 large companies whose CEOs remained in their positions in 2005 and 2006.  The analysis also found that the median value of CEOs' equity compensation, which includes in-the-money stock options and restricted stock awards, increased 48 percent last year to US$30.2 million. This was fueled in part by the 18 percent increase in total returns to shareholders (TRS) last year. For CEOs at high-performing companies (those with a median 30 percent TRS), equity compensation nearly doubled last year to US$31.3 million, while CEOs at low-performing companies (7 percent TRS) saw their equity compensation increase by 13 percent to US$25.3 million.  Further information is available on the [Watson Wyatt website](http://www.watsonwyatt.com/news/press.asp?ID=17245" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.16 Corporate political spending**  Faulting the largest US companies for weak regulation of their political spending, a report released in April 2007 by the Center for Political Accountability (CPA) calls for the adoption of an 11-point model code of conduct.  The CPA report, entitled Open "Windows: How Company Codes of Conduct Regulate Political Spending and a Model Code to Protect Company Interests and Shareholder Value", found that the codes of conduct of most S&P 100 companies handled political spending in "a weak and cursory manner." According to the study, none of the companies surveyed included comprehensive policies in their codes to ensure broad political transparency and accountability and ethical political behaviour.  Major findings of the CPA survey which covered the codes of conduct and policies on political spending of the S&P 100 are:   * Of the 81 companies that address the topic of corporate political spending in their codes of conduct, none include comprehensive policies to ensure political transparency and accountability. * Ten companies do not publicly disclose their policies governing corporate political contributions. Seven of these 10 made significant political contributions in the 2004 election cycle. * Only 34 companies in the S&P 100 require board oversight of their political contributions. * Only 17 companies in the S&P 100 publicly disclose their political contributions made with corporate funds. * Only 62 companies in the S&P 100 state that they require prior approval of political contributions by management, legal counsel, or the board of directors. Several of the companies that do not disclose prior approval policies made significant donations in the 2004 election cycle. * Only 55 companies in the S&P 100 disclose the executive officers or department responsible for approving corporate political donations.   Under provisions of the model code, companies would:   * disclose all expenditures of corporate funds on political activities, and all senior management officials responsible for approving corporate political expenditures. * disclose soft money political contributions and dues and other payments made to trade associations and other tax-exempt organizations that are or that it anticipates will be used for political expenditures. * disclose political expenditures, including direct and indirect political contributions (including in- kind contributions) to candidates, political parties or political organizations; independent expenditures; electioneering communications on behalf of a federal, state or local candidate; and the use of company time and resources for political activity. * require board of director monitoring of the company's political spending, receipt of regular reports from corporate officers responsible for the spending, supervision of policies and procedures regulating the spending, and review of the purpose and benefits of the expenditures. * require prior written approval of all corporate political expenditures from the General Counsel or Legal Department. * commit not to give contributions in anticipation of, in recognition of, or in return for an official act; reimburse employees directly or through compensation increases for personal political contributions or expenses; pressure or coerce employees to make any personal political expenditures or take any retaliatory action against employees who do not. * issue an annual report on their website on their adherence to their code for corporate political spending.   The report, which was based on a CPA survey of company codes conducted between June 2006 and January 2007, can be viewed on the [CPA website](http://www.politicalaccountability.net/files/PR-04-02-07.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.17 IPOs in Greater China raise record high of US$62 billion**  A PricewaterhouseCoopers report has found that the total funds raised from IPOs in the Greater China Capital Market in 2006 reached a record high level of US$62 billion for the first time, exceeding the aggregated amount of US$48 billion raised from IPOs in the United States (New York Stock Exchange, NASDAQ and American Stock Exchange). The two mega IPOs, namely Industrial and Commercial Bank of China (ICBC) and Bank of China (BOC), contributed significantly to this result.  In 2006, there were a total of 140 IPOs in Greater China. The average deal size was US$440 million, up from US$260 million in the previous year. This was higher than the average deal size of US$220 million in the United States and US$130 million in the United Kingdom. Moreover, there was generally an increase in pricing, in terms of price earnings multiple (P/E), of IPOs across the Greater China capital market.  The aggregated market capitalisation in the Greater China capital market at the end of 2006 amounted to US$3,455 billion, an increase of 79% when compared with the end of 2005, while 2006 annual trading value in Greater China nearly doubled to US$2,969 billion. There was an active foreign buying interest in shares listed on the Hong Kong Stock Exchange.  ICBC was the first company listed concurrently on both the Hong Kong Stock Exchange (H-share) and Shanghai Stock Exchange (A-share). By the end of 2006, there were 37 companies dually listed on the Hong Kong Stock Exchange (with price set in Hong Kong dollars), as well as the Shanghai or Shenzhen Stock Exchange (with price set in renminbi).  At the end of 2006, the market capitalisation of the Greater China capital market was 107% of Greater China's Gross Domestic Product (GDP) as compared to 71% in 2005. However, this ratio was still behind those of mature capital markets such as United Kingdom (at 152% of GDP) and United States (at 148% of GDP). In addition, the annual trading value in the Greater China capital market was 86% of its market capitalisation in 2006, while it was 200% in the United Kingdom and 174% in the United States.  The Greater China IPO Watch 2006 is an overview of the IPOs and listing activities on Greater China's principal stock markets, including Hong Kong, Shanghai, Shenzhen and Taiwan. The analysis covers companies listed in these stock markets from 1 January to 31 December 2006. For comparability purposes, all figures in the report have been translated into U.S. dollars (US$) at the applicable closing exchange rate at each year-end.  Further information is available on the [PricewaterhouseCoopers website](http://www.pwc.com/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.18 IPO activity in Australia**  PricewaterhouseCoopers has published an analysis of IPO activity in Australia in 2006. IPO activity declined 25 per cent in 2006, despite a market rise of 20 per cent.  The 2006 analysis shows that there were a total of 71 IPOs completed, raising close to $7 billion - excluding resources, compliance and backdoor listings. In comparison, the previous year saw 94 IPOs completed, raising $12.0 billion.  In 2006, 11 IPOs cited 'vendor sell-down' or 'exit' as the primary purpose for listing, reflecting the competitiveness of exits via IPO (compared to a trade sale).  The property trust sector was the only sector to raise more funds in 2006 than the previous year.  In 2006, large cap floats continued to achieve significant pricing premiums over small caps of around 45 per cent.  Forecast price to earnings ratios (P/Es) for small cap floats rose slightly to 9.1 times (compared with 8.5 times in the prior year), whilst P/Es for large caps rose more strongly, to 13.2 times (from 10.5 times).  The survey is available on the [PricewaterhouseCoopers website](http://www.pwc.com/extweb/ncpressrelease.nsf/42e3ba9660db98bc80257148004ee49a/214b7862be53dc95ca2572a50023d043/$FILE/SurveyOfSharemarketFloats.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231)  **1.19 ASX 200 executive and board remuneration report**  Ernst & Young has published an analysis of the remuneration practices of senior executives and non-executive directors (NED) of the ASX 200 companies. The 2006 analysis revealed that the impacts of the changing remuneration environment on executive and NED remuneration practices included:   * Stabilising of the remuneration mix with the proportions of fixed and variable executive remuneration remaining relatively constant when compared with 2005. * A continued trend to deferral of a portion of short-term incentive (STI) awards. * A further increase from FY05 in the use of performance rights plans and performance share plans, although share options remained the most common long-term incentive (LTI) plan structure. Consistent with FY05, the most common plan type introduced in FY06 was the performance rights plan. * Continued use of Total Shareholder Return (TSR) measured relative to other companies as the most common LTI performance measure overall as well as in new LTI plans introduced in the most recent financial year. * A significant number (30%) of LTIs using dual performance measures. In addition, more LTI plans are using performance measures other than relative TSR and absolute Earnings Per Share (EPS) than in previous years. * A change to the typical managing director contract structure from fixed term contracts to rolling contracts with twelve month notice periods. * An increase in fees for individual NEDs, including chairman fees as well as fees for membership or chairing of board subcommittees. * Only a small minority of companies continuing to provide retirement benefit arrangements to their NEDs and a slight decrease in the number of companies operating NED salary sacrifice arrangements.   In the coming year, Ernst & Young anticipates that the continued impact of increased shareholder awareness, shortage of talent and increased transaction activity will affect remuneration policies and practices in the following ways:   * Ongoing focus on linking variable reward elements of executive remuneration to different aspects of corporate and team performance. * An increase in the number of incentive plans and strategies with a strong retention element - such as deferral plans, medium term incentives and plans with a company match component - which allow executives to build up a shareholding and increase alignment with shareholders. * An increase in the use of ad-hoc arrangements implemented purely to address retention issues. * Shareholders and companies will find more common ground in relation to the design of LTI plans and the measures that will drive corporate performance, create shareholder value and influence executive behaviour. * Minimum shareholding requirements for executives will become more commonplace. Ernst & Young expects this practice to follow the lower mandatory requirements seen in the UK rather than the significant shareholding requirements seen in the US. * It will become harder to obtain a favourable vote on the Remuneration Report if the company has made extensive changes to its remuneration approach but communication and engagement with investors have not occurred.   Further information is available on the [Ernst & Young website](http://www.ey.com/Global/download.nsf/Australia/Tax_-_2007_Executive_and_Board_Remuneration_Analysis_0307/$file/TAX_ASX200_Executive_Board_Remuneration.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%231) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007_files/spacer%281%29.gif | | |  | | --- | | **2.1 ASIC issues report on relief applications - October to December 2006**  On 15 May 2007, the Australian Securities and Investments Commission (ASIC) released a report outlining its recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) between 1 October and 31 December 2006.  The report, "Overview of decisions on relief applications (October to December 2006)", provides a summary of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers, from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act.  The report also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report. The appendix now also contains hyperlinks to the relevant ASIC Gazette where those instruments have been published.  ASIC is vested with powers to exempt or modify the Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act.  ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where business can be facilitated without harming other stakeholders.  ASIC publishes a copy of most of the exemption and/or modification instruments issued in the ASIC Gazette.  Applying for relief:   * Applications for relief must be in writing and should address the requirements set out in Policy Statement 51 [PS 51] Applications for relief. * Applications can be submitted electronically to: [applications@asic.gov.au](mailto:applications@asic.gov.au" \t "_new). * More information on applying for financial services relief is available at [http://www.asic.gov.au/fsrrelief](http://www.asic.gov.au/fsrrelief" \t "_new). * Information on applying for corporate finance relief is available at [http://www.asic.gov.au/cfrelief](http://www.asic.gov.au/cfrelief" \t "_new).   ASIC has published previous information releases on its relief decisions including:   * Information Release IR 07/01 ASIC issues report on relief applications - July to September 2006 (18 January 2007); * Information Release IR 06-33 ASIC issues report on relief applications decided between April to June 2006 (29 September 2006); and * Information Release IR 06/27 ASIC report on relief applications expands to include corporate finance applications (25 July 2006).   Copies of the reports are available on the [ASIC website](http://www.asic.gov.au/" \t "_new) or by calling ASIC's Infoline on 1300 300 630  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%232)  **2.2 Appointments of Mr Tony D'Aloisio as Chairman and Mr Jeffrey Lucy AM as a Commissioner of ASIC**  On 14 May 2007, the Australian Treasurer, the Honourable Peter Costello MP, announced the appointments of Mr Tony D'Aloisio as Chairman and Mr Jeffrey Lucy AM as a Commissioner of the Australian Securities and Investments Commission (ASIC). Mr D'Aloisio has been appointed as Chairman from 13 May 2007 for a four-year period and Mr Lucy has been appointed as a Commissioner from 13 May 2007 for a two-year period.  Mr D'Aloisio was appointed as a full-time Commissioner of ASIC on 22 November 2006 for a three-year term. Mr D'Aloisio has extensive public and private sector experience and has been involved in business policy and regulation for over 30 years. He has recently held the position of Managing Director and Chief Executive Officer of the Australian Stock Exchange. In addition, he has practised law and has been a managing partner of a major Australian law firm.  Mr Lucy commenced with ASIC in 2003 as a Commissioner, became the acting ASIC Chairman at the end of 2003 and was appointed Chairman in 2004. Mr Lucy is a Chartered Accountant and a Fellow of the Institute of Chartered Accountants in Australia (ICAA), the National Institute of Accountants and the Australian Institute of Company Directors. He was made a Member of the Order of Australia for his contribution to the accounting profession, particularly through the ICAA and to the business sector as an adviser on corporate and taxation reform.  The appointments were approved by the Governor-General at the Executive Council meeting of 10 May 2007.  Mr Jeremy Cooper was appointed as Deputy Chairman of ASIC on 12 July 2004 for a five-year term.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%232)  **2.3 ASIC and Tax Office sign new MOU**  On 11 May 2007, the Australian Securities and Investments Commission (ASIC) Chairman Jeffrey Lucy and Tax Commissioner Michael D'Ascenzo signed a new memorandum of understanding to consolidate and strengthen the working relationship between the two agencies.  The new MOU is a principles-based document that will underpin the future relationship between ASIC and the Tax Office.  The new MOU does not affect the legal position on what information may or may not be disclosed to the other agency. Both agencies remain subject to existing secrecy and confidentiality provisions in the law.  The new MOU replaces an earlier memorandum created in 2003.  The MOU is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/MOU_ASIC_ATO_07.pdf/$file/MOU_ASIC_ATO_07.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%232)  **2.4 ASIC consults on relief for some arrangers of group insurance**  On 7 May 2007, the Australian Securities and Investments Commission (ASIC) issued a consultation paper seeking submissions from the public on its proposals to offer exemptions for some bodies that arrange group insurance.  ASIC is seeking feedback to help it consider exemption for some bodies which arrange group insurance policies, such as sporting and community associations, from the licensing provisions of Chapters 7 and 5C of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  Given the role of certain kinds of insurance arrangers, ASIC considers that strict compliance might be disproportionately burdensome due to the significant costs associated with holding an AFS licence and registering a managed investment scheme. When group purchasing bodies are small industry bodies or not-for-profit associations, it may not be economical for them to obtain an AFS licence or to register a managed investment scheme.  Further, without relief, it is likely that insurance costs for consumers may increase and/or there may be less availability of insurance cover for consumers.  ASIC is also consulting on proposals for technical relief for insurers from the product disclosure statement provisions when a person to be covered under a group insurance product would have acquired the product as a wholesale client if they were the insured.  The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/070507_ConsultationPaperInsurance%20Arrangers.pdf/$file/070507_ConsultationPaperInsurance%20Arrangers.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%232)  **2.5 ASIC consults on proposals to modify requirements for management rights schemes**  On 7 May 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting comment on its proposal to modify existing relief for management rights schemes.  Management rights schemes are managed investment schemes that involve holiday letting arrangements for strata units.  The consultation paper sets out ASIC's proposal to modify Policy Statement 140 Serviced strata schemes [PS 140] and includes proposals on:   * granting AFS licensing relief for certain people giving financial product advice concerning participation in management rights schemes; * how Part 7.9 Financial Product Disclosure and other provisions relating to issue, sale and purchase of financial products of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) applies to management rights schemes; * clarifying ASIC relief for the upfront acquisition of furniture, and when ASIC's relief applies where an operator provides a rental guarantee; and * whether there is a case for reviewing the furniture and fittings expenditure fund limit.   ASIC invites comments on the proposals set out in the consultation paper by 9 July 2007.  A management rights scheme is an arrangement under which the owners of strata units in a hotel, motel or serviced apartment complex make their units available to an operator who conducts a letting service. Each strata unit owner is entitled to a share of the income earned by the operator in letting out all the participating strata units.  Currently conditional relief is provided for management rights schemes under Class Order [CO 02/305] Management Rights Schemes and Class Order [CO 02/304] Management Rights Schemes from the licensing and managed investment scheme requirements under the Act.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%232) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007_files/spacer%281%29.gif | | |  | | --- | | **3.1 ASIC releases annual assessment of Australian Securities Exchange**  On 10 May 2007, the Australian Securities and Investments Commission (ASIC) released its annual assessment of the Australian Securities Exchange (ASX Limited).  ASIC Chairman, Jeffrey Lucy, said the assessment again confirms that the ASX has the necessary measures in place to ensure that Australia's market is properly supervised.  ASIC's assessment found that the ASX has adequate arrangements for supervising the market, including arrangements for:   * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way; * monitoring the conduct of participants; and * enforcing compliance with its rules.   The regulator's assessment covered a period of significant structural change within the operation of the ASX, including the establishment of ASX Markets Supervision Pty Ltd.  ASIC's report described the formation of ASX Markets Supervision as a positive development as it further delineates between the ASX's commercial and supervisory activities. The assessment found that ASX Markets Supervision has implemented a number of strategies to ensure it has sufficient resources to fulfil its important function.  **Background**  A financial market is defined as a facility through which offers to buy and sell financial products are regularly made. Anyone who operates a financial market in Australia must obtain a licence to do so, or otherwise be exempted by the Minister.  As part of the conditions of a granting a licence to operate a financial market, the licensee must supervise the market in accordance with Part 7.2 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).  Under the Corporations Act, ASIC is required to assess whether a licensee has adequate arrangements to supervise its market. ASIC must do this at least once per year in relation to each licensee.  The report is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASX_Annual_Assessment_ReportMay07.pdf/$file/ASX_Annual_Assessment_ReportMay07.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%233)  **3.2 New Board appointments**  The Board of ASX Limited announced on 9 May 2007 the appointments of Mr David Gonski AO and Mr Shane Finemore as directors of the Company from 1 June 2007.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%233)  **3.3 Update on revised corporate governance principles implementation**  ASX Corporate Governance Council announced a new timetable in April 2007 for the implementation of the revised Principles of Good Corporate Governance and Best Practice Recommendations (the 'Principles'). The start date for the revised Principles will now be 1 January 2008. It is expected that the finalised Principles will be released to the market by the end of June 2007.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%233) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007_files/spacer%281%29.gif | | |  | | --- | | **4.1 Summit Resources Limited - Final decision**  On 18 May 2007, the Takeovers Panel advised that it had made a declaration of unacceptable circumstances in relation to an application by Areva NC Australia Pty Ltd concerning the affairs of Summit Resources Limited and statements by Paladin Resources Limited (see TP07/21) but has decided not to make orders.  The Panel considers that truth in takeovers is a fundamental tenet of the takeovers regime. However, although the circumstances are unacceptable, in this case the Panel considers that there are no orders which are reasonably available which would appropriately remedy the effects of the unacceptable circumstances.  The Panel stated that it is disappointed with the quality and timeliness of the disclosure by Paladin and Summit and does not consider it to be an example of good market practice. The Panel does not consider that Summit shareholders have been well served in terms of the information both Paladin and Summit have provided about their intentions in relation to the Areva Transaction.  The Panel's decision not to make orders should be viewed in light of the particular circumstances and should not be taken as the Panel considering that Paladin and Summit have acted satisfactorily. If the Panel had considered that there were orders that would have been effective in remedying the effects of the unacceptable circumstances, and were in the interests of current and former Summit shareholders, the Panel would not have hesitated to make those orders.  **(a) Background**  Summit was the subject of an off-market scrip takeover bid by Paladin Resources Ltd. Paladin's bid had initially been rejected by the board of Summit. It was subsequently declared unconditional.  On 11 April 2007, Summit and Areva entered into, and announced, an agreement under which Summit was to convene a general meeting to consider the issue of shares and options in two tranches to Areva. If approved, upon the second subscription by Areva (allowing Areva to increase its shareholding in Summit to 18%), Areva would be appointed to market two-thirds of Summit's share of uranium production from its Australian projects (Areva Transaction).  The day after the announcement of the Areva Transaction Paladin announced an increase in the consideration under its bid which was then recommended by the board of Summit. In the announcement to the market concerning the increase in the consideration under its takeover bid, Paladin made a number of unqualified statements which indicated it supported the Areva Transaction and would vote its Summit shares in favour of the Areva Transaction (Intention Statement). Paladin's officers made similar statements to the media in the days following.  On 22 April 2007, Paladin informed Summit that it would not vote in favour of the Areva Transaction. Summit advised its shareholders on 23 April 2007 that it had decided not to convene the general meeting, at least in part as a consequence of Paladin's advice that it would not vote in favour of the Areva Transaction.  Areva's application related to:  (a) Paladin' Intention Statement; (b) Paladin's subsequent departure from its Intention Statement;  (c) statements by Paladin that Areva claimed implied that the Areva Transaction would not proceed; and  (d) statements by Summit that the Areva Transaction would not proceed.  Areva sought a declaration of unacceptable circumstances and final orders requiring:  (a) Summit to convene a general meeting to consider the Areva Transaction and  (b) Paladin to vote in favour of the Areva Transaction in accordance with its previously stated intention.  **(b) Decision**  **(i) Importance of truth in takeovers**  The Panel considers truth in takeovers to be a fundamental tenet of the Australian takeovers regime and unwarranted departures by takeovers participants from statements they make to the market are taken very seriously. The Panel's decision to declare unacceptable circumstances clearly indicates this. The Panel's decision not to make orders given the particular facts of this case is not in any way an endorsement of the conduct of Paladin and Summit.  Neither Paladin nor Summit should indicate publicly that their position and conduct has been vindicated - this is not the case. The Panel considers the circumstances which arise as a consequence of the conduct of Paladin and Summit are unacceptable.  The Panel considers that Paladin's departure from its Intention Statement is not consistent with the truth in takeovers policy. The Panel does not accept Paladin's submission that it was justified in departing from its Intention Statement because a recommendation from the Summit board was "unforeseeable".  It is clear that once Paladin increased its offer, the Summit board would need to consider the revised offer. The only options available to the Summit board were to reject the revised offer or recommend the revised offer. Paladin itself was responsible for an increase of approximately 24% in the bid consideration. The Panel is not persuaded that the change of recommendation was unforeseeable. On this basis, the Panel does not accept that Summit's recommendation was an unforeseeable change in circumstance such that it was acceptable for Paladin to depart from its Intention Statement.  The Panel considers that where parties make unqualified statements in the context of takeover, shareholders should be able to rely on those statements when considering whether or not to accept an offer. The Panel considers that parties involved in takeovers should be aware that making statements without qualification carries risk and that departing from publicly stated positions (without qualification) will generally have consequences.  In relation to Summit's conduct, the Panel considered whether Summit's qualification on recommending the Areva Transaction (in the absence of a higher offer) impliedly put a similar qualification on the statement about calling the meeting. The Panel considers that Summit's statement concerning putting the proposal to Summit shareholders is not an unqualified statement, because there is the reference to a higher offer in the later statement concerning the recommendation and some linkage may in this case be inferred. However, such an inferred qualification is a far from satisfactory approach. Shareholders may reasonably expect a difference between the convening of a meeting and the recommendation of the directors in respect of that meeting. The Panel does not think that Summit's reasons for deciding not to convene the meeting were properly explained to Summit shareholders.  The result is that the Panel considers that disclosure of information by both Paladin and Summit was unsatisfactory.  For these reasons, the Panel is disappointed with the conduct of Paladin and Summit and does not consider it to be an example of good market practice. The Panel does not consider that Summit shareholders have been well served in terms of the information both Paladin and Summit have provided about their intentions in relation to the Areva Transaction.  The Panel's decision not to grant orders should be viewed in light of the above, given the particular circumstances of this case. If the Panel had considered that granting orders would have been effective in remedying the unacceptable circumstances, the Panel would not have hesitated to make orders.  **(ii) Orders in these circumstances**  In reaching its decision not to grant orders the Panel considered:  (a) the likely effect the unacceptable circumstances had on Summit shareholders; and (b) whether orders would remedy the unacceptable circumstances in a manner that protected the rights and interests of Summit shareholders, and ensured that the Paladin Offer proceeded in a way that it would have proceeded if the unacceptable circumstances had not occurred.  The Panel considered what orders might be appropriate to remedy the effect of the unacceptable circumstances on shareholders who had accepted into the Paladin Offer (accepting shareholders).  No evidence was produced to establish a reasonable basis for concluding that many, if any, accepting shareholders were influenced by Summit's announcement of the Areva Transaction or Paladin's Intention Statement, or by the unsatisfactory way in which information about the changed positions came into the market. The Panel considered the steady flow of acceptances into the Paladin Offer following Summit's decision not to convene a meeting (which became known through Summit's 23 April announcement) and Paladin's departure from its Intention Statement (which became known through Summit's 5th supplementary target's statement of 30 April). The Panel also considered that it had no evidence that any Summit shareholders would avail themselves of withdrawal rights if they were ordered.  While the Panel is entitled to make an evaluation based on its own experience and expertise as to the effect of the circumstances, in the absence of any evidence to the contrary, the Panel considered in this instance that, although the circumstances were unacceptable and do not represent good market practice, any effect on accepting shareholders was not such that it warranted the granting of orders. In this case, the Panel was reluctant to order withdrawal rights where it appeared the unacceptable circumstances had not had an effect that withdrawal rights were likely to address.  Areva sought final orders requiring Summit to convene a general meeting to consider the Areva Transaction and requiring Paladin to vote in favour of the Areva Transaction in accordance with its previously stated intention. The Panel did not consider these orders were appropriate to address the effect of the circumstances. The Panel considered that in any event it is in the power of Areva to requisition a meeting if it chooses. The Panel considered ordering that Paladin vote some or all of the shares it had acquired under the Paladin Offer, should there be a meeting, but considered that such an order was not practical because:  (a) the Panel would not be able to determine which shares were accepted on the basis of the Paladin statement that it would support the Areva Transaction and which were accepted on the basis that the Areva Transaction would not be put to Areva shareholders; and (b) requiring all Summit shares held by Paladin to be voted for the Areva Transaction would force Paladin into a commercial alliance with Areva that Paladin now did not wish to be in and that would potentially cause harm to the new and existing shareholders of Paladin.  The Panel considered that the effect the circumstances had on Areva's proposed acquisition of a substantial interest in Summit was unacceptable. However, it did not consider withdrawal rights were an order that would address this effect.  Accordingly, the Panel concluded that no orders were appropriate to remedy the effect of the unacceptable circumstances on Areva. The Panel would not regard the fact that it decided in this situation not to make orders as any precedent for future cases involving truth in takeovers policy.  The Panel will publish its reasons for the decision on its website when they are finalised.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234)  **4.2 Qantas Airways Limited 02 - decision and review**  **(a) Application**  On 6 May 2007, the Takeovers Panel advised that it had received an application from Airline Partners Australia Limited (APA) concerning APA's off-market, cash takeover bid for Qantas Airways Limited (Offer).  The Panel decided not to commence proceedings in relation to APA's application.  APA's offer closed at 7.00pm on Friday 4 May 2007 in accordance with the terms of the Offer and APA's public statements that the Offer would not be extended past that time and date. APA submitted that approximately 5 hours after the close of the Offer, and subsequent to APA's announcement on 4 May that the Offer had closed, an offshore arbitrage and special situation investor (Late Investor) holding Qantas shares, contacted APA and sent its acceptance form to APA for 98,445,907 Qantas shares, amounting to 4.96% of Qantas' issued share capital. APA submitted that had this acceptance been received within the Offer period, the Offer period would have automatically been extended for 14 days.  APA sought a declaration under section 657A that the closing of the APA offer and subsequent acceptance by the Late Investor constituted unacceptable circumstances. APA sought orders to the effect that APA be required to continue the Offer as if the acceptance of the Late Investor was received prior to 7.00 pm on 4 May 2007.  **(b) Decision**  In the absence of clear evidence to the contrary, the Panel does not accept that that the Offer period closing at 7pm 4 May 2007, in accordance with the bid terms and APA's public statements that the Offer would not be extended past that deadline, has an impact on the efficient, competitive or informed market for Qantas shares, or gives rise to unacceptable circumstances. The Panel did not consider that the submissions in APA's application provided a sufficient basis for the Panel to commence proceedings in relation to the application.  **(c) Review of decision**  On 7 May 2007, the Takeovers Panel advised that it had received an application from Airline Partners Australia Limited (APA) for review of the decision made by the sitting Panel in the Qantas Airways Limited 02 proceedings.  The Panel met urgently in response to an application for review of the initial Panel's decision not to commence proceedings. The review Panel also declined to commence proceedings.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234)  **4.3 Queensland Cotton Holdings Limited - Panel decision**  On 4 May 2007, the Takeovers Panel announced its decision in relation to the application (the Application) from Louis Dreyfus Cotton International NV, a company incorporated in Belgium, under section 657C of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) in relation to the affairs of Queensland Cotton Holdings Limited.  On the basis of undertakings and confirmations provided by parties in response to the Panel's initial enquiries, the Panel has decided not to commence proceedings in relation to the Application. In its Application, Louis Dreyfus submitted that:  1. a Takeover Bid Implementation Agreement dated 6 March 2007 (TBIA) that Queensland Cotton had entered with Olam International Limited included terms regarding "no-shop", "no-talk" and fiduciary exception that had an anti-competitive effect on the market for control of Queensland Cotton;  2. the Queensland Cotton Board was incorrectly interpreting and applying the terms of the TBIA by amongst other things:  a) declining to advise Louis Dreyfus what information Louis Dreyfus needed to provide to the Queensland Cotton board for the proposal it had submitted to be considered a "Competing Proposal" which the Queensland Cotton board could consider within the terms of the fiduciary exception in the TBIA; and  b) declining to provide Louis Dreyfus with access to confidential information to enable Louis Dreyfus to assess whether or not to make a formal takeover bid for Queensland Cotton.  Louis Dreyfus submitted that this was causing the acquisition of control of Queensland Cotton to take place in a market that was not efficient, competitive and informed; and  3. Queensland Cotton's target's statement in respect of the bid by Olam, and its subsequent market announcement dated 16 April 2007, contained false or misleading disclosures, specifically in relation to the possible competing proposal by Louis Dreyfus.  Olam had submitted that the TBIA was "in accordance with market practice" for this type of agreement.  The TBIA contained the following:  1. "no-shop" and "no-talk" provisions;  2. a further provision that the "no-talk" provision would cease to apply if compliance with it would, in the opinion of the board of Queensland Cotton reasonably formed in good faith for a proper purpose, in reliance on legal advice and having received financial advice that the competing proposal is superior to the Olam offer, constitute a breach of any statutory or fiduciary duties of the Queensland Cotton board (Fiduciary Exception Provision); and  3. provisions as to when a break fee may be payable by Queensland Cotton.  On 2 April 2007, Louis Dreyfus wrote to Queensland Cotton advising, amongst other things:  1. that it was seriously considering, and had taken extensive steps to make, a competing proposal, as defined in the TBIA (Competing Proposal). It said the Competing Proposal would be superior to the Olam Offer;  2. that it needed to undertake due diligence in respect of non-public information of Queensland Cotton; and  3. that it was seeking the same level of access to Queensland Cotton's confidential information and management as had been given to Olam.  On 3 April 2007, Queensland Cotton responded to the effect that it did not regard the contents of the 2 April Letter as a "firm proposal" and, given the "no-shop" and "no-talk" provisions, there was no basis to provide access to Louis Dreyfus.  Louis Dreyfus replied on 10 April with a revised proposal which it submitted was a "Competing Proposal". Louis Dreyfus also requested the Queensland Cotton board, if it did not consider Louis Dreyfus' proposal to be a "Competing Proposal", to clarify any additional steps Louis Dreyfus needed to take or information it needed to provide to permit access to Queensland Cotton's confidential information.  On 11 April 2007, Queensland Cotton further responded to the effect that:  1. Louis Dreyfus had not provided a basis for Queensland Cotton to give access to confidential information without breaching the TBIA and potentially triggering payment of a break fee;  2. Louis Dreyfus' proposal did not meet the requirement for a "Competing Proposal" that was superior to the Olam offer; and  3. the board was unable to provide any guidance on the steps Louis Dreyfus needed to take or information it needed to provide to permit access to Queensland Cotton's confidential information due to the "no-shop" provision and break fee provision.  **(a) Interpretation of the TBIA**  The Panel considered that an initial significant issue before it that might have given rise to unacceptable circumstances was whether Queensland Cotton was interpreting the TBIA in a restrictive way that prevented Queensland Cotton from being able to clarify what additional steps or information Louis Dreyfus would need to provide for its proposal to be considered a Competing Proposal.  In correspondence with the Panel, Queensland Cotton identified specific criteria that it considered would have to be met for it to consider Louis Dreyfus's proposal to be a Competing Proposal. The criteria were, it said, customary Australian market practice. The Panel considered that it was possible for the parties to resolve this issue if Olam confirmed that, in the event that Louis Dreyfus made a proposal to Queensland Cotton which satisfied the criteria then Olam would not object to Queensland Cotton relying on the fiduciary exception provision. That would allow Queensland Cotton to participate in any discussions or provide some or any information to Louis Dreyfus as considered appropriate by the Queensland Cotton board. Olam also needed to confirm that merely by so doing a break fee payment would not be required under the TBIA.  The Panel accepted that Olam's confirmation could be made subject to:  1. the terms and conditions of the further proposal, including price; and  2. Queensland Cotton receiving all appropriate external advices (including that the further proposal was superior to the Olam offer).  The Panel advised parties that if it received the undertakings and confirmations requested that it considered that it would not be minded to commence proceedings in response to Louis Dreyfus's application, as the most pressing issue would have been resolved.  The parties agreed to provide undertakings and confirmations to the Panel to the following effect:  1. Olam undertook to the Panel in terms of the confirmation the Panel requested;  2. Louis Dreyfus confirmed that it had submitted a further proposal to Queensland Cotton which satisfied the criteria; and  3. Queensland Cotton confirmed that it sought to engage with Louis Dreyfus in relation to this further proposal in reliance on the fiduciary exception provision in the TBIA.  The Panel considers that the most pressing issues raised in the Application have been resolved by the co-operation of the parties and that commercial negotiations are progressing. Therefore, the Panel did not consider that there was a basis to commence proceedings.  **(b) Disclosure in target's statement and subsequent announcement**  The Panel indicated that Queensland Cotton shareholders would expect to be advised of some or all elements of the Louis Dreyfus proposal and of their directors' progress in negotiations with Louis Dreyfus. The Panel considers that disclosure of these developments could have been addressed in a number of ways. The Panel noted that one of the ways this could be done would be by the issue of a supplementary target's statement by Queensland Cotton.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234)  **4.4 APL vs Alinta Ltd - Takeovers Panel announcement and appeal to the High Court**  On 30 April 2007, the Takeovers Panel issued a statement in relation to the decision of the Full Court of the Federal Court in Australian Pipeline Limited v Alinta Limited [2007] FCAFC 55 which was handed down on 20 April 2007. This decision is summarised below and is also discussed further in item 5.6 of this Bulletin.  **(a) Federal Court decision**  The Panel's jurisdiction comes from section 657A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Section 657A gives the Panel two bases for declaring circumstances in relation to the affairs of a company to be unacceptable circumstances.  The first (section 657A(2)(a)) is if the Panel considers that the circumstances are unacceptable having regard to their effect on either control or potential control of a company, or on an acquisition or proposed acquisition of a substantial interest in a company.  The second (section 657A(2)(b)) is if the Panel considers that the circumstances are unacceptable because they constitute or give rise to a breach of the Takeovers Chapters of the Corporations Act 2001 No. 50 (Cth) (chapters 6, 6A, 6B and 6C).  In its decision relating to the Panel's declaration of unacceptable circumstances, the Federal Court (Finkelstein J dissenting) declared that section 657A(2)(b) of the Corporations Act 2001 No. 50 (Cth) is invalid. The court discussed the operation of section 657A(2)(a) but did not find it to be invalid. The Federal Court found that section 657A(2)(b) seeks to confer on the Takeovers Panel the judicial power of the Commonwealth, in contravention of Chapter 3 of the Constitution of Australia.  On the basis that the declaration of invalidity made by the Federal Court is limited to section 657A(2)(b), and the Federal Court made no declaration in relation to section 657A(2)(a),the Panel considers that it is not prevented from operating in reliance on section 657A(2)(a).  **(b) Existing applications**  The Panel has advised parties to current applications of this approach and of any steps it considers they would need to take to ensure that it is able to consider the applications.  **(c) Future applications**  Following the decision of the Federal Court the Panel will decline to accept applications which seek a declaration of unacceptable circumstances based on section 657A(2)(b) or which make allegations of contraventions of the Corporations Act 2001 No. 50 (Cth).  Applicants to the Takeovers Panel should, henceforth, frame applications solely in terms of seeking declarations based on section 657A(2)(a) of the Corporations Act 2001 No. 50 (Cth). The grounds for such declarations should be based on the terms of section 657A(2)(a) and section 602. Applications should not refer to the legality of any circumstances for which they seek declarations or orders.  The Panel is confident that the vast majority of disputes concerning takeovers are able to be framed in terms of section 657A(2)(a). The Panel considers that very few, if any, persons will be left without a forum for resolution of their disputes following the Federal Court's decision in relation to section 657A(2)(b).   **(d) Guidance notes**  The Panel proposes to review its Guidance Notes to assess whether any of them need updating in light of the Federal Court decision.  **(e) Corporations (Takeovers Amendments) Act 2007**  The Panel notes that on 13 May 2007, the [Corporations (Takeovers Amendments) Act 2007 No. 64 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=95468" \t "_default) commenced. The Act changes a number of provisions relating to the operations of the Takeovers Panel, including section 657A(2)(b) of the Corporations Act 2001 No. 50 (Cth).  The act, amongst other things: (i) amends section 657A(2)(a); (ii) introduces a new section 657A(2)(b) which provides a ground for the Panel to make a declaration of unacceptable circumstances based on the purposes of the Corporations Act 2001 No. 50 (Cth) as set out in section 602 of the Corporations Act 2001 No. 50 (Cth). This provision was not considered by the Federal Court in the Federal Court decision; and (iii) introduces a new section 657A(2)(c). The new section 657A(2)(c) is similar to the current section 657A(2)(b) which it replaces, but has some differences.  The Panel proposes to accept applications made under new sections 657A(2)(a) and (b), provided these do not allege breaches of the Corporations Act 2001 No. 50 (Cth). The Panel does not propose to accept applications made under the new section 657A(2)(c).  The Panel will operate on that basis unless a court finds otherwise.  **(f) Appeal to High Court**  On 3 May 2007, the Commonwealth Attorney-General and the Commonwealth Treasurer announced that the decision of the Federal Court "undermines the objective that the Takeovers Panel be the primary forum for the resolution of takeovers disputes."  The Attorney-General has applied to the High Court for special leave to appeal the decision of the Full Federal Court to defend the validity of the challenged provisions of the Act.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%236) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007_files/spacer%281%29.gif | | |  | | --- | | **5.1 A person's obligations under a contract extend beyond the contract's express terms and includes obligations imposed by the contract's implied terms.**  (By Thea Schwartz, Mallesons Stephen Jaques)  *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 413, New South Wales Supreme Court, Barrett J, 2 May 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc413.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc413.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 8 Pty Limited ("E8") entered into a contract to provide services to Shaw Stockbroking Limited ("Shaw"). Although the express terms of the contract did not impose on E8 obligations of exclusivity or an obligation to act in the best interests of Shaw, Barrett J found that such terms were implied into the contract because E8 and Shaw had established a relationship similar to that between an employee and an employer. His Honour held that in light of this relationship, Shaw's summary termination of the contract with E8 was legitimate.  Barrett J also held that Mr Wookey (one of two shareholders in E8) was subject to director's and fiduciary duties in respect of Shaw Corporate (which was formed by Shaw to act as the sole corporate finance arm of Shaw) because of the nature of the role he performed for Shaw Corporate, and even though the contract did not expressly impose such duties. His Honour found that when Mr Wookey continued to represent E8 as an entity separate from Shaw (after the two companies had entered into a contract), he was in breach of the implied terms of the agreement and his duties.  **(b) Facts**  In 2002, Mr Wookey (the third cross-defendant), together with Mr Martin (the fourth cross-defendant) purchased Bell Potter Corporate Finance ("BPCF"), which later changed its name, and is referred to in the judgment as Cartesian.  The plaintiff and first cross-defendant, E8, was incorporated to act as the corporate vehicle through which the services of Cartesian and the team of people behind Cartesian ("the Team") would be made available to the defendant and cross-claimant, Shaw. Mr Wookey and Mr Martin were the only shareholders in E8.  In July 2002, E8 entered into a contract ("the July 2002 agreement") with Shaw to provide services to Shaw Corporate. The only evidence of the contract between Shaw and E8 was a letter, sent by Mr Shapiro, on behalf of Shaw, to Mr Wookey and Mr Martin. On 18 July 2002, a supplemental agreement to the July 2002 agreement was made ("the Clarification").  Relations soured between the parties. From August 2003 until December 2003, the parties exchanged acrimonious correspondence. On 10 December 2003, Mr Shapiro called Mr Wookey and Mr Martin to a meeting and handed them a letter stating that Shaw was terminating the July 2002 agreement, effective immediately.  **(c) Decision**  **(i) The claims regarding implied terms**  His Honour held that it was clear from the contract that E8 was intended to occupy, in relation to Shaw Corporate, a position akin to that occupied by an employee in relation to his or her employer. In light of this, Barrett J accepted that the following terms were taken to be implied into the contract:  (a) that E8 and the Team would supply their services exclusively to Shaw; (b) that E8 and the Team would do all that was reasonable to promote, develop and extend the business of Shaw and Shaw Corporate; (c) that E8 and the Team would not be directly or indirectly engaged, concerned or interested in any trade, business or occupation which is or may be in competition with the whole or any part of the business of Shaw or Shaw Corporate; (d) that E8 and the Team would act in the best interests of Shaw and Shaw Corporate; (e) that E8 and the Team would faithfully and diligently perform the duties required of them.  **(ii) The officer and fiduciary question**  Mr Wookey was in charge of Shaw Corporate's financial planning and therefore had the capacity to significantly affect the financial standing of Shaw Corporate. Consequently, Mr Wookey fell within the section 9 definition of "officer" under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). As such, he was obliged to comply with all director's duties. His Honour also found that Mr Wookey was relied on to perform critical tasks, and this was enough to establish that he owed Shaw Corporate fiduciary duties.  Barrett J found that Mr Martin's role was subordinate. As such, he was not an officer for the purposes of the Corporations Act 2001 No. 50 (Cth), nor did he stand in a fiduciary relationship with Shaw Corporate.  **(iii) The bonus representation**  The July 2002 agreement contained a clause which required Shaw to pay E8 a bonus in specified circumstances. This was replaced in the Clarification by an arrangement whereby E8 was to receive 35% of outstanding collectables. Despite the bonus clause being replaced in the Clarification, Mr Wookey represented that Shaw owed E8 $98,182.48 by virtue of the "entitlements to bonuses" under the original agreement.  His Honour held that Mr Wookey's representations in respect of the bonus entitlement were misleading or deceptive and breached the implied term that E8 and the Team would act in the best interests of Shaw and Shaw Corporate.  **(iv) Fees received by Cartesian in breach of contract**  His Honour found that after the July 2002 agreement, E8 and Cartesian received a fee for a scoping report from Park Plaza Kemayan, an advisory fee from Delta Electricity and a placement fee from Consolidated Gaming Corporation ("CGC"). His Honour held that E8's contract with Shaw required all remuneration generated by services to be directed to Shaw Corporate. As such, E8 and Cartesian's retention of the fees amounted to a breach of the implied terms of the contract, and was also a breach of fiduciary duty by Mr Wookey. His Honour held that Cartesian was knowingly concerned in the breach of fiduciary duty by Mr Wookey in relation to the CGC fee.  E8, through Mr Wookey, represented that an acquisition of shares to be made in CGC was to be on-market. In fact, the application was not made under a prospectus. His Honour concluded that in causing and permitting Cartesian to subscribe for the CGC placement, E8 was in breach of the implied terms. Furthermore, in allowing this to happen, Mr Wookey was in breach of his fiduciary duties.  **(v) Client representations**  Mr Martin and Mr Wookey represented to clients and ASIC that even after its commitment to the July 2002 agreement, Cartesian was a free and independent intermediary. However, in reality, the services of the relevant personnel were committed exclusively to Shaw Corporate. Barrett J held that the making of these representations entailed breaches of the implied terms (b), (c) and (d).  **(vi) The 'proper responses' issue**  His Honour held that correspondence between Shaw and Mr Wookey (and, to a certain extent, Mr Martin) over the course of 26 August 2003 and 3 December 2003 contained false statements and also failed to deal with questions that were of legitimate concern to Mr Shaw. This confirmed that E8, through Mr Wookey and Mr Martin, was unwilling to be frank and forthright in its communications with Shaw.  **(vii) The termination**  The July 2002 agreement contained no express term as to its duration; nor was there any express term allowing either party to terminate. In holding that the nature of the relationship between E8 and Shaw imported the terms usually implied into a contract between an employee and employer, his Honour noted that an employer may dispense with the services of an employee summarily on account of a single instance of misconduct, provided that it is of sufficient gravity. Barett J concluded that the behaviour of E8 was sufficiently grave to justify summary termination by Shaw.  **(viii) E8's claim for a bonus**  E8 claimed that it was owed the bonus provided for in the July 2002 agreement. His Honour held that as the financial year had ended before the July 2002 agreement was terminated and the services that the bonus was intended to recognise had been provided, there was no reason why the bonus should not be paid to E8.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.2 Application to the ASX for quotation and the court's discretion to extend time limits in which companies must satisfy certain conditions**  (By Holly Edwards, Blake Dawson Waldron)  *In the matter of NuSep Ltd* [2007] FCA 613, Federal Court of Australia, Lindgren J, 30 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca613.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca613.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**  NuSep Ltd ("Company") issued a prospectus for the issue of shares and options. The [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act") requires a company to apply to the Australian Securities Exchange ("ASX") for quotation within 7 days of the date of issue of the prospectus. The Company failed to do so and, under section 723(3) of the Act, risked that any issue of securities would be void and that it would have to return any money received from the applicants for shares.  The Company applied for, and was granted, relief under section 1322(4)(d) of the Act which allows the court to extend periods of time under the Act by which companies must do certain things. The court retrospectively extended the date by which the application for quotation to the ASX must have been made (to 2 March 2007).  **(b) Facts**  On 14 December 2006, the Company issued a prospectus for the issue of shares and options. The prospectus stated that within 7 days of the issue of the prospectus, the Company would apply to the ASX for quotation of the shares and options (admission to official list of the ASX). Thus, the application to the ASX should have been made by 21 December 2006.  The Company's solicitor misinterpreted the ASX requirements and failed to make the application within 7 days. The solicitor's mistake was to wrongly conclude that his application to the ASX on 16 October 2006 for an "indicative ruling" on the Company's proposed listing application constituted the application to the ASX for quotation.  On 1 March 2007, the Company applied to the ASX for quotation. At this time, the Company found that its failure to apply to the ASX for quotation within 7 days of the issue of prospectus meant that section 723(3) of the Act applied. The section states (inter alia):  If a disclosure document (or prospectus) for an offer of securities states or implies that the securities are to be quoted on a financial market and:  (a) an application for the admission of the securities for quotation is not made within 7 days after the date of the disclosure document (which would have been 21 December 2006); or  (b). the securities are not admitted to quotation within 3 months after the date of the disclosure document (which would have been by 14 March 2007);  then:  (c). an issue or transfer of securities in respect to an application made under the disclosure document is void; and (d) the person offering the securities must return the money received by the person from the applicants as soon as possible.  The Company applied for relief under section 1322(4)(d) of the Act which gives the court discretion to extend the period for the doing of any act, matter or thing under the Act.  Neither the ASX or the Australian Securities and Investments Commission challenged the application.  **(c) Decision**  In reaching its decision, the court considered the meaning of the words in the prospectus. The prospectus stated that the Company would make an application to the ASX for quotation. Lindgren J stated:  "I think that the statement signifies, in terms of section 723(3), that the securities are to be quoted on a financial market."  The court held that it had the power under section 1322(4)(d) to extend the periods of time under sections 723(3)(a) and (b) and ordered (inter alia), pursuant to section 1322 of the Act, that:   * for the purposes of section 723(3)(a) of the Act, the time by which the Company must have made its application to the ASX for admission to the official list be extended (retrospectively) from 21 December 2006 to 2 March 2007; and * for the purposes of section 723(3)(b) of the Act, the time by which the shares must have been admitted to quotation be extended to 16 May 2006.   The court also indicated that the making of orders would not prejudice the right of action of any shareholder who had suffered loss or damage as a result of the shares not being quoted on the ASX within 7 days of the prospectus.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.3 Misleading and deceptive conduct under the Trades Practices Act**  (By David Lipshutz, Blake Dawson Waldron)  *Findlay & Co Stockbrokers (Underwriters) Pty Limited v Carminco Gold & Resources Limited* [2007] FCA 573, Federal Court of Australia, Cowdroy J, 24 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca573.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca573.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 case concerned the failure of the respondents to repay moneys loaned to them by the applicant. The applicant asserted that it agreed to loan this money to the respondents on the basis of misleading and deceptive representations made to it by the respondent and brought an action for recovery of this money on the following grounds:   * Breaches of the [Trade Practices Act 1974 No. 51(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) (the Act) * Breach of contract * Unjust enrichment   Cowdroy J arrived at his decision based on the evidence put forward by the parties, finding in favour of the applicant.  **(b) Facts**  Mr Ivor Findlay was Managing Director of the stockbroking firm, Findlay & Co Stockbrokers (Underwriters) Pty Limited (Findlay Underwriters). In October 2003, Mr Findlay was informed of an approach by Mr Roderick Salfinger to Findlay Underwriters, requesting assistance for the initial public offering (IPO) of his company, Trans Pacific Mining Limited (the Company) and its listing on the Australian Stock Exchange.  Meetings were held in October 2003 and November 2003 between Mr Findlay, Tibor Vajda (an employee of Findlay Underwriters) and Mr Salfinger to consider Mr Salfinger's proposed IPO of the Company. Mr Salfinger informed Mr Findlay that the Company had three gold mining projects in north Queensland (the Croydon Gold Fields) and two other projects in British Columbia known as Spectrum and the Summit Lake Mine. Mr Salfinger stated that 'the Summit Lake Mine is very interesting. It is not currently operating but it has all the equipment ready to go'. He explained that the Company could re-start the mine for very minimal operating costs and that it had 'a lot of gold'.  On 19 November, Mr Salfinger told Mr Findlay and Mr Vajda that the Company 'has Spectrum, the Summit Lake Extended Claims, Summit Lake Mine and Croydon'. He also stated that the Company owned 97% of a subsidiary company, Akaroola Resources Limited (Akaroola) which held the Spectrum tenements and that he wanted to float the Company 'with these properties'. He stated that he Company need to raise $550,000 (CAD) in order to exercise its option over the Summit Lake Mine (the Option) and that the an additional $750,000 was required as seed capital to fund the initial arrangements for the IPO.  At a later discussion, Mr Findlay proposed that Findlay Underwriters would raise an amount of between $150,000 and $175,000 to be the seed capital funds. In addition, Findlay Underwriters would separately loan the amount necessary to exercise the Option. As consideration, Mr Salfinger agreed to issue Findlay Underwriters, free of charge, two shares in the Company for every dollar advanced, to provide security over all of the Company's property including the Summit Lake Mine and to execute documentation to provide such security. Mr Findlay made it clear that the loan funds were to be used solely for the purpose of exercising the Option. Mr Salfinger asserted that the Option was to be exercised by 15 February 2004.  On 12 December Mr Salfinger changed the name of the Company to Carminco Gold & Resources Limited and on 15 December 2003, he registered a new, unlisted public company under the name Trans Pacific Mining Limited (TPM). He did not reveal this to Findlay Underwriters. Towards the end of December, Mr Salfinger told Mr Vadja that he had made a mistake and that the Option needed to be exercised by 15 January 2004. During January 2004 Mr Salfinger told Mr Findlay and Mr Vadja that the loan would be repaid within days if the IPO was successful. He agreed that if there was no IPO by May 2004, the loan monies would be repaid that month. Findlay Underwriters transferred $170,000 to the Company on 12 January 2004 for the IPO expenses.  On 17 January 2004, Mr Findlay was informed that the Option had not been exercised. Mr Salfinger attributed this to the holiday period and stated that 'everything is under control. I wouldn't worry about it'. On 20 January 2004, Findlay Underwriters transferred $450,000 to the Company's lawyers in Vancouver. On 28 January 2004, Mr Salfinger informed Mr Findlay that he needed more money to exercise the option, however, Mr Findlay refused. Mr Salfinger then sent several emails to Mr Findlay providing optimistic progress on the exercise of the Option and the IPO. Mr Findlay also read an email forwarded by Mr Salfinger to an investment company, indicating that the Option would be exercised.  During February, Mr Salfinger stated that the negotiations were going well and referred to the need to create a new company. He proposed calling it Trans Pacific Mining Ltd, and did not reveal that this had already been created. Mr Findlay later travelled to Canada and met with the CEO of Tenajon, Bruce McLeod. Mr McLeod informed him that Mr Salfinger held no Option and that the mine, held by Tenajon, was not for sale.  On 13 March 2004, when asked for documentation relating to the security over the Summit Lake Mine and the assets of the Company, Mr Salfinger stated that he would give Mr Findlay signed transfer forms for all of the properties as security for the loan. Nevertheless, he failed to do so. On 15 April 2004, a letter of demand was sent to the Company requesting repayment of the $450,000, however, no payment was forthcoming.  **(c) Decision**  The proceedings were heard undefended and the Amended Defence was not supported by any evidence. Consequently, the Court was unable to consider the claims made in the Amended Defence or Cross Claim.  **(i) Breach of section 52 of the Trades Practices Act 1974 (Cth)**  The court found that there had been a number of breaches of the TPA. Cowdroy J determined that Mr Salfinger's representation that the Company owned the Option had been misleading and deceptive. Since this representation was made by Mr Salfinger in his capacity as director and secretary of the Company and TPM, the two companies had, therefore, breached section 52 of the Act. Moreover, the court held that Mr Salfinger had breached section 75B of the Act by knowingly making this false representation. In arriving at this conclusion, Cowdroy J referred to the decision of the Court of Appeal for British Columbia, which determined that neither the Company nor TPM ever held the Option. Since the Australian proceedings had earlier been adjourned on the basis of an undertaking given by Mr Salfinger that he would not dispute the decision of the Canadian Court regarding this question, Cowdroy J concluded that the representation by Mr Salfinger was misleading and deceptive and occurred in trade and/or commerce contrary to the provision of section 52(1) of the TPA.  In addition, the court also found that the Company and TPM had further breached section 52 of the Act and Mr Salfinger had breached section 75B of the Act, as he had falsely represented that the Company was the unencumbered owner of 100% of the mining tenements at the Croydon Gold Fields.  Finally, the court held that the Company and TPM had also breached section 52 of the Act as they had falsely represented that they would provide loan documentation securing the interests of the Company, including the Summit Lake Mine, to Findlay Underwriters. Moreover, Mr Salfinger was found to have breached section 75B of the Act through his participation in making the representation.  Cowdroy J accepted the arguments put forth by Findlay Underwriters that they would not have made payments of $170,000 for the pre-IPO expenses or entered into the $450,000 loan but for the false representations made by the respondents and, therefore, they had suffered loss within the meaning of section 82 of the Act. Consequently, Cowdroy J awarded damages of $803,289.52, being the repayment of these amounts including interest  **(ii) Breach of contract**  In the alternative claim put forward by Findlay Underwriters, the Court accepted the argument that the failure by TPM and the Company to repay the amounts of $170,000 and $450,000 constituted a breach of contract.  **(iii) Restitution**  Findlay Underwriters also made a claim for restitution based upon the unjust enrichment of the respondents. Since Findlay Underwriters succeeded in its action under other grounds, Cowdroy J did not examine this claim in depth, but commented that there was no reason which would permit the Company and TPM to retain the funds given to them.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.4 Should the court grant leave to pursue a derivative action on behalf of a company in liquidation?**  (By David Hargreaves and Eugene Tse, Clayton Utz)  *Promaco Conventions Pty Ltd v Dedline Printing Pty Ltd* [2007] FCA 586, Federal Court of Australia, Siopis J, 24 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca586.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca586.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 case concerned whether a person should be granted leave to bring proceedings on behalf of a company in liquidation, pursuant to section 237 in Part 2F.1A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act).  Siopis J held that while the better view is that Part 2F.1A of the Act has no application to a company in liquidation, he was bound by prior decisions to adopt the opposite view. He then considered whether granting leave under section 237 of the Act would be in the best interests of the company. He held that, as the true nature of the dispute in question was a partnership dispute between the first plaintiff and the defendants, it could more properly be litigated as a partnership dispute, and it was not in the company's best interests to grant leave pursuant to section 237 of the Act.  **(b) Facts**  The first plaintiff (Promaco) carried on business in the tourism and convention industry. The first defendant (Dedline) carried on a printing business. The principals of Dedline were Mr Ripley and the second defendant Mrs Ripley. Dedline wanted to enter into the colour process printing market, but was unable to do so on its own. Promaco and Dedline entered into a partnership agreement, and incorporated The Printing Place Pty Ltd (the Company). The second plaintiffs were nominees of the first plaintiff, and the holders of 30 shares each in the Company. Pursuant to the partnership agreement, Mr Ripley was responsible for the day-to-day operations of the printing business, and Promaco would refer its printing work to the Company. Promaco and Dedline were to share equally in the profits, and be equally liable for the expenses of the business.  The Company entered into a hire purchase agreement with BankWest for the purchase of a colour printing machine, secured by a fixed and floating charge over the assets of the Company, and guarantees by its directors.  The Company's trading operations were ultimately unsuccessful, and the Company ceased trading in October 2002. The printing machine was sold, with one of the purchasers being Mr Ripley. Promaco discharged the Company's remaining liability under the hire purchase agreement, was subrogated to the bank's security and discharged all the other liabilities of the Company. Promaco was the only remaining creditor of the company. After the Company ceased trading and before the printing machine was sold, Mr Ripley continued to carry out jobs on behalf of Dedline using the colour printing machine without informing Promaco.  The second plaintiffs applied for leave under section 237 of the Act to issue proceedings in the name of the Company against Dedline and Mrs Ripley as a director of the Company. Their claim was based upon the unauthorised use by Dedline of the colour printing machine and its failure to account for profits. They also claimed that Mrs Ripley was in breach of her director's duty to the Company in respect of the use by Mr Ripley and Dedline of the colour printing machine.  **(c) Decision**  **(i) Should leave be granted to a prospective plaintiff pursuant to section 237 to pursue an action on behalf of a company in liquidation?**  Siopsis J considered the various conflicting authorities on this point (paras [14]-[20]). The majority of these had concluded that leave may be granted pursuant to Part 2F.1A of the Act to pursue an action on behalf of a company in liquidation. All of the authorities had been decisions by single judges.  Siopsis J considered the Explanatory Memorandum to the Bill introducing Part 2F.1A of the Act, and CLERP Paper No 3. He said that, based upon that material, the better view was that Part 2F.1A had no application to a company in liquidation. However, he then considered ASIC v Marlborough Gold Mines Ltd (1993) 177 CLR 485, which requires a single judge interpreting a statute applied nationally to give effect to the decisions of other single judges construing that statute, unless satisfied that the previous decisions are "plainly wrong". In light of the considerable number of single judges who were of the view that Part 2F.1A of the Act does apply to a company in liquidation, Siopsis J decided he did not have a sufficiently high degree of assurance to characterise that view as "plainly wrong", and that he was therefore required to consider if conditions for the grant of leave in section 237 of the Act were satisfied.  **(ii) Was it in the best interests of the company to grant leave under section 237 of the Act?**  Section 237 of the Act provides that leave to issue proceedings in the name of the company may only be granted where it is in the best interests of the company. Generally, the best interests of a company in liquidation are determined by reference to the best interests of the external body of creditors. However, this was a special circumstance in which Promaco was the company's only creditor. As the true nature of the dispute was a partnership dispute between Promaco and Dedline and each of the matters in dispute (including those in respect of which leave was sought) could be adequately dealt with in an action between Promaco and Dedline without involving the Company, it was not in the Company's best interest to grant leave pursuant to section 237 of the Act.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.5 Specific performance of pre-bid acceptance agreements**  (By Emily McConnell, Freehills)  *Lionsgate Australia v Macquarie Private Portfolio Management Ltd* [2007] NSWSC 371, 20 April 2007, New South Wales Supreme Court, Barrett J, 20 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc371.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc371.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**  An announcement of a proposed scheme of arrangement was not the making of a 'higher offer' for the target which would cause a requirement to sell shares pursuant to a pre-bid acceptance agreement to lapse.  Where a pre-bid acceptance agreement is in place, the bidder has a particular interest in obtaining the actual subject matter of the contract. Therefore, the general rule that specific performance would not be ordered in relation to stock exchange traded securities is displaced.  **(b) Facts**  In February 2007, to assist it in its proposed takeover bid for Magna Pacific (Holdings) Ltd ("Magna Pacific"), Lionsgate Australia Pty Ltd ("Lionsgate") entered into a Deed of Irrevocable Undertaking ("Deed") with Macquarie Private Portfolio Management Ltd ("Macquarie"), an 11.2% shareholder in Magna Pacific. Pursuant to the Deed, Macquarie undertook, amongst other things:   * that it would not deal with or enter into any arrangement concerning any of its shares in Magna Pacific, other than by accepting Lionsgate's offer; and * to accept the Lionsgate offer for all Magna Pacific shares no later than five business days after Lionsgate dispatches its bidder's statement to target shareholders, provided that the offer price is no less than 32 cents.   The undertakings were stipulated to lapse if (amongst other things) a "higher offer" for all Magna Pacific shares was made by a third party.  Five business days after dispatch of Lionsgate's replacement bidder's statement, Destra Corporation ("Destra") and Magna Pacific jointly announced their intention to implement a scheme of arrangement, under which Destra would acquire all of the shares in Magna Pacific for a consideration of 38 cents per share, or one fully paid Destra ordinary share and 15 cents cash, at the election of each target shareholder.  Macquarie considered that the Destra offer was a "higher offer" under the Deed and that Macquarie's undertaking to Lionsgate pursuant to the Deed had consequently lapsed so that it was not obliged to accept Lionsgate's offer. Lionsgate made an application to the NSW Supreme Court for specific performance and an injunction to restrain Macquarie from dealing with its Magna Pacific shares.  **(c) Decision**  Barrett J held that the proposed scheme of arrangement did not cause Macquarie's obligations under the pre-bid agreement to lapse and ordered specific performance of the contract. In coming to this conclusion, the court considered:   * whether the proposed scheme of arrangement amounted to a 'higher offer' capable of being accepted by Macquarie and therefore negating Macquarie's obligations to Lionsgate under the agreement; * if Macquarie was required to accept the offer, whether performance of the pre-bid agreement would entail contraventions of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default); and * whether specific performance was an adequate remedy.   **(i) Was the proposed scheme of arrangement a 'higher offer' capable of being accepted by Macquarie?**  The court considered that Destra had not made a contractual offer capable of acceptance so as to give rise to a contract. In coming to this conclusion, Barrett J noted:   * the announcement was addressed to the ASX rather than to shareholders; * the announcement referred to a common intention as to future action, it did not include a message of solicitation; * the nature of a Part 5.1 arrangement is that while it allows the shareholder to vote on what will happen to their shares it does not represent an exercise of the will of the particular shareholder that their shares will be transferred; and * while the Part 5.1 arrangement can achieve the same outcome as offers made to all shareholders, that does not mean that a Part 5.1 arrangement is an offer or that any element of it or step in it constitutes the making of an offer.   Additionally, Barrett J emphasised that as sophisticated commercial operators, Macquarie and Lionsgate could have framed the clause so as to include other means by which a company can be reorganised, such as Part 5.1 arrangements. However, the companies chose not to do so. Accordingly, having regard to the commercial context and the objectives of the parties, Barrett J refused to extend the meaning of "offer" and "made", as used in the relevant clause.  **(ii) Would Macquarie's performance of the pre-bid agreement contravene the Corporations Act?**  Macquarie contended that the court should not compel specific performance of the agreement as performance of the agreement would contravene the Corporations Act 2001 No. 50 (Cth). Macquarie argued that the pre bid agreement contained provisions that granted Lionsgate rights other than those which would arise via the takeover bid and that accordingly sections 619(2) and 627 of the Corporations Act 2001 No. 50 (Cth) were contravened as the offer made to Macquarie was not on the same terms as that made to other Magna shareholders.  Barrett J held that the pre-bid agreement did not alter the terms of the takeover offer, rather, it facilitates the acceptance of an off-market market offer. Accordingly, the specific performance of the contract would not contravene the Corporations Act 2001 No. 50 (Cth).  **(iii) Is specific performance an appropriate remedy where the subject matter of the contract is listed shares?**  Barrett J noted that ordinarily, the court will not decree specific performance where the contract is for the sale of shares that are traded on a stock exchange, since damages may be awarded and then used to purchase the shares on market.  However, the court reasoned that a party attempting to acquire the whole of a company's issued capital stands in a special position as the party has a particular interest in obtaining the actual subject matter of the contract. Monetary compensation would be inadequate as the party is unable to purchase the exact parcel on market. Accordingly, Barrett J awarded specific performance of Macquarie's obligations under the contract.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.6 Constitutional validity of the Takeovers Panel**  (By Yasmin Yazdani, Clayton Utz)  *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55, Federal Court of Australia, Full Court, Finkelstein, Gyles and Lander JJ, 20 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fcafc55%20.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fcafc55%20.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 Australian Pipeline Limited v Alinta Limited (the "Alinta decision") the Full Court of the Federal Court of Australia held, by majority, that section 657A(2)(b) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the "Act") is invalid as it involves the Takeovers Panel exercising judicial power contrary to Chapter III of the Constitution.  The majority also suggested, although it left the point undecided, that the remainder of sections 657A and 675D are unconstitutional insofar as they permit the Panel to decide existing inter-partes disputes about the application of the law to the facts and then make remedial orders.  **(b) Facts**  To facilitate the merger between Alinta Limited ("Alinta") and the Australian Gas Light Company ("AGL"), the two parties entered into a series of agreements to merge their respective infrastructure operations. The question arose as to whether as a result of those agreements, Alinta had acquired a relevant interest in Australian Pipeline Trust ("APT") in contravention of section 606 of the Act.  Australian Pipeline Limited ("APL"), the responsible entity of APT, applied to the Takeovers Panel under section 657C of the Act. The Panel made a declaration that Alinta's acquisitions of APT units constituted or gave rise to unacceptable circumstances in relation to the affairs of APT as they contravened section 606 of the Act. Consequential orders were made by the Panel including a divestment order.  APL commenced Federal Court proceedings seeking a further declaration that Alinta contravened section 606 of the Act. In a separate proceeding in the Federal Court, Alinta sought judicial review of the Panel's decision to make a declaration of unacceptable circumstances and consequential orders. Both cases were dismissed by the Federal Court.  On appeal to the Full Federal Court by both parties, the issues for decision included:  1. whether Alinta acquired a relevant interest in APT in contravention of section 606; 2. whether, in reaching its decision, the Panel had misdirected itself in law; and 3. whether sections 657A and 657D of the Act provide for the exercise of Commonwealth judicial power and thus contravene Chapter III of the Constitution.  This note will focus on the first and third issues; namely, the alleged contravention of section 606 and the constitutionality of section 657A and 657D of the Act.  **(c) Decision - section 606**  The court found that Alinta had breached section 606. How this occurred is not discussed in this note. However, an issue of practical interest in relation to section 606 was the timing of acceptances under a Chapter 6 takeover bid. Before the two parties reached agreement on the merger, Alinta had been making a Chapter 6 bid for AGL. One crucial issue in relation to section 606 was whether Alinta had had a relevant interest in certain target securities at a particular time.  The securities in question related to acceptances of Alinta's bid. The acceptances had been received by Alinta's share registry by 8am on 26 April. The acceptances were CHESS offeror initiated acceptances (ie, the target shareholders had completed acceptance forms and had sent them to Alinta).  The issue for the Court was: had Alinta acquired a relevant interest in the securities covered by the acceptances at 8am (before Alinta and AGL had signed heads of agreement for the merger)?  At first instance and on appeal, the Court accepted that section 653A of the Act prescribes compliance with the ASTC operating rules as a necessary component of a valid acceptance for an off-market bid. Under the ASTC rules, a transfer in an offeror initiated acceptance must be completed by the offeror sending a valid message to ASTC. APL argued that, although the 77 acceptances had been received by Alinta before the Heads of Agreement were signed, there was insufficient evidence that a valid message had been sent to ASTC before the signing. The result, APL said, was that Alinta did not have a relevant interest in those securities before the heads of agreement were signed.  At first instance, Emmett J held that the valid message issue was irrelevant. Once Alinta had received the acceptances, it had a relevant interest in the shares to which they related:  "Notwithstanding that the processing required under the ASTC Operating Rules may not have been completed prior to the entry into of the Heads of Agreement, the terms of the 77 acceptance forms completed on behalf of the respective holders of shares in AGL were such as to give Alinta a relevant interest in all of the shares that were the subject of those acceptances. By completing and delivering the acceptance form to Computershare, Alinta was placed in a position where it had power to dispose of, or control the exercise of, the power to dispose of the shares that were the subject of the acceptance form. It follows that, prior to entering into of the Heads of Agreement on 26 April 2006, Alinta had a relevant interest in the units in the Trust held by AGL."  The Full Court disagreed:  "With respect, we disagree with the primary judge in relation to that conclusion. We think, as APL contended, that the only manner in which Alinta could have accepted the offers was in conformity with the ASTC Rules. That follows, in our opinion, because of the provisions of reg 6.8.01, s 653A and reg 7.11.24. Those provisions indicate that Parliament intended that the exception provided for in s 611, Item 1 would only apply if a person has accepted in accordance with s 653A and reg 7.11.24, and the appropriate ASTC Rules. That conclusion is consistent with Alinta's bidder statement which required acceptance in compliance with the ASTC Settlement Rules.  ...  We ... do not think that there can be an acceptance otherwise than in accordance with the statutory and regulatory regime."  This issue arose again shortly afterwards, in relation to the APA bid for Qantas. Because APA had initiated that bid before the Full Court handed down its decision, ASIC made an order treating an acceptance form received in accordance with the terms of the offer before the close of the bid as a valid acceptance under the bid even if it had not been put into the CHESS system (ASIC Media Release 07-114, 3 May 2007). However, it is understood that bids initiated subsequent to the Full Court decision may not necessarily obtain the same relief.  **(d) Decision - constitutionality of section 657A(2)**  Gyles and Lander JJ (Finkelstein J dissenting) held that section 657A(2)(b) is unconstitutional and invalid, and suggested (but did not decide) that the remainder of section 657A and section 657D may also be invalid.  The court found that section 657A(2)(b) confers judicial power on the Panel because:   * The Panel is expressly empowered to make a declaration of unacceptable circumstances based upon a contravention of the Act; * The Act permits an application for declarations and orders to be made by any person whose interests are affected by the relevant circumstances; * The courts have a significantly restricted role during and after the bid period and, in particular, do not have power to grant positive and negative orders to remedy a breach of the law other than orders for the payment of money; and * The Panel can make remedial and costs orders similar to those made by courts" (at [399]-[403]).   The majority described the Act as evincing a "deliberate legislative policy" that the Panel adjudicate disputes about existing obligations. It went on to say:  "The effect of the current provisions is to transfer the power to make orders to enforce a statute from the courts to another body otherwise than in conformity with Ch III of the Constitution. It is one thing to remove the courts from the enforcement of prohibitions created by statute. It is quite another to transfer that function to a body which is not a court. It is also another thing to preclude courts from exercising jurisdiction under the general law as is provided expressly in section 659B(4) and impliedly in section 659C of the Act." (at [401]-[403])  The majority further said:  "Because the Panel has under the Act the power to determine whether a breach of the law has been committed and, if so, has power to make an appropriate remedial order is enough to indicate that more than the creation of new rights is involved" (at [413]).  The majority noted other factors that, when viewed together, indicated that the Panel's power was judicial in nature, such as:   * The Panel is required to adhere to the rules of procedural fairness; * Decisions must be given in writing and reasons must be published; * A finding of fact recorded in an order by the Panel or its written statement of reasons is proof of the fact in the absence of evidence to the contrary; and * The Panel is immune from suit. (at [415]).   Finally the majority addressed, but did not decide, the issue of whether the remainder of section 657A and section 657D could be invalid. It said that section 657(1) is invalid insofar as it purports to give the Panel jurisdiction to declare circumstances which constitute a contravention of the Act to be unacceptable circumstances (at [418]) and said, more generally that:  "A provision that permits the Panel to decide existing inter-partes disputes about the application of the law to the facts and then make remedial orders is invalid for the same reason as section 657A(2)(b) is invalid, subject to the operation of section 15A of the [Acts Interpretation Act 1901 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_default)." (at[428])  In a dissenting judgment, Finkelstein J found that sections 657A and 657D are not unconstitutional. His Honour said that the Panel does not determine whether there has been a contravention of the Act and then impose a penalty. Rather, the contravention is a "pathway" to a finding that the circumstances are unacceptable (at [91]-[92]).Accordingly, the Panel is not concerned with the ascertainment or enforcement of existing rights; it creates rights that operate for the future (at [93]).  Finkelstein J held that the Panel does not apply the law to the facts as found, but makes a subjective evaluation and value judgment (at [94]). Finally, his Honour said that its orders are not "binding and authoritative" because the intervention of a court, under section 657G of the Act, is required to enforce its orders (at [95] - but compare paras [404[-[415] where the majority Justices said that the degree of enforceability of the Panel's decisions, the availability of collateral methods of challenge, the Panel's power to create new rights and the requirement that it consider policy issues were all non-decisive factors).  **(e) Consequences of the decision**  Following the decision of the Full Court, it is unclear what forum a bidder, target or other interested person may have to agitate a contravention of the Act during a takeover.  This is further complicated because the majority asserted there is the "unreality" of addressing whether circumstances are acceptable without forming a view as to compliance with the Act (at [420]), particularly in light of the "plethora of legal requirements" relating to takeovers (at [426]). The Commonwealth has, perhaps unsurprisingly, announced its intention to apply for special leave to appeal to the High Court of Australia.  In the meantime, the Takeovers Panel has announced that it will continue to accept applications based on section 657A(2)(a); however applications should not refer to the legality of any circumstances for which they seek declarations or orders. The Panel is "confident that the vast majority of disputes concerning takeovers are able to be framed in terms of section 657(2)(a)" and "that very few, if any, persons will be left without a forum for resolution of their disputes" (Media Release TP19/2007, 30 April 2007).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.7 Does the conduct of litigation by a non-party amount to an abuse of court processes?**  (By Anita Siassios, DLA Phillips Fox)  *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* [2007] FCAFC 52, Federal Court of Australia, Full Court, Tamberlin J, Jacobson J and Rares J, 16 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fcafc52.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fcafc52.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 1998-1999, JP Morgan Portfolio Services Limited ("JP Morgan PSL") purchased two share registry businesses ("Businesses") from Deloitte Touche Tohmatsu, Moxlabia Pty Ltd, Greenwood Challoner & Co, Allan Martin Delaney and AM Delaney Nominees Pty Ltd ("the Appellants"). When JP Morgan PSL purchased the Businesses, it was known as Bankers Trust ("BT") Portfolio Services Limited ("BTPSL"), and was a member of the BT group of companies and its shares were held by BT Australia Limited ("BT Australia"). Westpac Banking Corporation ("Westpac") is now the holding company and ultimate owner of the BT group.  The original proceedings (instigated by Westpac) to this matter arise out of the purchase of the Businesses by JP Morgan PSL. JP Morgan PSL alleged that the Appellants were in breach of warranties in the sale agreements and were liable to pay compensation for loss and damage under section 82 of the [Trade Practices Act 1974 No. 51(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) and its analogues ("the Claims").   For reasons explained below, an agreement between JP Morgan Chase Bank NA ("JP Morgan") and Westpac dated 1 December 2004 ("the Letter Agreement") gave the entire benefit and effective control of the original proceedings to Westpac. The Appellants in these proceedings contended that the effect of the Letter Agreement amounted to an assignment of a bare right of action, which is contrary to the law, and an abuse of process. They argued that Westpac's indirect initiation of the proceedings was not driven by a desire to resolve the Claims, but by a wish to profit from the proceeds of the litigation if JP Morgan PSL was successful.  JP Morgan PSL contended that when Westpac acquired BT Australia, it obtained a relationship that was sufficient to justify its use of JP Morgan PSL as its conduit in the original proceedings to recover damages that would benefit Westpac.  The primary judge considered that the central question was whether what was being done had a tendency to corrupt the administration of justice. He concluded that the Letter Agreement gave Westpac control of the proceedings, although he considered that it ensured that the exercise of control was subject to the scrutiny of JP Morgan through a right of JP Morgan to appoint lawyers with a watching brief of the proceedings. The primary judge could not see that the Letter Agreement had any tendency to abuse the process of the court.  The Appellants appealed this decision. The majority (Tamberlin and Jacobson JJ) of the Federal Court ("the Court") dismissed the appeal.  **(b) Facts**  In late 2000, the BT group sold its shareholding in BTPSL, but excluded from the terms of sale the BT group's interest in the Claims. The purchaser of the shares was the Chase Manhattan Bank, which is now known as JP Morgan. Upon completion of the share sale, BTPSL changed its name to JP Morgan PSL.   The share sale agreement between the BT group and Chase Manhattan Bank (the Share Sale Agreement) provided in clause 6.4(a) that, on completion of the purchase of JP Morgan PSL, the Chase Manhattan Bank assigned to the BT group (i.e. the vendor of the shares) its entire right, title and interest in the Claims. Clause 6.4(b) of the Share Sale Agreement provided that the BT group would be entitled to call upon Chase Manhattan Bank to take such action as may be required to enforce any rights of action arising out of or in connection with the Claims, and specifically allowed the BT group the right to call upon Chase Manhattan Bank to commence legal proceedings and assume responsibility for the conduct of those proceedings. The clear intention of the parties was for the rights arising out of the Claims to be retained by the BT group, which subsequently became owned by Westpac.  In late 2004, proceedings were brought by JP Morgan PSL following the execution of the Letter Agreement. The Letter Agreement stated that in accordance with clause 6.4(b) of the Share Sale Agreement, JP Morgan PSL would commence proceedings on behalf of Westpac against the Appellants. The terms of the Letter Agreement also stated that subject to a provision for the mediation of any dispute between Westpac and the JP Morgan entities, Westpac would assume control of the proceedings with sole authority to instruct the solicitors.  It was common ground between the parties to these proceedings that the purported assignment of the causes of action in clause 6.4(a) of the Share Sale Agreement failed. The Appellants argued that the purpose of the Letter Agreement was to achieve the illegitimate object of giving effect to an invalid assignment under clause 6.4(a). Consequently, they argued, the Letter Agreement and the subsequent proceedings amounted to an abuse of process of the court, as the proceedings had been brought for the dominant purpose of enabling Westpac, and not JP Morgan PSL, to take advantage of any financial benefit arising from the Claims. The Appellants contended that JP Morgan PSL had no interest in litigating the original proceedings against them on its own account, as no controversy existed between them and JP Morgan PSL at the time the proceedings were instituted which those parties would have liked to have had resolved.  JP Morgan PSL defended their bringing of the proceedings by arguing that Westpac had a genuine commercial interest in the enforcement of the Claims, as Westpac was now the parent company of the group entitled to benefit from such enforcement.  **(c) Decision**  **(i) Did the Letter Agreement and the original proceedings amount to an abuse of the court's process?**  Tamberlin and Jacobson JJ (in the majority) held that the Letter Agreement and the original proceedings did not amount to an abuse of the original court's process. Nor was the Letter Agreement a de facto assignment of the cause of action in an attempt to overcome the ineffective assignment contained in clause 6.4(a) of the Share Sale Agreement, as argued by the Appellants. Their Honours supported their decision by stating that the question in these proceedings was not whether the Letter Agreement amounted to an assignment of a bare right of action. Rather, the Letter Agreement was an agreement under which Westpac would retain all of the benefits of the cause of action. Such benefit would ultimately be reflected upon the consolidation of the group's accounts in the hands of Westpac as the parent, and ultimately explained Westpac's control of the litigation and its entitlement to the whole of the proceeds.  Furthermore, Tamberlin and Jacobson JJ found that Westpac and JP Morgan PSL aimed to keep the original proceedings in line with the court's processes. Their Honours stated that the watching brief given to JP Morgan PSL's solicitors and the provision for the mediation of disputes between JP Morgan PSL and Westpac were significant steps in ensuring the preservation of the integrity of the original Court's processes. Moreover, a firm of experienced solicitors was conducting the proceedings with fiduciary duties to both JP Morgan PSL and Westpac, whose conduct was also subject to the scrutiny of another highly experienced firm.  While the Appellants sought to use the reasons of the minority in Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 ALR 58 ("Fostif") (the "trafficking" of litigation is to attempt an invalid assignment of a bare cause of action) to support their arguments, their Honours distinguished the facts of Fostif from the facts of these proceedings. For instance, in these proceedings (as previously discussed), Westpac had a genuine commercial interest in the original proceedings, as opposed to the situation in Fostif, where the trafficking of causes of action between the funder and the party funded was neither supported by any transfer of property interest nor any genuine commercial interest which the funder had in taking the assignment of the causes of action and enforcing them for their own benefit. Their Honours, and Rares J (in the minority), however, believed that there was no factual resemblance to an ordinary litigation funding agreement in these proceedings, and therefore dismissed this argument.  **(ii) Who was the real litigant?**  Tamberlin and Jacobson JJ acknowledged the primary judge's observation that JP Morgan PSL had no interest in bringing the litigation on its own account. However, their Honours did not believe that JP Morgan PSL commenced the original proceedings for reasons other than to seek compensation for the alleged breach of warranties in the sale agreements between the Appellants and BTPSL. Accordingly, Westpac, as the owner of the BT group, required JP Morgan PSL to commence the proceedings in accordance with the obligation undertaken by JP Morgan PSL's parent in the Share Sale Agreement.  Rares J had a different view. He believed that there was no controversy before the original court, and hence no litigant. In his view, Westpac manufactured these proceedings by using JP Morgan PSL's name and possible causes of action in circumstances where JP Morgan PSL had no purpose in its own right to invoke the exercise of judicial power.  However, the majority decided otherwise. The majority held that the commercial and economic reality was that the cause of action came into existence as an asset of JP Morgan PSL when it was a member of the BT group. It was always intended that the cause of action would remain as an asset of the BT group, which now happened to be owned by Westpac.   **(iii) Orders**  Tamberlin and Jacobson JJ ordered the appeal to be dismissed with costs. Rares J dissented.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.8 Directors cannot rely on an indemnity for costs of actions brought in a personal capacity**  (By Myles Tehan, Mallesons Stephen Jaques)  *National Roads and Motorists' Association v Whitlam* [2007] NSWCA 81, New South Wales Court of Appeal, Beazley and Campbell JJA and Handley AJA, 11 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswca81.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswca81.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 NSW Court of Appeal has held that a company director who brings an action for defamation is not acting in their capacity as a director. Consequently, the director will not be able to rely on any indemnities that require the director to be acting in that capacity.  There are various situations in which a director may be able to commence, or continue, legal action and still be acting in their capacity as director - but such action will have to be in the best interests of the company, or necessary to prevent the director from breaching their duty to the company.  **(b) Facts**  **(i) Chronology of events**  In 2001, Nicholas Whitlam was the President of the National Roads and Motorists' Association (NRMA). He was interviewed by the Nine Network (Nine) about matters related to his activities as President of NRMA. Allegations made in Nine's story were later repeated on radio station 2GB.  Whitlam sued Nine and 2GB, alleging that certain of the allegations carried a defamatory imputation. After a jury found that the imputations were defamatory, both the actions were settled by the parties: by 2GB in 2002 and Nine in 2007.  In 2004 Whitlam brought an action in the New South Wales Supreme Court against NRMA, seeking NRMA to pay the legal costs he had incurred in bringing the defamation actions.  At trial (Whitlam v National Roads and Motorists' Association Limited [2006] NSWSC 766) Bergin J upheld Whitlam's right to the indemnity. NRMA appealed, and succeeded.  **(ii) Whitlam's main arguments**  Whitlam claimed entitlement to having his costs paid on three grounds:   * that two deeds of indemnity executed by NRMA in Whitlam's favour, and the NRMA Constitution, provided an indemnity for the costs he incurred; * that, under the general law, a person who does something on behalf of another, and suffers loss as a result, is entitled to an indemnity; or * that the broader indemnity should be implied into the deeds.   **(iii) The NRMA deeds of indemnity**  The NRMA Constitution relevantly provided that 'every officer, auditor or agent of [NRMA] shall be indemnified by [NRMA] against any liability incurred by that person in that capacity'.  To confirm the constitutional indemnity, NRMA executed two deeds of indemnity in 1999 and 2002. Relevantly, the deeds indemnified Whitlam 'against all Liabilities incurred by [him] as an officer of the NRMA Group Company'. "Liability" was defined to mean 'any loss, liability, cost, charge or expense'.  Although there was some argument about which of the deeds applied, Campbell JA held that it was unnecessary to decide between them.  **(c) Decision**  **(i) Was Whitlam indemnified by virtue of the NRMA deeds of indemnity?**  Whitlam argued that the "liability" against which he was indemnified covered two losses he had suffered:   * his loss of reputation as a result of the defamatory statements; and * his financial loss incurred in bringing the action.   In considering the loss of reputation argument, Campbell JA was required to decide whether "liabilities", as defined in the deeds ('all losses, liabilities, costs, charges or expenses'), could include a loss of reputation. Campbell JA looked at the purpose of the clause, and the context of "loss" within the broader definition, to determine its scope.  His Honour concluded that the indemnity did not intend to cover all possible meanings of loss. Additionally, given that "loss" was defined in the context of "charges" and "expenses", it was intended to cover financial costs, but not a loss of reputation.  As a result, Whitlam was not covered by the indemnity for his loss of reputation.  In seeking the indemnity to cover his legal costs, Whitlam argued that his costs fell within the indemnity's definition of "liability" as a 'cost, charge or expense'. Campbell JA accepted that the costs did constitute a liability according to the definition.  However, Campbell JA held that Whitlam had failed to satisfy the requirement in the deeds that the liability be incurred 'as an officer of NRMA'. Although Whitlam had given the interview in his capacity as an officer of NRMA, his commencement of legal proceedings was not part of his duties as an officer, and hence did not satisfy the requirements set out in the deeds.  **(ii) Was Whitlam indemnified under the general law?**  Whitlam argued that there is a general legal principle that a person who acts on behalf of another is entitled to indemnity for all losses that they incur as a result.  Campbell JA rejected this construction, instead limiting the indemnity to situations where a third party suffers injury or loss. Given that the only loss suffered was by Whitlam himself, the narrowly-construed principle was of no assistance to him.  However, Campbell JA acknowledged that there are situations in which a corporate officeholder would be entitled to an indemnity for expenses incurred in commencing or continuing litigation. For example, a director may be entitled to an indemnity if they commence litigation in the best interests of the company, or to prevent themselves from breaching their duty to the company.  Such an entitlement to indemnity, however, requires that the commencement or continuation of litigation is a part of the officeholder's due performance of their role. As a result of Campbell JA's analysis of the Deeds of Indemnity issue (see above at (c)(i)), his Honour concluded that Whitlam had no entitlement to the indemnity, because the litigation was not part of the performance of his role.  **(iii) Should the broader, general indemnity be implied into the deeds?**  Campbell JA acknowledged that it was possible for a broader, general indemnity to be implied in the deeds, even in cases where a narrower, express indemnity existed. Campbell JA used the test for implication set out by the High Court in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1988) 180 CLR 266 (at 283) and Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 (at 347). His Honour concluded, however, that the general indemnity was not 'so obvious that it goes without saying'. Without applying the other steps of the test, this alone was sufficient to ensure that the term could not be implied into the deeds.  **(iv) Conclusion**  The NSW Court of Appeal upheld the appeal, and awarded costs to NRMA.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.9 Enforcing pre-bid agreements in the courts**  (By Sheena Loi, Freehills)  *Lionsgate Australia v Macquarie Private Portfolio Management Ltd* [2007] NSWSC 318, New South Wales Supreme Court, Austin J, 5 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc318.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc318.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**  On 5 April 2007, the NSW Supreme Court held that it could hear a case, where a bidder under a takeover bid had brought an action for specific performance of a pre-bid acceptance agreement. This was the first case to consider these issues.  The decision made clear that:   * courts are increasingly open to accepting jurisdiction to hear cases relating to takeovers and are willing to determine the enforcement of a pre-bid acceptance agreement and are prepared to do so relatively quickly; * a court may have jurisdiction to hear a case to enforce a pre-bid acceptance agreement if the agreement is not taken to be part of a takeover bid; * section 659B can only apply to court proceedings concerning matters over which the Panel can exercise jurisdiction and make orders; and * if the Panel has jurisdiction to hear a matter, a court's jurisdiction is not necessarily ousted.   **(b) Facts**  In February 2007, to assist it in its proposed takeover bid for Magna Pacific (Holdings) Ltd ("Magna Pacific"), Lionsgate Australia Pty Ltd ("Lionsgate") entered into a Deed of Irrevocable Undertaking ("Deed") with Macquarie Private Portfolio Management Ltd ("Macquarie"), an 11.2% shareholder in Magna Pacific. Pursuant to the Deed, Macquarie undertook, amongst other things:   * that it would not deal with or enter into any arrangement concerning any of its shares in Magna Pacific, other than by accepting Lionsgate's offer; and * to accept the Lionsgate offer for all Magna Pacific shares no later than five business days after Lionsgate dispatches its bidder's statement to target shareholders, provided that the offer price is no less than 32 cents.   The undertakings were stipulated to lapse if (amongst other things) a "higher offer" for all Magna Pacific shares was made by a third party.  Five business days after dispatch of Lionsgate's replacement bidder's statement, Destra Corporation ("Destra") and Magna Pacific jointly announced their intention to implement a scheme of arrangement, under which Destra would acquire all of the shares in Magna Pacific for a consideration of 38 cents per share, or one fully paid Destra ordinary share and 15 cents cash, at the election of each target shareholder.  Macquarie considered that the Destra offer was a "higher offer" under the Deed and that Macquarie's undertaking to Lionsgate pursuant to the Deed had consequently lapsed so that it was not obliged to accept Lionsgate's offer. Lionsgate made an application to the NSW Supreme Court for specific performance and an injunction to restrain Macquarie from dealing with its Magna Pacific shares.  Macquarie objected to the court having jurisdiction to hear the matter, arguing that the court proceedings were in relation to a takeover bid or proposed takeover bid and therefore section 659B of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) applied to prohibit Lionsgate from commencing court proceedings.  **(c) Decision**  The court, being the first to consider the issue, held that section 659B was inapplicable and was not an obstacle to Lionsgate's application for continuation of the interlocutory injunction. In coming to this conclusion, Austin J considered the following matters:   * the underlying policy behind section 659B; * whether the proceeding constituted a proceeding in relation to a takeover bid or a proposed takeover bid; and * whether the Panel would have jurisdiction to hear the matter.   **(i) The underlying policy behind section 659B**  Section 659B places restrictions on court proceedings in relation to a takeover bid or proposed takeover bid and is designed to reinforce the role of the Takeovers Panel as the primary forum for the resolution of takeover disputes while a takeover is underway.  Austin J was of the view that the circumstances of Lionsgate's case fell outside conduct that section 659B was intended to address. Introduced as part of the CLERP reforms in 2000, one of the section's main purposes was to do away with the tactical takeover litigation of the 1980s and 1990s which sought to disrupt and delay takeover bids. Lionsgate's case only dealt with the meaning, and enforceability, of a private contract and not whether a takeover should be disrupted or allowed to proceed. In this case, the takeover bid would still proceed even if Macquarie was not required to sell into Lionsgate's bid.  Austin J also made the point that a court could decide matters such as the proper construction of a contract as quickly and efficiently as could be expected to be achieved by any other tribunal.  **(ii) Did the proceeding constitute a proceeding in relation to a takeover bid or a proposed takeover bid?**  The court held that the case did not fall within the meaning of section 659B(4), as it was not in relation to a document or notice prepared, or given, under Chapter 6 nor was it a proceeding in relation to an action taken, or proposed to be taken as part of, or for the purposes of, a takeover bid.  The proceeding is properly characterised as one in relation to the Deed between Lionsgate and Macquarie, and in relation to the enforcement of Macquarie's alleged contractual obligations contained in the Deed. Although the Deed contemplated that a takeover bid would subsequently be made, that a bidder's statement would be subsequently issued by Lionsgate, and that the time limits for the contractual obligations undertaken in the Deed were set by reference to the bid period, these factors were not enough to render the proceeding to be one in relation to a document or notice prepared or given under Chapter 6.  Importantly, the fact Macquarie's obligation to sell into Lionsgate's bid was triggered by the dispatch of the bidder's statement did not serve to make the proceeding one in relation to that document, but "merely accidental" to it.  **(iii) Could the Panel hear the matter?**  Austin J held that the proper construction of section 659B is affected by considering the Panel's power to deal with the subject matter and circumstances of the court proceeding and the section can only apply to court proceedings concerning a matter over which the Panel could exercise jurisdiction and make orders. In this context, Austin J noted two points of relevance.  First, section 659AA envisages the Panel to be the main forum for resolving disputes about a takeover bid until the bid period has ended. It follows that if the Panel lacks the power to deal with a certain matter, and that matter could, but for section 659B, be dealt with by the court, then section 659B should not be construed in such a way as to prevent the court from dealing with the matter. Second, Austin J held that the Panel would be empowered under sections 657A and 657D to hear a case covering the circumstances of the Lionsgate's application, as a contract for the sale of shares in a company is capable of falling within the "affairs of a company" for the purposes of a Panel application.  In Lionsgate's case, although Austin J held that the Panel could hear the matter under section 657A, this appears to be outweighed by the fact that the proceeding was in respect of a private contract only and not in relation to a takeover bid (or proposed takeover bid).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.10 When a request to inspect a company's books is in good faith and for a proper purpose**  (By Rebecca Kovacs, DLA Phillips Fox)  *Vinciguerra v MG Corrosion Consultants Pty Ltd* [2007] FCA 503, Federal Court of Australia, Gilmour J, 5 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca503.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca503.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 case concerned an application by a member to inspect the books of the respondent company under section 247A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). Gilmour J ordered inspection be granted as he was satisfied that the applicant had demonstrated that (a) he was acting in good faith and (b) that inspection was to be made for the proper purpose of deciding whether to commence proceedings against the company.  **(b) Facts**  Alberto Cesario Vinciguerra (the applicant) was a former employee and director of MG Corrosion Consultants Pty Ltd (the respondent). He currently holds 30 of the 100 shares issued by the respondent. The remaining 70 shares are held by Sola-Kleen Pty Ltd (Sola-Kleen), the sole shareholder and director of which is Mr Malcom Gilmour. Mr Gilmour is also the sole director of the respondent.  The applicant became concerned that financial reports provided to him by the respondent did not make sense and requested justification from Mr Gilmour. Mr Gilmour abruptly refused to respond.  The applicant eventually requested that the respondent's books be made available for inspection and failing this, he would institute proceedings under section 247A of the Act. This application was subsequently commenced.  The applicant's reasons for securing an order to inspect the respondent's books included concerns he had about the respondent's finances and the accuracy of financial information provided to him, improper use of the respondent's assets and the relationship between Mr Gilmour, the respondent and Sola-Kleen.  From his knowledge and involvement with the respondent's business the applicant considered that over the course of a number of years the respondent had been transformed into a company of significant value, however this had not been reflected in its financial statements. No substantial profits had been retained by the respondent and no dividends had been paid.  He further alleged that there had been improper use of the respondent's assets to assist Sola-Kleen, that the respondent had been creating parallel sets of financial statements and that there were numerous inconsistencies in the respondent's financial information provided to him.  The applicant thus sought inspection of the respondent's books to determine whether he could commence proceedings under sections 232 and 233 of the Act on the basis that the conduct of the respondent's officers was oppressive, unfairly prejudicial to, or unfairly discriminatory against, him as a member of the respondent.  He also sought orders for inspection under section 247A(3) of the Act in relation to bringing leave under section 237 of the Act in the name of the respondent against Mr Gilmour.  **(c) Decision**  Gilmour J was satisfied that each of the concerns raised by the applicant warranted further investigation. He held that if these concerns were made good upon inspection of the respondent's books, this would assist the applicant in his contemplated proceedings.  Gilmour J applied the reasoning of Brooking J in Intercapital Holdings Ltd v M.E.H Ltd to conclude that the applicant was of the view that his investment in the company may have been adversely affected and he wished to investigate whether he should cause legal proceedings to be taken, in which he may recover damages or compensation.  Gilmour J was satisfied that the applicant demonstrated he was acting in good faith and that inspection was to be made for a proper purpose as required under section 247A of the Act.  He rejected the respondent's submissions that the applicant's purpose in making the application was improper as it was aimed at inducing the respondent or Mr Gilmour to buy his shareholding at a generous price. He also rejected the argument that the applicant had been guilty of such delay as to evidence bad faith. The applicant had previously made formal demands to access the respondent's books which had proved futile.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.11 What evidence is required to establish solvency in response to failure to comply with a statutory demand?**  (By Justin Fox and Norah Wright, Corrs Chambers Westgarth)  *Deputy Commissioner of Taxation v De Simone Consulting Pty Ltd* [2007] FCA 548, Federal Court of Australia, Finkelstein J, 20 March 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca548.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca548.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 Deputy Commissioner of Taxation brought an application to wind up De Simone Consulting Pty Ltd, as a result of its failure to comply with a statutory demand. The company did not apply to have the statutory demand set aside, but at the hearing of the winding up application a company director produced a suitcase of cash and subsequently served an affidavit deposing to the company's solvency. Following payment of $175,000 to the Deputy Commissioner, the registrar granted the Deputy Commissioner leave to withdraw the application and made a costs order against the company. The company appealed against the registrar's decision to award costs against it.  To determine the issue of where costs should lie, the court was required to consider the question of what form of evidence is required to rebut the presumption of insolvency arising from a failure to pay a statutory demand. The court held the evidence needed for a company to establish solvency will be dependent on the facts and is not limited to the production of audited accounts.  The director's affidavit was found to make out a prima facie case of solvency. Costs were therefore awarded against the company only up until the date of production of the affidavit.  **(b) Facts**  The Deputy Commissioner made an application for the winding up of the company based on the company's failure to comply with a statutory demand for unpaid tax of $408,500.96. The company denied liability to pay the amount but did not apply to have the statutory demand set aside.  Under section 459A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) the court has jurisdiction to wind up a company in insolvency if the company is insolvent. A presumption of insolvency arises under section 459C(2)(a) where a company fails to comply with a statutory demand. The presumption operates except so far as the contrary is proved and the onus is on the company to establish its solvency: section 459C(3).  The Deputy Commissioner issued the application to wind up the company on 13 October 2006. The application came before the registrar on 16 November 2006. At the hearing Mr De Simone, a director of the company, produced a suitcase that contained several hundred thousand dollars in cash. He asserted that there was more than enough to meet the debt due to the Deputy Commissioner, and argued that the production of the cash was evidence of the company's solvency. The application was stood over to enable the company to file proper evidence of its solvency.  On 8 December 2006, Mr De Simone served a lengthy affidavit detailing the company's solvency. The substance of his evidence was that, after allowing for the debt due to the Deputy Commissioner, the company had surplus assets exceeding $1.4 million. The following week, the company paid $175,000 to the Deputy Commissioner.  When the application came before the registrar again, the Deputy Commissioner was granted leave to withdraw the application. The registrar ordered that the costs be borne by the company. This order was appealed by the company.  **(c) Decision**  Finkelstein J noted that the court had jurisdiction to make a costs order notwithstanding that the matter had settled. He noted however that the task is difficult unless the judge can form a view as to the merits of the case. In the current circumstances this required the court to consider whether the merits of the Deputy Commissioner's case were so clear as would justify the making of a costs order against the company.  The Deputy Commissioner argued that he was entitled to his costs as Mr De Simone's affidavit did not prove the solvency of the company and a winding up order would have been made had the Deputy Commissioner decided not to withdraw his application.  The Deputy Commissioner argued that a practice had developed by which a company wishing to prove its solvency in response to an unpaid statutory demand must produce audited accounts that evidence solvency. This practice was said to arise from the cases referred to by Weinberg J in Ace Contractors & Staff Pty Ltd v Westgarth Developments Pty Ltd [1999] FCA 728, a decision cited with approval in NSW Court of Appeal decision of Expile Pty Ltd v Jabb's Excavations Pty Ltd (2003) 45 ACSR 711.  Finkelstein J rejected the proposition that to discharge the onus established by section 459C(3) a company must produce audited accounts. Neither the cases which Weinberg J referred to nor his decision support the existence of such a rule. He held that it is contrary to the basic rules of evidence to assert that there is only one method of proving solvency.  The court found that the question of whether a company is solvent involves both a question of fact and law. The legal question, or what may be a partly legal question, is what is meant by the word "insolvent" in section 459A for the purposes of determining what is meant by the opposite. The judge will provide that meaning. A company that wishes to establish the fact of solvency in accordance with the meaning laid down by the judge must tender evidence for that purpose.  The court noted that judges will look with care at the evidence made to attempt to prove solvency to avoid winding up, especially if the judge suspects the company is or may be in a weak financial position. Dependent upon the degree of doubt justified by the facts, a judge may say that the only evidence he will treat as probative is "the fullest and best" evidence available. It will depend on the facts of each case.  Finkelstein J held that Mr De Simone's affidavit was not the "fullest and best" evidence of the company's financial position but it did make out a prima facie case of solvency. On that basis it was not clear that the winding up application would have been granted. He held that while neither side was entitled to all the costs, the Deputy Commissioner was entitled to costs up to 8 December 2006 when he received Mr De Simone's affidavit.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.12 Deregistered company is reinstated by ASIC despite opposition by an interested third party**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  *In the matter of Callegher v Australian Securities and Investments Commission* [2007] FCA 482, Federal Court of Australia, Lander J, 4 April 2007  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca482.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca482.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 matter involves an application pursuant to section 35A(5) of the [Federal Court of Australia Act 1976 No. 156 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default) to review a decision of a Registrar of the Court. The Registrar had ordered that ASIC reinstate the registration of a company upon payment by the company of outstanding fees to ASIC. An interested third party, who opposed the reinstatement of registration, applied to have the Registrar's decision reviewed. The application was dismissed by Lander J and orders for reinstatement were enforced.  **(b) Facts**  In June 2005, ASIC deregistered a company called Australian Commerce and Mortgage Finance Pty Ltd (ACMF) for failing to pay an outstanding lodgement fee. On 12 April 2006, Mr Callegher, sole director and company secretary of ACMF, made an application pursuant to section 601AH of the Corporations Act 2001 (Corporations Act) seeking that ASIC reinstate the registration of ACMF. One of the reasons provided for reinstatement was that ACMF was pursuing litigation in the District Court against Mr De Angelis for the sum of $290,000.  On 20 April 2006, ASIC advised that they were prepared to reinstate ACMF if it paid all outstanding fees and penalties within 14 days of reinstatement. On 5 May 2006, Mr De Angelis, as an interested third party, filed a notice opposing the application for reinstatement of ACMF, on the grounds that Mr Callegher is not a person aggrieved pursuant to section 601AH of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and also setting out Mr De Angelis' interest in discontinuing the District Court litigation.  Claremont Management Australia Pty Ltd (Claremont), sole shareholder in ACMF, applied to be enjoined as co-plaintiff to the application on the basis that it was also a person aggrieved on the basis that prior to deregistration of ACMF, Claremont was entitled to any dividends and the distribution of ACMF's assets. On 17 May 2006, Registrar Christie made orders to join Claremont as second plaintiff and that subject to outstanding fees payable to ASIC being paid, ASIC would reinstate registration of ACMF. It was this decision that the Court reviewed in this instance.  **(c) Decision**  Lander J dismissed the application and affirmed the Registrar's order that ACMF's registration be reinstated by ASIC. His Honour's reasons can be summarised as:  1 the deregistration was due to default by the director, who offered to remedy the default; 2 ASIC had no objections to reinstatement; 3 the director's default was not of the kind that would make it unjust to order reinstatement (the default was held to be inadvertent); 4 ACMF was solvent and its future activities involved pursuing litigation that could benefit its sole shareholder, Claremont; and 5 prejudice to others was not of the kind which would make it unjust to order reinstatement.  As part of the review process, parties were invited to submit further evidence to the Court for the hearing of the review, which they did. One of the issues raised in the evidence was the reason for ACMF failing to pay the various ASIC fees.  Despite inconsistencies in Mr Callegher's various affidavits attempting to explain away this failure, Lander J held that he did not believe Mr Callegher was trying to mislead the Court. Lander J found that Mr Callegher was simply careless about the obligations to ASIC, which inadvertently lead to ACMF being deregistered. Lander J considered whether Mr Callegher was a "person aggrieved" by the deregistration. Mr Callegher's actions (or rather inactions) lead to the deregistration of ACMF and accordingly, as secretary of ACMF, Mr Callegher would potentially be exposed to prosecution under section 188 of the Corporations Act 2001 No. 50 (Cth). Lander J noted that although there was no indication that any such proceedings would be brought, the very risk would entitle Mr Callegher to be a person aggrieved. Lander J held also that Claremont was a person aggrieved as it may potentially benefit from the District Court proceedings, should ACMF be reinstated.  Mr De Angelis argued that he would be prejudiced by reinstatement as he would be required to defend the District Court proceedings commenced by ACMF. Lander J held that as the litigation was commenced when ACMF was registered, the prejudice was not of the kind to make it unjust to order the reinstatement.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%235)  **5.13 Delaware Chancery Court criticises sloppy sale process in private equity auction**  (By Jonathon Redwood, Barrister, Victorian Bar - List A)  **(a) Introduction**  In a decision issued on 14 March 2007, the Delaware Chancery Court in re: Netsmart Technologies, Inc. Shareholder Litigation held that although the board and special committee had implemented an effective (although imperfect) auction of Netsmart among private equity bidders, the overall process failed to comply with the board's duty to seek the best price reasonably available because the board did not have a reasonable basis for failing to undertake any exploration of interest by strategic buyers, particularly in view of the company's "micro cap" ($US82 million equity value) size. Applying the higher Revlon standard under Delaware law, Vice Chancellor Strine (widely regarded as America's leading jurist on takeover matters) declined to enjoin the completion of the deal, but instead entered a preliminary injunction requiring the company to make additional disclosures regarding:  (i) the process (or lack thereof) that led to the formation of a special committee and caused the company to focus its sale process exclusively on financial buyers, and (ii) the financial projections used by the company's investment banker in rendering its fairness opinion.  The Netsmart case is the latest example in a series of recent Delaware Chancery Court cases that have found flaws in sale processes employed by target companies and ordered additional disclosure. At a time when almost every Australian public company appears exposed to a private equity consortia bid or auction process, it is also a timely reminder - notwithstanding the absence of a Revlon standard in Australia - for companies undertaking a private equity auction to ensure robust board procedures and protocols are in place.  **(b) Facts**  On November 20, 2006, Netsmart entered into a merger agreement with two private equity firms pursuant to which the shareholders of Netsmart, a micro-cap company listed on NASDAQ, would receive about $115 million in cash. The merger agreement, which was negotiated by a special committee of Netsmart's board, contained fairly common deal protection and termination provisions, including a 3% termination fee. A "window shop" provision allowing Netsmart to entertain unsolicited bids by other firms, and a "fiduciary out" that allowed the board ultimately to recommend against the merger under certain circumstances. As is typical, the management of Netsmart participated in the buyout.  The process that led to the merger agreement began in late 2005, when Netsmart management first received overtures from private equity buyers. By May 2006, management, together with its long-standing financial advisor, recommended to the board that it consider a sale to a private equity firm through an auction process with a discrete set of possible private equity buyers. The decision to authorize the company's financial advisor to explore a going-private transaction was made at a 19 May 2006 "informal board meeting" at which no minutes were taken. In the course of that same undocumented "informal board meeting," the Netsmart board supposedly also reached the conclusion that a number of factors counselled against including any strategic buyers in the sale process, including the fact that previous discussions, dating back seven years or more, did not yield any interest from strategic buyers. The court found Netsmart's subsequent recitation of the many events that supposedly occurred at this undocumented meeting to be of "doubtful accuracy."  In July 2006 - after the decision was reached to pursue the going-private strategy - a special committee of independent directors was formed. However, Netsmart management and its Chief Executive Officer remained involved in the sale process, and the court noted that the special committee retained the investment bankers that already had been advising management as its own financial advisor.  During the first meeting, the special committee authorised the commencement of an auction process involving seven private equity buyers. That important meeting also lacked any minutes, and there was some discrepancy as to whether the meeting actually occurred. The initial solicitation of interest from the seven potential buyers yielded competitive bids from four of the firms. The Special Committee eventually focused on negotiations with one of the bidders, ultimately securing an agreement to pay $1.00 more per share than the buyer's initial expression of interest and materially more than any other offers.  On the whole, however, the price received was "less than exciting" compared to the valuations prepared by Netsmart and its advisors. The court specifically made note of the fact that the price was well below the bottom of the discounted cash flow range of values prepared by Netsmart, and all but one of the implied transaction multiples were at the low end of the range (and below the mean and median) of comparable transactions prepared by Netsmart's advisors.  **(c) Decision of Vice-Chancellor Strine**  The board's failure to engage in "any logical efforts to examine the universe of possible strategic buyers and to identify a select group for targeted sales overtures" was unreasonable and a breach of their Revlon duties. Even though the "Special Committee proceeded in an appropriately price-driven manner," the court held that Netsmart's sale process was fatally flawed because it failed to present any "reasonable, factual basis for the board's conclusion that strategic buyers in 2006 would not have been interested in Netsmart as it existed at that time." The court also rejected Netsmart's claim that the "window shop" and fiduciary out clauses provided a sufficient post-signing market-check to validate Netsmart's decision not to pursue strategic buyers because, in the court's view, the "M&A market dynamics" in the market for micro-cap companies did not provide the same motivations for topping bids that might exist in the markets for larger companies.  The court also held inadequate Netsmart's disclosures regarding the work of its financial advisors and the information relied upon in providing their fairness opinion. The court found that the Netsmart proxy disclosed two sets of financial projections, neither of which were the projections actually relied upon by the financial advisors and presented to the board with the fairness opinion. The court noted that accurate information of this type was important for shareholders evaluating the merits of the transaction.  **(d) Implications**  The court in Netsmart emphasized that Revlon duties do not "require every board to follow a judicially prescribed checklist of sales activities" and that Delaware law "recognizes that there are a variety of sales approaches that might be reasonable, given the circumstances facing particular corporations." The court noted, however, that the Revlon standard contemplates a stricter level of judicial scrutiny of the reasonableness of the board's decision-making process. In short, Revlon duties require a board to act reasonably, on an informed basis, and to undertake "a logically sound process" and "the directors have a choice of means" to accomplish that end.  The court's conclusion that the process employed by Netsmart fell short of a "logically sound process" was influenced by a number of "tactically-flawed" or "poorly motivated" characteristics of the sale process:   * The court noted repeatedly the general lack of meaningful evaluation, identification and consideration of potential strategic buyers by Netsmart or its investment bankers, and the potential financial interests of those constituencies to favour a going-private deal. * The evidence suggesting that management steered the board in the direction of a private equity buyout coupled with the fact that the special committee "collaborate[d] closely with Netsmart's management, allowing [the CEO] to participate in its meetings" and retained the company's long-time advisor as its own financial advisor. * The court appeared influenced by the fact that the due diligence process was handled by Netsmart management with little involvement from the special committee or its advisors. * The court found that the sporadic discussions between Netsmart's CEO and its investment banker with potential strategic buyers at various points during the previous decade that included a signal by Netsmart of a potential interest in being acquired (none of which resulted in any expression of interest by the potential acquirers) was insufficient information upon which to base a decision not to approach at least some strategic buyers. The court reasoned that only a contemporary market search could be meaningful, especially considering significant changes that had taken place at Netsmart over the previous year, including the completion of a relatively large acquisition. * The court also did not find convincing other aspects of the board's rationale for not approaching strategic buyers after the process with the private equity bidders was underway (the board's stated rationale being that strategic acquirers would believe that Netsmart's market segment was too narrow for their interests and that confidentiality leaks would be detrimental to Netsmart since many strategic buyers were Netsmart's direct competitors). In fact, the court characterized the proffered excuses for not seeking out strategic buyers as "indicative of an after-the-fact justification for a decision already made." * The court did not believe that a post-signing market check where the merger agreement included a "window shop' provision and a 3% termination fee would be adequate to entice potential strategic buyers because in light of Netsmart's size, the amount of resources required for a strategic buyer to make a hostile topping bid would likely be preclusive.   Netsmart was concerned with the so-called Revlon duty, named after *Revlon Inc v MacAndrews & Forbes Holdings Inc* 506 A 2d 173 (Del 1986) where the Delaware Supreme Court said that an enhanced judicial review applied to directors in transactions involving a "sale" of control of the corporation. In such a case "the directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the shareholders at a sale of the company." Australian courts have not explicitly adopted a similar approach in a sale context, though they are generally less deferential to the decisions of directors in a takeover context than the Delaware Courts, where the business judgment rule applies with full vigour.  Accordingly, notwithstanding the absence of a Revlon duty in Australia, directors are subject to the general common law and statutory duties to act with reasonable care and diligence and in good faith for a proper corporate purpose. In the particular circumstances of a given case, especially in the context of a private equity bidding auction, those fiduciary duties may demand a response of directors analogous to the Revlon standard. To that extent, Netsmart is a cautionary reminder of the need for companies that put themselves up for private equity auction to put in place a thorough and robust process for evaluating competing bids.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007.htm%234) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20117%20May%202007_files/spacer%281%29.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  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