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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) NEW BOOK ON EXPERTS' REPORTS

A new book titled 'Experts' Reports in Corporate Transactions has been published by Federation Press. For further details, please see item 6 of this Bulletin.

(B) SEC TO INCREASE STAFF

On 20 June 2003 the United States Securities and Exchange Commission praised US Congress House and Senate leaders for expediting passage of H.S. 658 the Accountant, Compliance, and Enforcement Staffing Act of 2003, which will greatly streamline the Commission's efforts to add more than 800 lawyers, accountants, economists and examiners to its staff.

The House of Representatives passed the bill on suspension June 17. The Senate approved the legislation by unanimous consent. President Bush is expected to sign the measure into law soon.

"The passage of this legislation will allow the SEC to more quickly hire and assimilate the many new employees needed to fulfill the corporate governance reforms of the Sarbanes-Oxley Act, and will help the Commission to continue its efforts aimed at increasing investor protection and restoring confidence in our markets," SEC Chairman William Donaldson said.

(C) ETHICS OFFICERS SAY THEY DON'T TRAIN THEIR BOARDS IN ETHICS

Despite a continuing wave of ethical lapses in major corporations, large numbers of ethics officers from US companies say their boards of directors have never received training in ethics or compliance issues, The Conference Board reports in a survey released on 17 June 2003.

The survey covers more than 80 ethics, human resources and legal officers participating in The Conference Board's 2003 Ethics Conference in New York.

While 81 percent of firms have conducted ethics and compliance training among their employees, only 27 percent have held any training sessions for their directors. About 55 percent of those surveyed say their boards are "not engaged enough" in major ethical issues involving the company.

Some 67 percent of the surveyed executives say compensation for senior executives is "out of control" in their companies. About 62 percent acknowledge that executives who leave their companies because of major violations of the company's ethics and compliance codes "get a financial package and go." In about 38 percent of the firms, wrong-doing executives leave the company without a package.

"Although board involvement in governance has increased dramatically in the past year, this is a clear indicator that ethics officers, boards and executives need to strive for higher levels of ethical leadership and accountability," said Steve Priest, who conducted the survey, and is founder of the ten-year-old Ethical Leadership Group. "Ethics officers, along with Warren Buffett, recognize that extremely high short term incentives can distort long-term business performance. The finding that is most troubling - both in itself and because of the message it sends to all the honest, decent employees - is that in over 60 percent of companies, executives who do the wrong thing actually get rewarded with a severance package".

The Conference Board survey finds that nearly 5 percent promote "great performers" who don't live up to their companies' values, with 22 percent saying they "tolerate them" and more than 25 percent reporting that they "coach them." Less than 8 percent of the companies fire them.

The survey shows that while most believe corporate ethics training can play only a modest role in preventing major scandals, it won't halt malfeasance in all companies. About 42 percent say ethics training would have made no difference in the Health South business scandals, just as a majority of these officers said ethics training would not have prevented the Enron debacle. "This is not an indictment of ethics training," according to Priest, "it is recognition that ethics codes, training and hot-lines are only part of the answer to preventing wrong doing. Good ethics programs pay as much attention to incentives, culture and management as they do to codes and training."

While a large majority of these surveyed firms have toll-free hot-lines for employees to report concerns about ethical lapses, 69 percent of the executives say that fear of retaliation is a "big issue" in their companies. Only 6 percent say their companies have a "culture of dissent" where employees can openly speak their minds.

Among other key findings:

- 59 percent say the Sarbanes-Oxley Act is a "plus that will foster improvement in ethics, compliance and governance."   
- About 41 percent expect 6-10 more major business scandals among Fortune 500 companies during the next 12 months.

(D) OECD RELEASES WHITE PAPER ON CORP0RATE GOVERNANCE IN ASIA

On 10 June 2003 the OECD Asian Roundtable on Corporate Governance released a White Paper on Corporate Governance in Asia. Following is the Background and Executive Summary from the Paper.

(1) Background

(a) The Asian Roundtable and the White Paper on Corporate Governance in Asia

The Asian Roundtable on Corporate Governance ("Roundtable") serves as a regional forum for structured policy dialogue on corporate governance. Established in response to a G-7 mandate to the Organisation for Economic Co-operation and Development (OECD) and the World Bank to encourage the implementation of the OECD Principles of Corporate Governance (the "OECD Principles"), the Roundtable comprises senior policy-makers, regulators, and representatives from stock exchanges, private-sector bodies, multilateral organisations, and non-governmental institutions.

Between March 1999 and March 2003, the OECD and the World Bank Group, in partnership with the government of Japan, the Global Corporate Governance Forum and the Asian Development Bank, and in co-operation with regional and local partners, organised five Roundtable meetings to discuss improving corporate governance in the Asian region. Using the OECD Principles as a conceptual framework, the Roundtables examined a range of subjects, from boards of directors to minority-shareholder protection to disclosure and transparency issues. In the May 2000 Roundtable meeting in Hong Kong China, participants decided to develop a region-specific corporate governance white paper ("White Paper") that would identify common policy objectives and formulate a practical reform agenda to improve corporate governance in Asia.

The White Paper is a non-binding, consultative document reflecting the discussions and recommendations of Roundtable meetings. Without assessing or ranking individual Asian countries, the White Paper provides region-specific guidance and suggestions to assist policymakers, regulators (including stock exchanges), and other standards-setting bodies in non-OECD-member countries of the Asian region ("Asian Roundtable Countries"). The White Paper also targets companies, investor and other parties that have a role or interest in promoting good corporate governance practices. The White Paper focuses primarily on publicly-traded companies although some may also find the document useful for the governance of privately-held firms and state enterprises.

While the White Paper represents a home-grown response to the corporate governance issues faced in Asia, the White Paper utilises the general structure of the OECD Principles. In so doing, the White Paper builds upon the OECD Principles, reflecting the importance of both coherence and convergence in international corporate governance standards.

The substantive chapters of the White Paper match the five key elements of a strong corporate governance framework described in the OECD Principles: (i) the rights of shareholders; (ii) the equitable treatment of shareholders; (iii) the role of stakeholders in corporate governance; (iv) disclosure and transparency; and (v) the responsibilities of the board.

The White Paper was written, debated, and endorsed on a consensus basis by an informal but highly influential group of policy-makers, regulators, stock exchange officials, private-sector participants, investors, and other interested groups. The Roundtable's inclusive approach recognizes that the OECD Principles are drafted as aspirations and that different jurisidictions may adopt different approaches to the same concerns based on their understanding of local conditions. Of course, while local conditions may determine how corporate governance aspirations should be fulfilled, these conditions do not excuse jurisdictions from fulfilling them.

Upon completion, the White Paper will be distributed to key national policy-makers, securities regulators and representatives of stock exchanges, standards-setting bodies and relevant private-sector institutions in the Asian region. The White Paper will also be submitted to multilateral institutions for consideration. Finally, the White Paper will be disseminated to the general public.

The Roundtable plans to conduct a stock-taking of developments in Asia two years after issuance of the White Paper. This stock-taking will enable Roundtable participants and the public to assess progress and to identify remaining challenges.

(b) The OECD Principles of Corporate Governance and Regional Roundtables

The OECD Principles of Corporate Governance constitute the only internationally accepted body of governance principles that address the entire corporate governance framework: the legal, institutional, and regulatory structures and practices that create the context within which firms operate. The OECD Principles resulted from broad consultation among OECD-member countries and key non-member countries, including many from Asia. The Financial Stability Forum has identified the OECD Principles as one of 12 core standards for sound financial systems. The OECD Principles have also been endorsed by the International Organisation of Securities Commissions (IOSCO), as well as by private-sector bodies, such as the International Corporate Governance Network. The OECD Principles have served as a reference point in the development of national codes of corporate governance. In Asia, the OECD Principles have been cited extensively in public- and private-sector initiatives to improve corporate governance.

The OECD Ministers formally endorsed the OECD Principles in May 1999, after which the OECD entered into an agreement with the World Bank to advocate jointly for better corporate governance worldwide. As part of this collaboration, the OECD has taken the lead in establishing regional roundtables to promote corporate governance policy dialogue and reform. A total of five regional roundtables - in Asia, Eurasia, Latin America, Russia and Southeast Europe - have been established, each of which has completed or will complete a regional white paper or a comparative paper.

In addition to the involvement of the OECD and the World Bank, each of the regional roundtables has benefited from the support of regional partners, whose active participation and support has been crucial. In Asia, the Roundtable has enjoyed the invaluable assistance of local hosts, including securities commissions, stock exchanges and private-sector institutions. Other organisations, including the Asia-Pacific Economic Cooperation forum (APEC), have also expressed their support for the objectives of the Asian Roundtable.

(2) Priorities for reform

(a) Priority 1: Public and private-sector institutions should continue to raise awareness among companies, directors, shareholders and other interested parties of the value of good corporate governance.

Since the 1997 financial crisis, Asian regimes have made considerable progress in raising awareness of the value of good corporate governance, which challenges many Asian business leaders and controlling shareholders to re-think their relationships with their companies and with the minority shareholders who lay claim to partial ownership in them. Achieving this re-orientation in thinking requires not only a strong national commitment to corporate governance, but one that is also broadbased.

(b) Priority 2: All jurisdictions should strive for effective implementation and enforcement of corporate governance laws and regulations.

Over the past several years, most Asian jurisdictions have substantially revamped their laws, regulations and other formal corporate governance norms. Such advances in rules must now be matched by advances in their implementation and enforcement, since the credibility - and utility - of a corporate governance framework rest on its enforceability. Leadership from the uppermost reaches of government is necessary to promote public confidence in the state's commitment to the rule of law.

(c) Priority 3: Asian Roundtable Countries should work towards full convergence with international standards and practices for accounting, audit and non-financial disclosure. Where, for the time being, full convergence is not possible, divergences from international standards and practices (and the reasons for these divergences) should be disclosed by standards setters; company financial statements should repeat or reference these disclosures where relevant to specific items.

Full adoption of international accounting, audit and financial disclosure standards and practices will facilitate transparency, as well as the comparability, of information across different jurisdictions. Such features, in turn, strengthen market discipline as a means for improving corporate governance  
practices.

From country to country, of course, local conditions may require the adoption of a set of standards, such as IAS,1 individually (rather than all at once) and/or at differing speeds. Until full convergence is achieved, standards setters should disclose where local standards and practices diverge from IAS (and the reasons for these divergences); company financial statements should reference specific disclosures where they apply to specific items and yield materially different results.

(d) Priority 4: Boards of directors must improve their participation in strategic planning, monitoring of internal control systems and independent review of transactions involving managers, controlling shareholders and other insiders.

Persistant problems with minority shareholder exploitation in Asia have called into question the independence and diligence of the region's boards. Recent scandals in developed markets have raised doubts in the public's mind on a global level with regard to directors' ability and willingness to discharge their fiduciary duties to the company and all of its shareholders.

In addressing these challenges, Roundtable recommendations comprise three basic categories. The first focuses on director training, voluntary codes of conduct, expectations for professional behaviour and directors' resources and authority vis-a-vis management. A second set of recommendations seeks to reduce or eliminate loopholes by tightening standards for director "independence", by making "shadow" directors liable for their actions, by increasing sanctions for violations of duties of loyalty and care and by advocating delineation of a core set of related-party transactions (such as company loans to directors and officers) that should be prohibited outright. Finally, Roundtable participants recommend adequately empowering shareholders to seek redress for violations of their rights and to ensure director accountability. Mechanisms to discourage excessive or frivolous litigation should not prevent or frustrate collective action by shareholders with meritorious claims.

(e) Priority 5: The legal and regulatory framework should ensure that non-controlling shareholders are protected from exploitation by insiders and controlling shareholders.

All Asian governments should introduce measures, or enhance existing measures, to provide non-controlling shareholders with adequate protection from exploitation by controlling shareholders. These measures should include, among other things: (i) strengthening disclosure requirements (particularly of self-dealing/related-party transactions and insider trading); (ii) ensuring that regulators have the capacity to monitor companies for compliance with these requirements and to impose substantial sanctions for wrongdoing; (iii) clarifying and strengthening the fiduciary duty of directors to act in the interest of the company and all of its shareholders; (iv) prohibiting indemnification of directors by companies for breaches of fiduciary duty; and (v) providing shareholders who suffer financial losses with private and collective rights of action against controlling shareholders and directors.

(f) Priority 6: Governments should intensify their efforts to improve the regulation and corporate governance of banks.

Asian banks play a dominant role in regional finance. Shortcomings in the governance of banks not only lower returns to the bank's shareholders, but, if widespread, can destabilise the financial system. To restore confidence to both debt and equity markets, policy-makers and regulators need, in addition to ensuring adequate banking laws and regulations and supervision of banks' operations, to promote sound corporate governance practices in the banking sector. Ownership and financial relationships should be disclosed. Self-dealing/related-party transactions should be subject to both banking and corporate governance restrictions. Bank directors should be able to pass "fit and proper" tests for service. These directors should also assume responsibility for bank systems and procedures that ensure sound lending and monitoring practices, as well as the capacity to handle distressed debt. Lastly, local insolvency systems must protect and enforce creditors' rights and provide efficient liquidation of debtors which cannot be expeditiously restructured into commercially viable enterprises.

The full report is available at [http://www.oecd.org/EN/document/0,,EN-document-77-nodirectorate-no-20-7445-28,00.html](http://www.oecd.org/EN/document/0,,EN-document-77-nodirectorate-no-20-7445-28,00.html" \t "_new)

(E) GMI LAUNCHES RATINGS ON AUSTRALIA'S ASX50

On 9 June 2003 GovernanceMetrics International(GMI), an independent corporate governance ratings agency announced ratings of the constituent companies of Australia's ASX50 index.

GMI rates companies on a scale from one to ten. Of the ASX50 companies, one, CSR Limited, received the highest rating of 10, while Woolworths scored a 9.5. GMI regards these as having governance profiles that are well above average.

Gavin Anderson, GMI's Chief Executive Officer, said: "We score companies relative to each other; they are not scored against some theoretical gold standard. It is important therefore to note that while a company may score a 10, it should not be taken to mean that it is perfect, but rather that its governance is better than others in the same universe. Nonetheless, the overall governance profile of top Australian companies is strong compared to most other markets. An interesting feature, however, is the presence in this index of complex entities such as Dual Listed Companies, "Stapled Securities Trusts" and Listed Property Trusts. The listed property trust in particular presents governance challenges in that shareholders own the underlying asset but have limited control over how it is managed because of restricted voting rights and limits on disclosure."

The main positive factors that GMI noticed in the top-ranked Australian companies were a high level of disclosure, significant separation of executive and chairman roles and a preponderance of boards with independent directors. What was troubling, though, was the amount of related-party transactions. Eighty five per cent of the ASX50 companies had related-party transactions in the last three years. These are levels that are high by US or UK standards. Significant too was the fact that in only 21 of the companies was there disclosure of a policy of board scrutiny of these transactions.

(1) The ASX50 - What was found

- 9 entities with unusual governance structures: 3 dual-listed companies, 4 listed property trusts, and 2 "stapled securities" trusts.   
- One telecommunications company with a "golden share" granted to the government, and another telecommunications company with voting and dividend rights that can only be changed through legislation.   
- A company with 15 directors, only four of whom are independent.   
- One company with such significant related-party transactions (nearly 18% of revenue) that they have established a Related-Party Committee, consisting of three independent directors.   
- A very large number of companies with related party transactions in the past three years - 85% of the index.   
- 33% of companies in the index give loans to directors and officers as part of equity incentive plans.   
- 12 companies that have significant stock ownership limitations.   
- Two-thirds of non-executive directors are paid entirely in cash, and half of all non-executive directors acquired shares other than through remuneration plans.   
- 90% of companies in the index have a total potential dilution from outstanding options of less than 5%.

(F) FINANCIAL SERVICES REFORM AMENDMENT BILL

On 6 June 2003 the Parliamentary Secretary to the Australian Treasurer, Senator Ian Campbell, released a list of proposed legislative changes designed to clarify aspects of new arrangements introduced by the [Financial Services Reform Act (FSRA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default).

The [FSR Amendment Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=70904" \t "default) containing the changes will be introduced into Parliament in the near future. The main amendments are listed below.

(1) [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) amendments

(a) Section 761A - definition of "basic deposit product" - term deposits

The definition of `basic deposit product' will be amended to include all term deposits of a term of two years or less.

(b) Section 761G - meaning of "retail" and "wholesale" client

It will be clarified that, in relation to bundled contracts of insurance, a person is considered to be a retail client only in respect of specific covers under the contract as opposed to the entire contract.

(c) Section 766E - meaning of "custodial or depository service"

An exception to the definition of providing a custodial or depository service currently applies in respect of the operation of certain superannuation funds. It will be clarified that this exception applies only to trustees, as opposed to other providers of services to those funds. A new exception will be provided for the operation of a statutory fund by a life office (which will also include the operation of a benefit fund by a friendly society).

(d) Paragraph 911A(2)(h) - overseas regulatory bodies

Difficulties have come to light with the application of this provision. It is intended to provide an exemption from licensing for certain persons if they meet prescribed conditions, including regulation by an overseas regulatory authority approved by ASIC, and dealing only with wholesale clients. To improve the practical application of the provision, it is proposed to allow ASIC to specify a financial service performed by a person regulated by an overseas regulatory body.

(e) Section 912D - reporting of breaches to ASIC

The requirements relating to notification of breaches of obligations to ASIC will be relaxed, including through extending the basic reporting period, the introduction of a materiality requirement, and specifying that it is only breaches of financial services laws under which ASIC or APRA are given functions and powers that require reporting.

(f) Section 912F - licence numbers on documents

A regulation-making power will be inserted into the section to clarify the list of documents where an AFSL number is required.

(g) Section 916F - appointment of authorised representatives

The period for notification of the appointment of an authorised representative will be extended from 10 to 15 business days. Notification to ASIC of the appointment of individual authorised representatives by a corporate authorised representative will not be required if certain requirements are met. These requirements will be that the individuals are in a specified class to which the licensee has consented; are employees of the corporate authorised representative; provide only general advice; and the advice is provided in relation to specified categories of financial products.

(h) Sections 942A and 1013B - ability to `combine' Financial Services Guides (FSGs) and Product Disclosure Statements (PDSs)

There is uncertainty over whether disclosure documents, such as FSGs and PDSs, can be combined in a single document. Amendments are proposed to permit combination in certain circumstances. These circumstances will be specified by regulation or ASIC relief and will be aimed at ensuring that the effectiveness of the information contained in the document(s) is preserved.

(i) Section 946B - execution-related telephone advice

The provisions relating to execution-related telephone advice will be refined, for example, by including advice that may not result in a transaction (eg. advice to `hold' a financial product) and advice in relation to financial products traded on appropriately regulated overseas markets.

(j) Section 1012G - verbal Product Disclosure Statement (PDS)

An amendment will be made to allow for the oral provision of PDS information in an effective manner that does not unduly affect business practices.

(k) Section 1015D - lodgement of "in use" notices by trustees of self-managed superannuation funds (SMSFs). Trustees of SMSFs are currently required to lodge a notice with ASIC advising that a PDS or Supplementary PDS is "in use". However, the information which this notice would provide is already generally available to ASIC from the Register of Complying Super Funds database maintained by the Australian Taxation Office. It is therefore proposed to remove the requirement for trustees of SMSFs to lodge in use notices. This will not compromise ASIC's ability to conduct surveillance, but will reduce its administrative workload and reduce compliance costs for SMSFs.

(l) Section 1017B - disclosure of material changes and significant events

It is proposed to clarify the operation of the ongoing disclosure requirements, including in relation to the information required by, the circumstances affected by, and persons subject to the obligation to provide information.

(m) Section 1274 - inspection of registers

It will be clarified that the public may inspect documents lodged with ASIC under sections 1015B (certain PDSs) and 1015D (what are known as "in use" notices).

(n) Parts 7.6-7.9 & 10.2 - ASIC's modification and exemption powers

Modification and exemption powers will be provided to ASIC under Part 7.6 (licensing) in line with its powers under Parts 7.7 to 7.9, to enhance ASIC's ability to grant relief. The powers in Chapter 7 will also be made consistent with those given to ASIC elsewhere in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

(o) Parts 7.6-7.8 & 7.10 - regulation making powers

To ensure that future FSRA-related issues can be resolved via regulation, more comprehensive general regulation-making powers such as those provided for in section 1020G of Part 7.9 will be included in Parts 7.6, 7.7, 7.8 and 7.10 of the Act.

(p) Part 7.9 - new provisions to regulate off-market share offers

The market value of a financial product will need to be disclosed when any person (licensed or unlicensed) makes an off-market offer to purchase that product from a retail client.

(2) [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) amendments

(a) Section 12AE - saving of State and Territory laws

An amendment is proposed to overcome a potential inconsistency that might prevent the application of the unconscionable conduct provisions of State and Territory fair trading laws.

(b) Section 127 - confidentiality

An amendment is proposed to allow ASIC to disclose confidential information to independent bodies that are established to supervise the conduct of financial markets referred to in Schedule 3 of the [Corporations Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default) (but do not themselves operate the market).

(G) NEW GUIDE TO TRIPLE BOTTOM LINE SUCCESS

On 6 June 2003 the Federal Minister for the Environment and Heritage, Dr David Kemp, unveiled a new publication to help more Australian companies reap the rewards from corporate environmental reporting.

Speaking at the Fourth Annual Global Conference on Environmental Taxation Issues in Sydney, Dr Kemp said leading organisations, both internationally and in Australia, were increasingly recognizing the benefits associated with environmental measuring and reporting.

"The role of corporate environmental reporting is to communicate to the market and broader community that appropriate measurement and management systems are in place to address environmental issues and risks associated with their activities," Dr Kemp told the conference.

"Companies who publish environmental or triple bottom line reports say that, in addition to managing risk, they are also gaining from enhanced reputation a greater ability to attract and retain high quality staff and a competitive advantage with both customers and suppliers, which all add to their financial bottom line."

The Triple Bottom Line Reporting in Australia: A Guide to Reporting Against Environmental Indicators can be found on the website at [http://www.ea.gov.au/industry/finance/publications/indicators](http://www.ea.gov.au/industry/finance/publications/indicators" \t "_new).

(H) INITIAL REPORT OF THE SPECIAL COMMITTEE ON GOVERNANCE OF THE NEW YORK STOCK EXCHANGE

On 5 June 2003 the Special Committee on Governance of the New York Stock Exchange released its initial report. The NYSE Board has announced that it is adopting the recommendations of the Committee. In a 26 March 2003 letter, United States Securities and Exchange Commission Chairman William H Donaldson asked the New York Stock Exchange and the other self-regulatory organisations to review their corporate governance in light of the broad review of governance practices throughout corporate America, to ensure that their governance structures and practices serve the public well.

The Committee recommends that the NYSE Board take a series of actions now to change or codify and disclose a number of the NYSE's existing governance practices. This Initial Report organises the changes and codifications into ten recommendations that can take effect upon action by the Board at the NYSE's annual organisation meeting because they do not require action by the NYSE's members or the SEC.

(1) Revise the charter of the Human Resources and Compensation Committee to provide that only non-industry directors may serve as members of the Committee.

(2) Annually provide the NYSE members, and make publicly available, a report of the Human Resources and Compensation Committee in which the compensation of the directors, the Chairman and the four other most highly compensated executive officers of the NYSE, is disclosed.

(3) Prohibit service by NYSE employees on the boards of directors of business corporations.

To minimise disruption to listed companies on which employees of the NYSE currently serve, such employees may continue to serve on the board of directors of listed companies until the listed company's next annual shareholders' meeting.

(4) Separate the Finance and Audit Committee into two standing committees of the Board and provide in the Audit Committee charter that only non-industry directors may serve as members. To the extent feasible, the Audit Committee should also comply with all of the other listing standards prescribed by the NYSE for listed-company audit committees.

(5) Establish a standing five-member Governance Committee responsible for reviewing the NYSE's governance-related matters. Three of the members should be non-industry directors (one of whom should chair the Governance Committee), and the other two should be the Vice-Chairs of the NYSE.

Given the NYSE's unique structure as a member-owned self-regulatory organisation, the Committee believes it is essential that, although the Governance Committee will have a majority of non-industry Directors, it should include representation of each of the NYSE's major member organisation constituencies. While nominating functions are often the responsibility of the same board committee that addresses governance functions, at this time the Committee is not recommending specific changes to the Nominating Committee. The composition and the responsibilities of the NYSE Nominating Committee are governed by provisions of the NYSE Constitution. Any change to those provisions requires a vote of the NYSE's members. Accordingly such changes cannot be implemented immediately. For that reason this Committee will consider Nominating Committee matters with the benefit of the input received during the review process.

(6) For matters within the Committee for Review's authority to oversee the NYSE Regulatory Group, require voting members to consist of a majority of non-industry directors.

The NYSE's Committee for Review is charged with, among other things, hearing appeals from member firm disciplinary proceedings, conducting listing status and delisting reviews, and reviewing the NYSE's enforcement and disciplinary procedures. The Committee for Review currently consists of 3 industry and 4 non-industry directors. Non-industry members of the Committee for Review rely on industry members to provide relevant industry expertise. This expertise is one of the most effective attributes of the self-regulatory function performed by the NYSE.

Pursuant to an SEC inspection and rule approval, the Committee's current charter requires that, when listing appeals come before the Committee, the voting members consist of a majority of non-industry directors. However, all members of the Committee who are industry directors may hear the argument and participate in the discussion.

This recommendation would apply that model to the oversight of the programs of the NYSE Regulatory Group. In this context, the Committee for Review will be responsible for monitoring and regularly reviewing all aspects of the structures, policies and procedures of the NYSE's surveillance, examination and enforcement units to better ensure the effectiveness and fairness of the structures, policies and procedures.

As is currently the case for all matters coming before the Committee for Review, if a programmatic matter came before the Committee that raised a conflict of interest for a particular industry member of the Committee, that member would recuse himself or herself.

The work of this Committee, which will report regularly to the Board, will assure a high degree of Board-level focus on the critical self-regulatory aspects of the NYSE's operations.

(7) For purposes of allocating Board committee assignments, the Board should not consider any director who is the CEO of a bank holding company, one of the subsidiaries of which is a broker or dealer that does business with the public, to be a non-industry director.

Provisions in the NYSE Constitution that predate the repeal of the Glass-Steagall Act make is impossible for a CEO of a bank holding company with a broker-dealer subsidiary that is not its principal subsidiary to be designated as an industry director. However, the NYSE Constitution permits such a CEO to serve as a non-industry director if the broker-dealer subsidiary contributes 20 per cent or less of the revenue of the bank holding company.

This Committee intends to consider in connection with its review process, the size and composition of the Board, including the Constitutional definitions of "industry director" and "public director". As noted, Constitutional changes will require member approval and accordingly cannot be implemented immediately. Nonetheless, the Board has the authority now, as a matter of policy in allocating committee assignments, to ensure that no non-industry position on any Board committee is occupied by a director who is the CEO of a bank holding company with any broker or dealer subsidiary that does business with the public.

(8) Adopt and post on the NYSE's website written Governance Principles (as drafted by the Special Committee) to formalise and establish the practices described therein and including, among others, (a) the regular convening of executive sessions of the Board at which the non-management directors meet without the management directors and (b) designating the Chairman of the newly-formed Governance Committee to preside over these executive sessions.

(9) Collect and augment the NYSE's current ethics requirements for NYSE directors in the form of an ethics code for directors. Post the directors ethics code on the NYSE's web-site, and promptly disclose any waivers of the ethics codes for directors or executive officers of the NYSE.

(10) Require that the committee charters and the membership of each committee be disclosed on the NYSE's website. This policy is included in the proposed Interim Governance Principles.

(I) SIX FORMER SENIOR EXECUTIVES OF XEROX SETTLE SEC ENFORCEMENT ACTION CHARGING THEM WITH FRAUD

On 5 June 2003 the United States Securities and Exchange Commission charged six former senior executives of Xerox Corporation, including its former chief executive officers, Paul A Allaire and G Richard Thoman, and its former chief financial officer, Barry D Romeril, with securities fraud and aiding and abetting Xerox's violations of the reporting, books and records and internal control provisions of the federal securities laws.

The six defendants have agreed to pay over $22 million in penalties, disgorgement and interest without admitting or denying the SEC's allegations. The SEC intends to have these funds paid into a court account pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002 for ultimate distribution to victims of the alleged fraud.

The SEC's complaint alleges that the executives engaged in a fraudulent scheme that lasted from 1997 to 2000 that misled investors about Xerox's earnings to polish its reputation on Wall Street and to boost the company's stock price. The scheme involved the use of accounting devices that were not disclosed to investors, many of which violated generally accepted accounting principles (GAAP). The complaint alleges that the defendants' fraudulent conduct was responsible for accelerating the recognition of equipment revenues by approximately $3 billion and increasing pre-tax earnings by approximately $1.4 billion in Xerox's 1997-2000 financial results.

The complaint names the following individuals as defendants who held senior positions at Xerox during 1997 through the publication of Xerox's 2000 financial statements:

Paul A Allaire, former CEO of the company until April 1999 and again from May 2000 through August 2001, and also the former Chairman of Xerox's Board of Directors and a Director throughout the period charged in the complaint;

G Richard Thoman, former President and Chief Operating Officer from July 1997 through April 1999, CEO from April 1999 through May 2000, and also a Director of the company from July 1997 through May 2000;   
  
Barry D Romeril, former CFO from 1993 through December 2001, and executive vice president from 1997 through early 1999 and then Vice Chairman;

Philip D Fishbach, former Controller until his retirement from Xerox in April 2000;

Daniel S Marchibroda, former Assistant Controller until January 2000; and

Gregory B Tayler, former Director of Accounting Policy (March 1997-April 1999), Assistant Treasurer (May 1999-March 2000) and Controller (April 2000-November 2001).

(1) The SEC's Federal Court complaint

The SEC's complaint, filed in US District Court for the Southern District of New York, alleges that the defendants relied on what Xerox internally called "one-time actions," "one-offs," "accounting opportunities" and "non-operational actions" to impose accounting adjustments on operational results for the purpose of increasing equipment revenues and inflating earnings in financial results Xerox reported to the public. These accounting actions, which were not disclosed to investors, were used at the end of each financial reporting period during 1997 - 2000 to "close the gap" between Xerox's actual underlying earnings and its internal targets and those of Wall Street analysts. The accounting devices improved Xerox's earnings, equipment revenues and margins in each quarter and year during 1997 - 2000, and allowed Xerox to meet or exceed Wall Street expectations in nearly every reporting period during 1997 - 1999. By 1998, nearly three out of every ten dollars of Xerox's annual reported pre-tax earnings and up to 37 per cent of its reported quarterly pre-tax earnings came from undisclosed changes to its historic accounting practices and estimates.

The complaint alleges that CEOs Allaire and Thoman, and CFO Romeril, set a "tone at the top" of the company, which equated business success with meeting short-term earnings targets. Romeril directed or allowed lower ranking defendants in Xerox's financial department to make accounting adjustments to results reported from operating divisions to accelerate revenues and increase earnings. Fishbach, Marchibroda and Tayler adopted and applied the accounting devices for the purpose of meeting earnings goals and predictions of outside securities analysts. Allaire and Thoman then announced these results to the public through meetings with analysts and in communications to shareholders, celebrating that Xerox was enjoying substantially greater earnings growth than true operating results warranted.

The complaint alleges that the defendants used undisclosed accounting devices to "close the gap" between underlying and desired financial results, and that the defendants were aware of Xerox's increasing dependence on such accounting actions during 1997-2000 through various internal Xerox reports, memos, e-mails and meetings that addressed the financial performance of Xerox's significant operating units and the company's overall consolidated financial results. For example, the complaint alleges:

- in a September 1997 e-mail copied to Fishbach, Marchibroda and Tayler, Romeril asked the controller of Xerox Europe about his progress in assessing a potential accounting device and stated: "This could be the crucial opportunity for making Quarter 3. I cannot see a higher priority in terms of once-offs";  
- in November 1998, Romeril informed Allaire, Thoman, Fishbach and others that over the past four years Xerox's major earnings-generating market in Brazil had "$700M of unreal profits" from "non-marketing actions" and that the "[c]onceptual framework [of] our profile is illusory...the profits are there the question is the timing of when you take them";  
- in August 1998, Fishbach told Thoman that although Xerox Europe's "operational" growth was 2 per cent, "the growth that is likely to be reported is closer to 10% given headquarters adjustments for margin normalization and other accounting items";  
- in October 1999, Xerox's vice chairman reported to Romeril and Thoman that Xerox Europe's underlying operational results, without accounting devices and restructuring, "have been deteriorating since 1995 and are very different than the reported results," and he provided them a chart from Xerox Europe's president illustrating operational results with and without the use of accounting devices;  
- likewise in January 2000, the president of Xerox Europe informed Thoman, Romeril and others that Europe's pre-tax profits had been "declining since 1996," that declines in 1999 profits were "driven by prior year once-offs [including accounting devices], the benefits of which started to reverse during 1999," but that "this declining trend has been fully contained in the reported profit" in part through the use of such accounting devices;  
- in November 1999, Romeril told Thoman and other Xerox executives that when accounting actions and certain other items were stripped away from Xerox's overall consolidated reported revenues, Xerox was essentially a "no growth" company from 1998-1999, and in that same month Romeril provided Thoman, Fishbach, and others with documents showing the historical impact of accounting actions and certain other items in order to show the company's "true operating economics."

Specifically, the complaint alleges that all of the defendants fraudulently failed to disclose to shareholders and investors the financial impact of the principal accounting devices Xerox used during 1997-2000. These devices accelerated the recognition of equipment revenue and increased earnings from leases of Xerox copiers that historically were recorded in future periods, and allowed Xerox to portray its business and growth as far more robust in 1997-99 than they in fact were. The complaint further alleges that defendants Romeril, Fishbach, Marchibroda and Tayler, Xerox's senior financial executives, knew or were reckless in not knowing that these accounting devices violated GAAP and should have been disclosed under GAAP. In addition, as alleged in the complaint, Romeril, Fishbach and Marchibroda knowingly or recklessly used excess or cushion reserves and income from tax refunds to manage earnings in violation of GAAP, and Tayler was aware of the improper use of the largest of these reserves. Finally, the complaint alleges that all of the defendants used undisclosed business transactions in 1999 to accelerate the recognition of equipment revenue and earnings that concealed financial and operating weaknesses.

(2) The settlement

The defendants have each offered to settle by consenting, without admitting or denying the SEC's allegations, to the entry of a final judgment in the civil action that:

- permanently enjoins each of them from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, and (except for Allaire and Thoman) violating Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder;   
- imposes an officer and director bar against Allaire (5 years), Thoman (3 years) Romeril (permanent), and Fishbach (5 years);   
- requires each of them to pay civil penalties in the following amounts: $1 million for Allaire; $750,000 for Thoman; $1 million for Romeril; $100,000 for Fishbach; $75,000 for Marchibroda; and $75,000 for Tayler;  
- requires each of them to pay disgorgement and prejudgment interest thereon in the following amounts:  
Allaire: $5,696,678 - disgorgement; $1,938,124 - prejudgment interest;  
Thoman: $4,668,396 - disgorgement; $1,440,993 - prejudgment interest;  
Romeril: $2,987,282 - disgorgement; $1,227,688 - prejudgment interest;  
Fishbach: $666,748 - disgorgement; $289,904 - prejudgment interest;  
Marchibroda: $273,399 - disgorgement; $88,920 - prejudgment interest;  
Tayler: $92,603 - disgorgement; $32,397 - prejudgment interest; and  
- requires Fishbach and Marchibroda to relinquish their respective rights to certain deferred bonuses ($127,035 for Fishbach and $50,228 for Marchibroda) plus accrued interest on these amounts.

In addition, both Romeril and Tayler have agreed to the entry by the SEC of an Order pursuant to Rule 102(e) of the SEC's Rules of Practice that suspends each of them (based on the entry of the injunction in the federal court action) from appearing or practicing before the SEC as an accountant. This Order will suspend Romeril permanently and suspend Tayler for three years with a right to apply for reinstatement after the three-year period.

(3) Prior SEC action

The SEC previously brought two other injunctive actions based on the same fraudulent scheme as is alleged against the senior Xerox executives, as well as other allegations. On April 11, 2002, the SEC brought an injunctive action against Xerox. Without admitting or denying the allegations of the complaint, Xerox consented to the entry of a Final Judgment that permanently enjoined the company from violating the antifraud, reporting and record keeping provisions of the federal securities laws. Xerox also paid a $10 million civil penalty, agreed to restate its financial statements and agreed to hire a consultant to review the company's internal accounting controls and policies. In addition, on 29 January 2003, the SEC brought an injunctive action against Xerox's former auditor, KPMG LLP, and four of its audit partners in connection with the audits of Xerox from 1997 - 2000. The action against KPMG and its partners is currently in litigation.

(J) IAASB ISSUES EXPOSURE DRAFT TO ENHANCE FIRM QUALITY CONTROL PRACTICES

In its ongoing efforts to ensure high quality performance by the world's auditors, the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) issued an exposure draft (ED) on 5 June 2003 containing a proposed International Standard on Quality Control (ISQC) 1, Quality Control for Audit, Assurance and Related Services Practices, and a proposed revised International Standard on Auditing (ISA) 220, Quality Control for Audit Engagements.

This ED, which also includes an explanatory memorandum, may be downloaded from the IFAC website at [http://www.ifac.org/eds](http://www.ifac.org/eds" \t "_new). Comments are requested by 31 August 2003.

The proposed ISQC 1 requires a firm to establish a system of quality control designed to provide it with reasonable assurance that the firm and its personnel comply with professional standards and applicable regulatory and legal requirements. It contains new proposed basic principles and procedures regarding leadership and responsibilities within the firm, including a requirement that the chief executive officer (or equivalent) of the firm has ultimate responsibility for the firm's system of quality control. Other areas addressed in the ED include ethics, partner rotation, acceptance and continuance of client relationships, engagement quality control review, and monitoring.

ISQC 1 represents the first in a series of International Quality Control Standards. The ultimate goal of the project is to establish quality control standards for all engagements falling within the scope of IAASB engagement standards.

The proposed revised ISA 220 establishes basic principles and essential procedures, and provides guidance on quality control procedures for audit engagements. These include requirements for an engagement quality control reviewer to perform an objective evaluation of the compliance with applicable professional standards. Guidance is specifically provided on leadership responsibilities, ethics, engagement performance, engagement quality control review, and monitoring.

It is proposed that the new guidance become effective January 1, 2005.

IAASB welcomes comments on any aspect of the ED. Comments may be sent to [edcomments@ifac.org](mailto:edcomments@ifac.org), mailed to the Technical Director, IAASB, 545 Fifth Ave, NY,  
NY 10017 US, or faxed to the Technical Director at +1-212-286-9570.

(K) NYSE/NASD IPO ADVISORY COMMITTEE PUBLISHES REPORT AND RECOMMENDATIONS

On 29 May 2003 the NYSE/NASD IPO Advisory Committee, formed in October 2002 by the New York Stock Exchange and NASD at the request of the Securities and Exchange Commission, issued its final report and recommendations.

The report, which was developed by a committee of corporate, financial and academic leaders, proposes 20 steps to enhance public confidence in the integrity of the IPO process, along the following themes:

- the IPO process must promote transparency in pricing and avoid aftermarket distortions;   
- abusive allocation practices must be eliminated; and  
- the flow of, and access to, information regarding IPOs must be improved.

The Committee's report states that its recommendations are intended to complement the numerous recent legislative and regulatory initiatives, including the Global Settlement among regulators and major investment banks.

The report is available on the NASD's website at [http://www.nasdr.com/pdf-text/ipo\_report.pdf](http://www.nasdr.com/pdf-text/ipo_report.pdf" \t "_new)

(L) SEC IMPLEMENTS INTERNAL CONTROL PROVISIONS OF SARBANES-OXLEY ACT

On 27 May 2003 the United States Securities and Exchange Commission voted to adopt rules concerning management's report on internal control over financial reporting.

Section 404 of Sarbanes-Oxley Act of 2002 directs the Commission to adopt rules requiring each annual report of a company, other than a registered investment company, to contain (1) a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) management's assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal control structure and procedures for financial reporting. Section 404 also requires the company's auditor to attest to, and report on management's assessment of the effectiveness of the company's internal controls and procedures for financial reporting in accordance with standards established by the Public Company Accounting Oversight Board. The Commission received over 60 comments on the Section 404 proposals that expressed general overall support for the Commission's approach to implementing Section 404 of the Act. The adopting release will incorporate a number of changes recommended by commenters.

Under the final rules, management's annual internal control report will have to contain:

- a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the company;  
- a statement identifying the framework used by management to evaluate the effectiveness of this internal control;  
- management's assessment of the effectiveness of this internal control as of the end of the company's most recent fiscal year; and  
- a statement that its auditor has issued an attestation report on management's assessment.

Under the new rules, management must disclose any material weakness and will be unable to conclude that the company's internal control over financial reporting is effective if there are one or more material weaknesses in such control. Furthermore, the framework on which management's evaluation is based will have to be a suitable, recognised control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment.

The new rules implementing Section 404 of the Act will define the term "internal control over financial reporting" to mean:

a process designed by, or under the supervision of, the registrant's principal executive and principal financial officers, or persons performing similar functions, and effected by the registrant's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the registrant;  
- provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and receipts and expenditures of the registrant are being made only in accordance with authorisations of management and directors of the registrant; and  
- provide reasonable assurance regarding prevention or timely detection of unauthorised acquisition, use or disposition of the registrant's assets that could have a material effect on the financial statements.

The Commission also voted to adopt amendments requiring companies to perform quarterly evaluations of changes that have materially affected or are reasonably likely to materially affect the company's internal control over financial reporting.

Compliance with the rules regarding management's report on internal controls will be required as follows: companies, other than foreign private issuers, meeting the definition of an "accelerated filer" in Exchange Act Rule 12b-2 (generally, US companies that have equity market capitalization over $75 million and have filed an annual report with the Commission) will be required to comply with the management report on internal control over financial reporting requirements for fiscal years ending on or after June 15, 2004, and all other issuers, including small business issuers and foreign private issuers, will be required to comply for their fiscal years ending on or after 15 April 2005.

(M) AUSTRALIA'S GLOBALISATION EXPERIENCE

On 26 May 2003, the Australian Department of Foreign Affairs and Trade published a report "Globalisation: Keeping the Gains". Following is an extract from the Executive Summary.

(1) Overview

Australia's experience shows how a medium sized open economy with appropriate domestic policies and strong institutions can succeed in a more integrated and competitive global economy. Over the past two decades, Australian governments have cut tariffs, opened capital markets to international flows and promoted competition. By 2002, Australia enjoyed one of the world's most open trading and investing environments. Over time, these reforms transformed Australian industries and service sectors, encouraging them to adopt new technologies, increase training efforts and seek export markets. Successive governments also increased the transparency and accountability of important economic governance institutions, enabling Australia to respond effectively to the demands of a globally integrated economy.

Opening to world markets also increased pressure for other domestic reforms, including in labour and capital markets, taxation and utilities, generating higher productivity and living standard growth.

As a result, in the 1990s, Australia's productivity and living standards grew much faster than in the preceding three decades. By 2001, Australians were around 55 per cent better off than in 1980, after adjusting for inflation.

As Australia globalised, its economy and exports also have become more diversified. As trade and investment barriers fell from the 1980s, Australia's manufacturing and services sectors became more efficient and they now provide over 40 per cent of Australia's exports, providing new jobs and income growth. Domestic reforms and a globalised economy also help Australia to remain a profitable exporter of minerals and agricultural products, even though the latter often confront high trade barriers. While agricultural producers in protected economies typically resist reforms and remain inefficient, Australia's agricultural sector is open to world markets, boosting farm efficiency.

(2) Globalisation part of East Asia's success

Opening to world markets also has been central to East Asia's rapid growth over the last 30 years, delivering more people from poverty more quickly than ever before in human history. Labour intensive export oriented industries productively employ millions of surplus agricultural workers across the region and foreign direct investment provides new skills, technologies and markets vital to expanding exports. East Asian governments generally created the policy environment to support this success, investing in education and infrastructure, operating stable macroeconomic policies and providing political stability. As a result, in just 12 years from 1987 to 1998, the number of East Asian citizens living below the international poverty line of US$1 per day dropped from 417 million to 267 million.

However, to encourage FDI and domestic investment and regain past growth rates, East Asian governments are aware they must strengthen market discipline and regulation of their financial and corporate sectors.

(3) Implications

Over the past three decades, the experience of Australia and successful East Asian countries shows that economies gaining most from globalisation have governments which provide effective and accountable economic policies and institutions, flexible markets, efficient infrastructure and quality mass education and training. Opening international markets to developing country exports is a key priority to help low income countries gain from globalisation; all economies also would gain significantly from further trade and investment opening, including through the WTO's current Doha Round.

Development assistance to help regional economies strengthen their key economic institutions also can help our neighbours maximise their gains from globalisation.

Further information about the report is available at:

[http://www.dfat.gov.au/publications/globalisation\_gains/index.html](http://www.dfat.gov.au/publications/globalisation_gains/index.html" \t "_new)

(N) COMPANIES MAKE CHANGES TO US BOARD COMPENSATION IN 2003 STUDY SHOWS

The shortage of qualified board candidates and a stronger corporate governance environment have prompted nearly 60 per cent of companies to change some aspect of their outside board of director compensation in 2003, according to Hewitt Associates, a global human resources outsourcing and consulting firm.

Hewitt surveyed 187 US companies (with median revenues of $3.7 billion) in its "Timely Topic Study on US Board Compensation," and found that 36 per cent of the organisations with board retainers are increasing them in 2003. Specifically, the median cash retainer for a board member this year is $35,000. In addition to that, the median cash retainer for committee chairs went from $4,000 in 2002 to an anticipated $7,500 in 2003. Retainers for audit committee chairs, in particular, doubled from $5,000 in 2002 to $10,000 in 2003, and retainers for compensation committee chairs more than doubled from $3,500 in 2002 to $7,500 this year.

As for meeting fees, 22 per cent of companies providing committee member meeting fees are paying more this year and 20 per cent of organisations with board member meeting fees are increasing them in 2003. The median fee paid per meeting in 2003 is $1,250.

(1) Options still a favoured form of equity compensation for board members

As for equity compensation, 73 per cent of the companies surveyed offer stock options as part of board compensation and 65 per cent provide either deferred, restricted or outright stock/units. Of the companies offering stock options to the board, 82 per cent do not plan to change to another form of stock incentive, at least in 2003. As for the remaining 18 per cent, approximately half are changing to restricted stock units and nearly a quarter are switching to deferred stock units.

Furthermore, the study indicates that 67 per cent of companies currently do not have director stock ownership guidelines, and 81 per cent do not require stock be held by directors for a set period of time. Of the 19 per cent that do have mandatory stock holding requirements, more than two-thirds said board members need to hold stock for their entire board tenure.

(2) Companies provide limited benefits and perks

In addition, when asked about benefits and perquisites, 48 per cent of the companies in the study said they do not offer benefits, while 51 per cent of these organisations do not offer perks. Of those companies offering benefits, travel/accident insurance is the most popular (37 per cent of those surveyed). Meanwhile, the most popular perks include a charitable matching gift program (30 per cent) and first-class air travel (24 per cent).

(3) Additional study highlights

- Lead/presiding directors  
Currently, one quarter of companies have a "Lead" or "Presiding" Director, and Hewitt expects this number to increase over time. Most often, these roles are responsible for presiding over executive sessions of the board and helping to determine board agendas.  
- Director retirement  
Two-thirds of companies specify a mandatory retirement age for directors, the most common being 70. However, half of these organisations allow for exceptions if the director has a special skill or knowledge that is important to the company.  
- Board meetings in 2003   
Compared to 2002, a large majority of companies expect that their boards will not change the number of full board meetings they hold. However, there are several committees where a significant proportion of companies do expect more meetings. These include Governance, Nominating and Audit committees.

(O) REVIEW INTO PART 23 OF THE [SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default)

Part 23 of the Australian [Superannuation Industry (Supervision) Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default) (SIS Act) enables a trustee of a superannuation fund to apply to the Minister for a grant of financial assistance where the fund has suffered a loss as a result of fraudulent conduct or theft. The Minister must be satisfied that loss has caused a substantial diminution in the fund's assets leading to difficulty in paying benefits, and that the public interest requires a grant to be made. The first grant of financial assistance under the provisions of Part 23 of the SIS Act occurred in 2002.

The issue of compensating members affected by fraud or theft in superannuation funds was raised in the October 2001 Issues Paper released by the Government, "Options for Improving the Safety of Superannuation", which can be found on the Department of Treasury webpage at [http://www.treasury.gov.au/content/superannuation.asp?ContentID=344&titl=Superannuation](http://www.treasury.gov.au/content/superannuation.asp?ContentID=344&titl=Superannuation" \t "_new).

The Final Report of the Superannuation Working Group (SWG) into the Issues Paper recommended that the provisions not be changed at that time, but that the Government should review the operation of Part 23 and consider possible amendments to it, in consultation with relevant stakeholders, once the first decision under Part 23 had been made. In responding to the SWG recommendations, the Government agreed to review the operation of Part 23.

Accordingly, the Government invites written submissions on the issues relating to Part 23 of the SIS Act and the associated levy process under the [Superannuation (Financial Assistance Funding) Levy Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8223" \t "default) (Levy Act).

Closing Date for submissions is Friday, 1 August 2003. Submissions should be addressed to:

Part 23 Review  
Superannuation and Insurance Unit  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Fax: (02) 6263 3030  
Email: [part23review@treasury.gov.au](mailto:part23review@treasury.gov.au)

Inquiries concerning the paper can be made to:

Joanne Evans (02) 6263 3240  
Karen Wood (02) 6263 2906  
Aaron Broughton (02) 6263 3806

2. RECENT ASIC DEVELOPMENTS

(A) ASIC AND HONG KONG SFC SIGN MOU

On 26 June 2003 Mr David Knott, Chairman of ASIC signed a Memorandum of Understanding (MoU) with Mr Andrew Sheng, Chairman of the Hong Kong Securities and Futures Commission (SFC).

The new arrangements will enable ASIC licensed managed investment scheme operators outside of Hong Kong to manage SFC authorised funds without having to apply for separate registration in Hong Kong.

'This is a further important step towards international reciprocity of regulation. From the perspective of Australian fund managers, today's initiative opens up new marketing opportunities without the requirement of additional licensing requirements in Hong Kong', Mr Knott said.

'Australia greatly values its close working relationship with the Hong Kong SFC and looks forward to further opportunities of this type throughout the Asia-Pacific region', he said.

The MoU (Declaration on Cooperation and Supervision of Cross-Border Investment Management Activity) lays the groundwork for the recognition of Australia as an Acceptable Inspection Regime (AIR) under the SFC's Code on Unit Trusts and Mutual Funds.

Under the MoU, the SFC and ASIC have agreed to exchange information and offer assistance to each other concerning the activities of fund managers licensed in one jurisdiction and also operating in the other jurisdiction. This regulatory co-operation facilitates ASIC in its supervision and inspection of fund managers that are licensed with the SFC and also operating managed investment scheme funds in Australia.

(1) Background

Australia is an active participant in the International Organization of Securities Commissions (IOSCO). Mr Knott chairs the IOSCO Technical Committee, which is undertaking substantial work in streamlining international regulation, including acceptance of international accounting standards.

On 18 November 2002, ASIC released a discussion paper on principles for cross-border financial services recognition, which address issues relating to the regulation of foreign markets, products and services across international borders. ASIC is also finalising a policy on foreign financial service providers for release shortly.

For further information contact:

Greg Tanzer  
Executive Director  
Regional Coordination and International Relations  
ASIC  
Tel: (07) 3867 4704  
Mobile: 0411 549 144

(B) ASIC POLICY STATEMENT: ADVISERS' CONDUCT AND DISCLOSURE OBLIGATIONS

On 26 June 2003 ASIC explained how it will administer the new conduct and disclosure obligations for financial advisers that have been designed to raise the standard of financial product advice that investors receive.

These new obligations are part of the amendments to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) made by the Financial Services Reform Act 2002 (FSR) which came into effect on 11 March 2002.

'The new obligations are designed to ensure that investors are given suitable personal advice, and that they ate adequately informed about the adviser and the advice they receive through the Financial Services Guide (FSG) and Statement of Advice (SOA) disclosure obligations', ASIC Executive Director, Financial Services Regulation, Mr Ian Johnston said.

Policy Statement 175 Licensing: Financial product advisers - conduct and disclosure provides guidance from ASIC for advisers on their conduct and disclosure obligations. In future we may issue additional guidance if it is deemed necessary, taking into account developments in industry practice and our experience', he said.

However, PS 175 does not constitute legal advice. In PS 175 ASIC has sought to provide helpful assistance but it remains the responsibility of each licensee and adviser to comply with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and regulations.

The PS 175 was developed after giving careful consideration to the views expressed in the submissions received in response to ASIC's policy proposal paper Licensing: Financial product advisers - Conduct and disclosure, that was released for public comment in December 2002.

(1) Summary of licensing: financial product advisers

Conduct and disclosure Part 7.7 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires a 'providing entity' (licensee or authorised representative) to comply with certain conduct and disclosure obligations when it provides financial product advice to retail clients. These conduct and disclosure obligations vary depending on whether the advice is general advice or personal advice.

Where personal advice is provided to a retail client, the key obligations are:

(a) preparing and providing a Financial Services Guide (FSG);

(b) complying with the suitability rule (section 945A);

(c) warning the client that the personal advice is based on incomplete or inaccurate information (if this is the case), and

(d) preparing and providing a Statement of Advice (SOA).

Whenever general advice is provided to a retail client, the providing entity must generally give the client a FSG, and provide a warning to the client that the advice has been prepared without taking into account the client's objectives, financial situation or needs.

PS 175 sets out ASIC's policy in relation to these obligations. In particular, it considers:

(a) the difference between personal and general advice;

(b) when and how a FSG must be provided;

(c) when a FSG can be combined with a PDS;

(d) the FSG content requirements, including the requirement to disclose fees, commissions and other benefits;

(e) the suitability rule (section 945A), including the extent of the obligation to make 'client inquiries' and the meaning of 'appropriate' advice; and

(f) the SOA content requirements, including the obligation to disclose the 'basis' of the advice and to disclose fees, commissions and other benefits.

PS 175 also refers to standard licence conditions which ASIC will impose requiring  
certain records to be kept by licensees.

PS 175 does not consider the full range of conduct and disclosure obligations imposed by Part 7.7 or on all issues raised in submissions received on ASIC's policy proposal paper Licensing: Financial product advisers - Conduct and disclosure (December 2002). It does not cover the following issues that are now covered by regulations:

(a) FSG relief for general advice provided by product issuers (paragraphs B3-B4 of the policy proposal paper) - this is now covered by reg 7.7.02(4); and

(b) personalised FSG relief (paragraphs B5-B6 of the policy proposal paper) - this is now covered by reg 7.7.05B.

PS 175 should be read in conjunction with ASIC's other policy statements and guidance publications that explain how ASIC administers the FSR licensing and disclosure' regimes.

PS 175 will also need to be read in conjunction with any relevant changes to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) or the regulations which may be made.

(2) List of key related ASIC policy statements and guidance publications

Policy Statement 146 Licensing: Training of financial product advisers [PS 1461]

Policy Statement 164 Licensing: Organisational capacities [PS 1641]

Policy Statement 167 Licensing: Discretionary powers and transition [PS 1671]

Policy Statement 168 Disclosure: Product Disclosure Statements (and other disclosure obligations) [PS 1681]

Building the FSRB Administrative Framework - Policy to implement the Financial Services Reform Bill 2001 (April 2001) and Supplement (September 2001)

Licensing and disclosure: Making the transition to the FSR regime -An ASIC guide (October 2001, updated November 2002)

Licensing: The scope of the licensing regime: Financial product advice and dealing -An ASIC guide (November 2001, updated November 2002)

Australian Financial Services (AFS) Licensing Kit (Version 3, April 2003)

Makingg the transition to an AFS licence: pre-FSR licences and insurance broker registrations - An ASIC Guide (April 2002)

(C) EXCESSES ON PI INSURANCE FOR INSURANCE BROKERS

On 10 June 2003 ASIC announced its interim position in relation to the circumstances in which it will permit excesses or deductibles on professional indemnity (PI) insurance cover to exceed the level prescribed by the [Insurance (Agents & Brokers) Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6415" \t "default) (IABA).

'ASIC recognises that the PI insurance market is difficult for some professionals at present', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said.

'We acknowledge that the maximum permissible excess has not been reviewed for some time, and have adopted an interim position regarding the circumstances in which we will permit excesses or deductibles to exceed the IABA-prescribed levels, to assist brokers in obtaining more affordable insurance', he said.

Under current compensation arrangements, an acceptable contract of PI insurance must be maintained by insurance brokers registered under IABA, and Australian Financial Services Licence (AFSL) holders whose licence authorises them to carry on an activity to which the IABA PI insurance requirements previously applied.

These current compensation arrangements will continue to apply until 10 March 2004, after which time, it is anticipated that new compensation arrangements, under s912B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act), will come into effect.

Under IABA, an acceptable contract of PI insurance is prescribed as one where any excess or deductible on the PI insurance cover does not exceed $10,000 or 2.5 per cent of the insurance brokerage income for the previous financial year (whichever is greater), ASIC has the discretion to allow an excess or deductible to exceed this particular requirement.

Under the interim arrangements announced today, ASIC will permit an excess or deductible to exceed the IABA requirements, provided the excess or deductible does not exceed $18,750, or 20 per cent of the surplus liquid funds (SLF) of the insurance broker or AFSL holder, whichever is greater. The SLF is to be calculated in accordance with Policy Statement 166 Licensing: Financial Requirements.

In order to qualify, an insurance broker or AFSL holder will need to apply to ASIC in writing. Where the excess or deductible is greater than $18,750 but does not exceed 20 per cent of SLF, applicants must also provide a supporting letter from a registered company auditor confirming the current amount of SLF. Where the excess or deductible is less than $18,750, a supporting letter is not required.

Further guidance will be provided in the event that the law is amended or ASIC's position changes.

For further information contact:

Parnela McAlister  
Director FSR -Legal & Technical Operations  
ASIC  
Tel: (03) 9280 3450  
Mobile: 0402 426 956

(D) EXTERNALLY ADMINISTERED COMPANIES: FINANCIAL REPORTING AND AGMs

On 5 June 2003 ASIC released an interim policy statement about the financial reporting and annual general meeting (AGM) obligations of externally administered companies, PS 174 - Externally administered companies: Financial reporting and AGMs.

ASIC has also issued Class Order [CO 03/0392] which exempts companies in liquidation from the financial reporting obligations in Part 2M.3 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act), and grants certain other externally administered companies an extension of time in which to lodge and, where applicable, distribute an upcoming financial report.

'ASIC's view is that companies which become externally administered are still obliged to prepare and lodge financial reports', ASIC Director, Corporate Finance, Mr Richard Cockburn said.

'The interim policy statement is intended to ensure external administrators are aware of a company's ongoing obligations under Part 2M.3 and s250N of the Act, and to assist externally administered companies to determine when it may be appropriate for the company to seek relief from those obligations', he said.

The Class Order and interim policy statement are the outcome of consultation undertaken by ASIC in the second half of last year on the financial reporting and AGM obligations of companies in external administration under Part 5.3A of the Act.

The interim policy statement discusses the Class Order relief, and sets out what individual relief is available for externally administered companies from the financial reporting obligations, as well as the circumstances in which ASIC may grant an externally administered public company an extension of time to hold an AGM.

For further information contact:

Richard Cockburn  
Director, Corporate Finance  
ASIC  
Tel: (03) 9280 3201  
Mobile: 0411 549 034

(E) RENE RIVKIN SENTENCED TO JAIL

On 29 May 2003 Mr Rene Walter Rivkin was convicted and sentenced in the NSW Supreme Court on one count of insider trading in the shares of Qantas Airways Limited (Qantas). Mr Rivkin was sentenced to nine months imprisonment, to be served by way of periodic detention, and was fined $30,000.

On 30 April 2003 Mr Rivkin was found guilty by jury on one count of insider trading in contravention of section 1002G(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), following a 21-day trial in the NSW Supreme Court before Justice Whealy.

Justice Whealy entered a conviction against Mr Rivkin and recorded a sentence.

The judgment of Justice Whealy is discussed in Item 5(H) of this Bulletin.

(1) Background

ASIC alleged that Mr Rivkin contravened the insider trading provisions of the Corporations Act when, on 24 April 2001, he purchased 50,000 Qantas shares.

The shares were purchased in the name of Rivkin Investments Pty Ltd, a company of which Mr Rivkin is the sole director. The charge followed an investigation by ASIC into the circumstances surrounding trading in Qantas shares shortly before Qantas announced that it would take over the operations of Impulse Airlines. Mr Rivkin has lodged a notice of intention to appeal in respect of the jury decision.

(2) Statement on conviction of Rene Rivkin by Mr David Knott, Chairman of ASIC

"Mr Rene Rivkin was convicted of the criminal offence of insider trading. Insider trading is a serious offence that undermines the fairness and integrity of our stock market. Mr Rivkin sought to trivialise these proceedings from the time they were first instituted. In doing so he mocks every investor who expects fair dealing and proper disclosure in share markets transactions.

"The fact that he made a relatively small profit from the transaction does not alter its criminal nature. The offence he committed was against the sellers of 50,000 Qantas shares who thought they were dealing in a properly informed market. Instead they were dealing with a person who had gained inside information and withheld it from them. If those sellers had not sold until after the announcement about Impulse Airlines their shares could have increased by more than $30,000.

"Over the past decade Australia has strengthened its determination to make our markets fairer for investors. Stronger insider trading laws, improved surveillance of suspect trading by the ASX and active enforcement by ASIC have all contributed to a market of increased integrity.

"None of this should come as a surprise to Mr Rivkin. He is a stockbroker of long experience and influence in our markets. His deliberate decision to flout the law, even in a small transaction, was a betrayal of the market in which he has been a prominent trader for many years.

"Mr Rivkin has attempted to divert attention from the serious implications of his misconduct with allegations that he was unfairly targeted by ASIC because he is a 'tall poppy'. That is not correct. When ASIC commenced its investigation into suspect trading in QANTAS shares Mr Rivkin's involvement was unknown to us. When the full evidence of the transaction emerged it was inevitable that he be charged. That evidence has now been considered and accepted by a jury, and a conviction recorded by the Supreme Court. Mr Rivkin has no-one to blame for this other than himself.

"I want to acknowledge the very difficult task of the jury in this matter. Insider trading cases are among the most complicated types of offences under our corporations law. It is no easy matter for a jury to come to grips with the various legal ingredients of the offence, and I believe that the members of this jury deserve the thanks of all investors in our market. I also thank the office of the Commonwealth DPP for its professionalism in the preparation and prosecution of the case.

"The decision of Justice Whealy to impose a sentence of nine months imprisonment to be served by periodic detention is the decisive judgment on the seriousness of Mr Rivkin's offence. By operation of law he is now banned from managing any corporation for the next five years, except by permission of the court.

"To any who suggest that the absence of a full time custodial sentence somehow diminishes the seriousness of the offence, I say 'think again'. Mr Rivkin broke the law and was caught. He now has a criminal conviction against his name. That fact will not be lost on others who may be tempted to test their luck with small inside trades.

"In the light of the sentencing by Justice Whealy ASIC will review the status of any license held by Mr Rivkin or any company in which he has a relevant interest. Such review will be conducted in accordance with legal requirements which will include an opportunity for Mr Rivkin to make submissions to ASIC. While I expect this process to commence in the near future, ASIC will observe strict confidentiality until hearings are concluded and decisions finalised.

"I conclude my statement by noting that Mr Rivkin has lodged a notice of appeal against the jury's verdict and is expected to also appeal today's sentence."

3. RECENT ASX DEVELOPMENTS

(A) ASX Corporate Governance Council

On 24 June 2003 the ASX Corporate Governance Council, chaired by ASX Executive General Manager, Issuers and Market Integrity, Karen Hamilton, met for the first time since the release of its Principles of Good Corporate Governance and Best Practice Recommendations on 31 March 2003. Ms Hamilton acknowledged the commitment and significant efforts of all Council members in this achievement and reiterated the aim of the Council to produce such a collaborative, broadly endorsed tool to assist companies in meeting the governance expectations of their investors.

The Council noted the extensive communications and education strategy undertaken by ASX and by various other Council members and the benefit of these in eliciting feedback, encouraging understanding and acceptance of the recommendations and emphasising the importance of the "if not, why not" regime. This regime is specifically designed to allow companies the flexibility to adopt different governance structures to suit their needs, a flexibility properly tempered by the requirement to be accountable and to explain the company's position to investors.

The Council discussed its continuing role and in particular the mechanisms for capturing feedback and ensuring that the recommendations remain at the forefront of best practice.

ASX outlined how it will be promoting and facilitating appropriate disclosure by listed entities against the best practice recommendations and how it will review and facilitate compliance with the requirement for the top 500 companies to have in place an audit committee.

The Council has committed to periodic review of the best practice recommendations and to establishing an Implementation Review Group to facilitate this. The Council agreed that the purpose of the IRG is to provide an independent perspective from those with a practical understanding of the issues associated with implementing and managing the recommendations and to make suggestions for improvements to the Council. Council appointed a nominations sub-committee to consider appointees to the IRG who would be able to bring an appropriate mix of views and experience. Council is seeking expressions of interest from senior candidates with practical implementation experience willing to commit to this important process. Expressions of interest and brief curriculum vitae should be forwarded to ASX by Thursday 31 July 2003.

Council agreed to meet again on 7 August when the composition of the Implementation Review Group will be finalised.

Principles of Good Corporate Governance and Best Practice Recommendations and additional supporting guidance are available on the ASX website at [http://www.asx.com.au/corporategovernance](http://www.asx.com.au/corporategovernance" \t "_new)

(B) ASX REFERRALS TO ASIC

(1) Summary

ASX made 14 referrals to ASIC for the quarter ended 31 March 2003. ASX made 54 referrals to ASIC for the Year ended 30 June 2002.

(2) Companies

These are referrals to ASIC from the ASX Companies Department under the MOU between ASX and ASIC in relation to possible breaches of the ASX Listing Rules by listed companies including possible breaches of disclosure obligations.

For the 12 months ended 30 June 2002 ASX made 8\* referrals to ASIC. For the quarter ended 31 March 2003 ASX made 2\* referrals to ASIC.

(3) Surveillance

These are referrals to ASIC from ASX Surveillance Department under the MOU between ASX and ASIC in relation to possible serious market abuse criteria which includes insider trading and manipulation offences.

For the 12 months ended 30 June 2002 ASX made 29 referrals to ASIC. For the quarter ended 31 March 2003 ASX made 8 referrals to ASIC Investigations.

(4) Enforcement

These are referrals to ASIC from the ASX Investigations and Enforcement Department under the Membership MOU between ASX and ASIC.

For the 12 months ended 30 June 2002 ASX made 17 referrals to ASIC. For the quarter ended 31 March 2003 ASX made 4 referrals to ASIC

\* These numbers include formal and informal referrals but do not include referrals made on the withdrawal of a prospectus.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL PUBLISHES FINAL GUIDANCE ON FRUSTRATING ACTION

On 16 June 2003 the Takeovers Panel published its Guidance Note on Frustrating Action. The final version follows a draft that the Panel released for public consultation.

The Guidance Note is based on the Panel's view that decisions about control and ownership of a company should be made by its shareholders. Where a corporate action could frustrate a proposal concerning control or ownership of a company, the Panel will generally require that shareholders be able to determine the control and ownership of the company.

The Panel's approach is based on legislative policy which requires it to examine the effect of conduct on shareholders and markets, rather than subjective factors.

The Guidance Note indicates the Panel's approach when considering actions of the directors of a company that is subject to a takeover offer, where those actions may lead to the offer lapsing, being withdrawn or not proceeding.

The Guidance Note aims to draw a balance between preserving the rights of shareholders and not unduly limiting the conduct of a target's business while a bid is on foot. The Guidance Note makes it clear that the Panel will not support applications by bidders who attempt to exploit the policy.

The Panel has also published on its website a paper that sets out the major external comments that the Panel received on the consultation draft and its response to those comments.

The Panel would like to thank the Frustrating Action Sub-Committee (Robyn Ahern, Tony Burgess, Kathy Farrell, Irene Lee and Marian Micalizzi) for their work.

The Frustrating Action Guidance Note and the Public Consultation Response Statement are available at [http://www.takeovers.gov.au](http://www.takeovers.gov.au" \t "_new)

(B) PANEL RELEASES FINAL GUIDANCE ON BROKER HANDLING FEES

On 3 June 2003 the Takeovers Panel released a final Guidance Note on broker handling fees. The final version follows public consultation on a draft that the Panel released on 28 March 2003.

The final Guidance Note is based on the Panel's view that broker handling fees have potentially two conflicting effects, which must be balanced against each other.

First, where a broker handling fee encourages brokers to inform their clients about the existence of a bid and to discuss the merits of the bid, the fee may facilitate the acquisition of shares taking place in an efficient, competitive and informed market.

Second, however, broker handling fees that are excessively high, or are only available for a limited period of time, may induce brokers to pressure their clients to accept an offer under a bid where they would not otherwise give such advice.

To promote market certainty, the Guidance Note sets out quantitative and other guidelines on the features of broker handling fees that the Panel is likely not to find unacceptable.

The Panel has also published on its website a paper that sets out the Broker Handling Fees Sub-Committee's response to external comments on the consultation draft.

The Panel would like to thank the Broker Handling Fees Sub-Committee (both the Panel's internal members Carol Buys, Braddon Jolley, Simon Mordant and especially the external members Paul Masi and Bruce Skelton) for their work.

The Broker Handling Fees Guidance Note and the Public Consultation Response Statement are available at:

[http://www.takeovers.gov.au/Content/guidance/broker.asp](http://www.takeovers.gov.au/Content/guidance/broker.asp" \t "_new)  
[http://www.takeovers.gov.au/Content/consultation/brokerPCRS.asp](http://www.takeovers.gov.au/Content/consultation/brokerPCRS.asp" \t "_new)

5. RECENT CORPORATE LAW DECISIONS

(A) ADVERSE COMMERCIAL EFFECTS AND S437F OF THE [CORPORATIONS ACT](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)  
(By Jeremy Williams, Freehills)

Sellers; in the matter of Beckley Forge Pty Ltd (Administrators Appointed) FCA 523, Federal Court of Australia, Finkelstein J, 19 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca523.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca523.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Summary

Section 437F of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) does not prohibit the creation of a new class of shares where this will have an adverse commercial consequence on the rights of existing shareholders, for example, watering down the value of shares. Section 437F is directed to the protection of legal rights.

(2) Facts

Administrators were appointed to Beckley Forge Pty Ltd and Beckley Appliance Components Pty Ltd upon suspicion by directors, and later confirmation by the administrators, that the companies were insolvent.

The administrators, in conjunction with one of the company's directors, Mr Barbano, sought to put a proposal to creditors which would raise funds to permit the companies to continue to trade. The administrators proposed the creation of a new class of preference shares. Mr Barbano would subscribe for $480,000 of the shares, which would inject sufficient capital to enable the companies to continue trading.

(3) Application

The administrators sought an order from the Federal Court as to whether the proposal was prohibited by section 437F of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the "Corporations Act"). Section 437F of the Corporations Act states that "a transfer of shares in a company, or...alteration in the status of members of a company, that is made during the administration of the company is void except so far as the Court otherwise orders."

(4) Law

Justice Finkelstein held, upon these facts, section 437F did not prohibit the creation of a new class of shares. The creation of the preference shares would merely water down the value of existing shareholders holdings. This was a commercial impact. His Honour stated that the section was not intended to protect against adverse commercial consequences, but to prevent a change in legal rights.

His Honour gave the following examples of the matters that section 437F is designed to protect:

- an alternation in status from a preference shareholder to an ordinary shareholder;   
- the alteration in status if partly paid shares are converted to fully paid shares without payment of the balance of the uncalled capital; and   
- rectification of the register to remove the name of a shareholder.

In each case, there has been a change in legal rights between the company and shareholder.

(5) Order

Despite finding in favour of the administrators, Justice Finkelstein refused to grant relief on the grounds that notice of the proceeding was not given to the creditors. His Honour was critical of this omission, noting that persons affected by the legal proceedings arising under companies legislation must be put on notice.

(B) SENIOR MANAGEMENT OWES A DUTY OF FIDELITY EQUIVALENT TO THAT OF A DIRECTOR   
(By Jeremy Williams, Freehills)

WA Fork Truck Distributors Pty Ltd v Jones [2003] WASC 102 Supreme Court of Western Australia, Pullin J, 29 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasc102.html](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasc102.html%20" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Summary

An employee in senior management position breached his employment contract and fiduciary duties by setting up a business in competition with his employer during work hours and whilst being paid by his employer. The employee, as a member of senior management, was said to owe duties to his employer equivalent to those of company directors. The case also deals in depth with the calculation of equitable compensation.

(2) Facts

WA Fork Truck Distributors Pty Ltd (the "plaintiff") conducted the business of selling, servicing and hiring forklifts in Western Australia. WA Access Pty Ltd and its subsidiary WA Access Hire Pty Ltd sold, serviced and hired mobile elevating work platforms ("the access business"). In 1996, Mr Jones was appointed the general manager of WA Access Pty Ltd. He was also a part of the "board of management" of the plaintiff, comprising senior management, where he would report on the progress of the access business.

In June 2000, the access hire business conducted by Access Pty Ltd WA, and the access sale business conducted by WA Access Pty Ltd were ceased to be conducted by these companies. The assets and liabilities of the two companies were transferred to the plaintiff who carried on the entire business.

The plaintiff placed full confidence in Mr Jones who was permitted to conduct the access business without interference. Mr Jones set the rate of hire, the terms of hire, decided whether or not discounts should be granted, maintained close contact with customers, made contacts with new customers and decided when it was time to recommend the purchase of new equipment.

In December 2000, Mr Jones was promoted. He was placed in charge, as "group general manager," of the access and forklift business. In February 2000 Mr Jones commenced the process of setting up his own access business to compete with the plaintiff. Whilst being paid by his employer and during normal work hours, Mr Jones clandestinely established the whole infrastructure of the new business of "Access Rentals". In August 2000 he gained the assistance of three of the plaintiffs employees: Mr Deschamp, Mr Reilly and Mr Powell.

(3) Application

The plaintiff sought damages against Mr Jones for breach of his employment contract and equitable compensation for breach of fiduciary duties as an employee.

The plaintiff also claimed equitable compensation from the three other former employees for failing to inform the plaintiff of Mr Jones' intention to resign from the plaintiff and his activities in setting up the competing business.

Equitable compensation was also sought against the two companies (the second and sixth defendants) set up by Mr Jones to conduct the business in competition with the plaintiff on the grounds that they took the benefit of the breaches of contract and fiduciary duty with knowledge of those breaches.

(4) Breach of contract by Mr Jones

Justice Pullin held that Mr Jones breached his contract of employment with the plaintiff. It was a breach of an express term of his employment contract to "devote his full attention, and to use his best endeavours, to further the development, reputation and business of the plaintiff."

(5) Breach of fiduciary duties

Justice Pullin restated the law of fiduciary duties owed by an employee to an employer. In particular he affirmed the decision in Digital Pulse Pty Ltd v Harris (2002) 166 FLR 421 at 29-30: "An employee must not improperly use his or her position to gain an advantage for themselves or someone else, or to cause detriment to the employer."

His Honour (citing with approval the remarks of Justice Kennedy in Green & Clara Pty Ltd v Bestobell Industries Pty Ltd [1982] WAR 1) held that Mr Jones, as a person in "top management" and not a "mere employee" owed a "larger, more exacting duty which was similar to that owed to a corporate employer by its directors." Mr Jones breached his duty of loyalty by improperly using his position to cause detriment to his employer by:

- secretly making arrangements during his employment to compete with the plaintiff after terminating his employment. Although Mr Jones could have left the plaintiff employee and set up a business in competition, he was not permitted to commit fraudulent, unfair or wrongful acts in the course of doing so; and   
- taking steps to encourage the three employees to leave their employment with the plaintiff.

It was wrong for Mr Jones to use a substantial amount of time paid for by the plaintiff to establish himself as a competitor, giving himself an advantage, namely the opportunity to commence competitive activities as soon as he resigned.

It was alleged that the three employees had also breached their fiduciary duties of fidelity and good faith by failing to inform the plaintiff of Mr Jones' clandestine activities.

Justice Pullin held that as a general proposition employees, not involved in senior management, are not obliged to inform their employer that staff intend to resign from their employment. In addition, the facts of this case did not evidence that the employees had actual knowledge of the extent of the activities Mr Jones had undertaken to set up the competing business. They were not obliged to reveal the few facts that they knew about Mr Jones' plans, nor facts learned from conversations outside work hours.

(6) Remedy

Justice Pullin held that Mr Jones, and the second and sixth defendants, were liable to pay equitable compensation to the plaintiff. The second defendant was liable to pay equitable compensation for knowingly participating in the breach of fiduciary duty. The sixth defendant was liable for knowingly receiving the benefits from the breaches of duty. A summary of the calculation is attached below.

- His Honour held, citing United States Surgical Corporation v Hospital Products International [1983] 2 NSWLR 157, that Mr Jones was liable for all the sales that were made during what is recognised as the "headstart" or "springboard" period. This was the period of advantage accrued by Mr Jones in setting up the business during working hours, whilst in the employment of the plaintiff. His Honour held that "if [Mr Jones] had not breached his duties and contract, he would not have been able to start in business straight-away." All sales made during this period, whether to new customers or existing customers of the plaintiff, were treated as sales rightfully of the plaintiff.   
- Future losses beyond the "headstart" period were not awarded to the plaintiff as these were losses suffered as a result of legitimate competition and not attributable to the breach of contract or fiduciary duties. Although notions of foreseeability, remoteness and contributory causes are irrelevant to the assessment of equitable compensation, there still must "from a commonsense point of view" be a connection between the breach and the loss. There was no such connection in this case.   
- His Honour refused to find that the limited competition from Mr Jones was responsible for a reduced rate of hire or sales of the plaintiff's access equipment. This was a result of a general downturn in prevailing market conditions.   
- Mr Jones was to refund the equivalent of three months wages, as the amount of time spent in setting up the business.   
- Income tax was not subtracted from the final award. His Honour awarded the compensation on the basis that if tax was not assessed, or assessed at a rate of less than 30%, the proportional amount reflecting the reduced tax rate would be refunded to Mr Jones, the second and sixth defendants.

(C) FACTORS RELEVANT TO DETERMINING WHETHER TO GRANT LEAVE TO A DISQUALIFIED DIRECTOR UNDER SECTION 206G(1) OF THE [CORPORATIONS ACT](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)  
(By Sarah d'Oliveyra, Phillips Fox)

Adams v Australian Securities and Investments Commission [2003] FCA 557, Federal Court of Australia, Lindgren J, 5 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca557.html](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca557.html" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)

(1) Background

Between 1 April 1985 and 20 June 1986, Harold John Adams ('the Applicant') conspired with two other individuals to defraud the Commonwealth of $156,051.20 worth of sales tax revenue. Notably, the Applicant purchased soft drinks from various manufacturers, including well-known soft drink companies, under the pretext that they were for export and therefore sales tax exempt. The Applicant then sold the goods on the domestic market.

On 30 January 1998, the Applicant pleaded guilty to a charge under section 86A of the [Crimes Act 1914 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default), as in force at the time, in respect of the above conduct. On 10 June 1998, the Applicant was sentenced to 12 months' imprisonment with a non-parole period of 6 months, and was directed to be released on 8 December 1998 with a period of 6 months' good behaviour ensuing thereafter. The Applicant was also subject to a reparation order in the amount of $156,051.20.

The Applicant sought leave to appeal against the sentence imposed upon him. On 25 November 1998, the New South Wales Court of Criminal Appeal refused leave to appeal, primarily on the basis that the Applicant was guilty of a serious offence which carried a maximum penalty of 5 years imprisonment. In their decision, the Court of Criminal Appeal made particular reference to the sentencing judge's observation that the Applicant not only devised the fraudulent scheme but took active steps to put it into effect. The Applicant not only deceived officers of reputable soft drink companies for the prolonged period of 14 months, but he also produced false documentation to assist in defrauding the Commonwealth.

(2) The application

On 12 February 2003, the Applicant sought leave under section 206G(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Corporations Act') to manage 5 named private corporations. Section 206G(1) relevantly provides: 'A person who is disqualified from managing corporations may apply to the Court for leave to manage: (a) corporations; or (b) a particular class of corporations; or (c) a particular corporation, if the person was not disqualified by ASIC'.

The application was made on the basis that the Applicant was not disqualified by ASIC, but that he was automatically disqualified by virtue of section 206B(1)(b)(ii) of the Corporations Act. Lindgren J noted that the Applicant was more likely to have been disqualified under the predecessor provision found in section 229(3) of the Corporations Law. Nevertheless, the Applicant and the Australian Securities and Investments Commission ('ASIC') proceeded on the basis that section 206B(1)(b)(ii) was the relevant provision. It states that 'a person becomes disqualified from managing corporations if the person...is convicted of an offence that...involves dishonesty and is punishable by imprisonment for a least 3 months'.

By virtue of section 206B(2) of the Corporations Act, the Applicant's period of disqualification was calculated as being due to expire at midnight on 7 December 2003, 5 years from the date on which he was released from prison.

(3) Applicable legal principles

Lindgren J confirmed that determinations under section 206G(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) are purely discretionary. The main issue is whether the Court should make an exception to the legislative policy underlying the disqualification provisions in the Corporations Act. The applicant bears the onus of establishing that the court should make such an exception. Lindgren J stated that the purpose of those provisions includes protection of the public, rather than punishment of the offender; general deterrence from engaging in conduct of the particular kind in question; and general deterrence from abusing the corporate structure to the disadvantage of investors, shareholders and others dealing with a company.

In Lindgren J's opinion, evidence of hardship to the offender alone is insufficient to warrant the granting of leave under section 206G(1) of the Corporations Act. The factors relevant to determining whether to exercise its discretion in favour of the applicant under section 206G(1) include the nature of the offence of which the applicant was convicted, the nature of his involvement and the general character of the applicant, including his conduct in the intervening period between disqualification and making the application.

In circumstances where the applicant seeks leave to become a director of particular companies, it is relevant for the Court to consider the structure of those companies, the nature of their businesses and the interests of their shareholders, creditors and employees. One matter warranting particular consideration is the assessment of any risks to those persons or to the public which may be affected by the applicant assuming a position on the board of directors or in management.

(4) Outcome of the application

In light of the above considerations, Lindgren J dismissed the application. He relied heavily on the seriousness of the offence of which the Applicant had been convicted. It was central to the Applicant's case that a refusal to grant leave would prevent the 5 named proprietary companies from securing a joint venture arrangement with certain Chinese interests. The Applicant's wife, who was also the sole director and secretary of 2 of the 5 named companies, gave evidence that the joint venture would not proceed unless the Applicant became a director. The evidence of 2 other directors and shareholders was merely to the effect that it would be 'beneficial' to the joint venture if the Applicant was a director.

On the basis of the 'unsatisfactory state of evidence', Lindgren J concluded that it would cause mere inconvenience to the directors and shareholders of the 5 named companies if the Applicant was not granted leave to become a director under section 206G(1). This was, in his opinion, insufficient to warrant the shortening of the statutory period of disqualification. In reaching this conclusion, Lindgren J appears to have been influenced by the Applicant's conduct prior to making the application. There was evidence that the Applicant had been lawfully engaged as a 'consultant' of the 5 named companies. However, Lindgren J noted that he appeared to be acting more in the capacity of a director. Not only was the Applicant actively involved in negotiations with the Chinese interests, but he had also signed an agreement on behalf of one of the companies as 'CEO'.

Irrespective of the implications of the evidence and the outcome of this application, Lindgren J stated that the Applicant would be permitted to make a fresh application on the basis of new evidence establishing that the directors and shareholders of the 5 named companies would suffer a 'great disadvantage' if he is not granted leave under section 206G(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

(D) APPLICATIONS UNDER SECTION 411 OF THE [CORPORATIONS ACT](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) FOR COURT APPROVAL TO CONVENE MEETING OF MEMBERS TO CONSIDER A SCHEME OF ARRANGEMENT  
(By Michael Jackson, Phillips Fox)

Re International Goldfields Ltd [2003] WASC 86, Supreme Court of Western Australia, Barker J, 12 May 2003

[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasc86.html](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasc86.html" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Background

International Goldfields Ltd ('the Applicant'), a publicly listed company, sought to obtain the approval of certain shareholders for a scheme of arrangement proposed between the Applicant and its shareholders. The Applicant applied to the Court for approval under section 411 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act') (a) to convene a meeting of the shareholders in the Applicant and (b) of the explanatory statement relating to the scheme of arrangement.

(2) The proposed scheme of arrangement

Justice Barker began by outlining the purpose of the scheme, which was to implement a merger between the Applicant and Hamill Resources Ltd ('Hamill Resources'). It was in a customary form, where the members of the Applicant would receive 6 Hamill Resource shares for every 7 shares in the Applicant transferred to Hamill Resources. If approved, the scheme would result in the Applicant becoming a 100% subsidiary of Hamill Resources and would in essence be a 'reverse takeover'.

(3) Matters to be considered under section 411 of the Act

Under section 411(1) of the Act, the Court may (a) order a meeting of the members of the applicant to be convened in such manner and to be held in such place as the Court directs; and (b) where the Court makes such an order, the Court may approve the explanatory statement required by section 412(1)(a) of the Act to accompany notices of the meeting. Citing Re Bond Corporation Holdings Ltd (1991) 5 ACSR 304 and Re Stockbridge Ltd (1993) 9 CSR 637 ('Re Stockbridge Ltd'), Barker J noted that this application to the Court was the first stage of a 3 part process involved in Part 5.1 of the Act with the second and third stages being holding of the meeting and, if the scheme is approved, application to the Court for its approval of the scheme.

In regard to the first stage, Barker J referred to the 5 matters identified by Santow J in Re NRMA Ltd (No 1) (2000) 156 FLR 349 ('Re NRMA Ltd') at 354-356 as to what the Court should have regard to when considering such applications, namely (a) proper disclosure; (b) that the scheme can properly be described as an arrangement or compromise; (c) that the applicant is a Part 5.1 body as defined in the Act; (d) that the scheme is properly proposed; and (e) that ASIC has had a reasonable opportunity to examine the terms of the scheme and to make submissions to the Court.

Barker J stated that when convening a meeting, the Court should be satisfied prima facie that the proposed scheme is (a) legal; (b) not misleading or deceptive in a material sense; and (c) the Court would regard the scheme upon approval of the members as being 'so far fair and reasonable as an intelligent and honest man may approve'. His Honour then followed Santow J's summary of the 5 matters that the Court is to have regard to in the first stage of an application brought under section 411 of the Act.

(a) Has there been proper disclosure: section 412(1)?

Barker J noted that proper disclosure requires that all the main facts be placed (or have already been placed) before members to enable them to exercise their judgment on the proposed scheme (Re NRMA Ltd). To satisfy these disclosure requirements, his Honour held that the disclosure requirements of section 412(1)(a) of the Act, regulation 5.1.01.(b) of the [Corporations Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default) and the relevant ASIC policy statements should be observed.

The explanatory statement was held to comply with the disclosure requirements as it conveyed the information necessary for a member to make an informed decision whether to approve the proposed scheme. The statement also provided a clear overview of the features of the proposed merger, including an independent expert's report in relation to the scheme (which also referred to supplementary independent reports concerning both companies). The Applicant submitted that this information satisfied the requirements of Chapter 6 of the Act.

(b) Can the scheme be properly described as an 'arrangement': section 411(1)?

In Re NRMA Ltd the term 'arrangement' had been given a broad and liberal meaning. Baker J held that the scheme constituted an 'arrangement'.

(c) Is the Applicant a 'Part 5.1 body' as defined in the Act: section 411(1)?

A 'Part 5.1 body' is defined by section 9 of the Act as a company or registrable body that is registered under Div 1 or 2 of Part 5B.2 of the Act. Barker J held the Applicant to be a Part 5.1 Body.

(d) Is the scheme properly proposed: section 411?

Barker J, referring to Re NRMA Ltd, stated that whether or not a scheme has been properly proposed is not generally a matter for the Court at the approval stage of the application, unless something improper emerges at the outset of the scheme. His Honour held that there was nothing in the Applicant's constitution contrary to any term of the proposed scheme, and, on the face of it, nor had the scheme been proposed by either party to avoid the operation of Chapter 6 of the Act (Chapter 6 regulates takeovers). His Honour then discussed the operation of Chapter 5 with regard to avoidance of Chapter 6 of the Act.

Referring to the judgment of O'Loughlin J in Re ACM Gold Ltd (1992) 34 FCR 530 at 538, Barker J held that Chapter 6 of the Act should not be viewed as having a position of dominance over or automatically taking precedence over the provisions of Chapter 5. His Honour also referred to the judgement of Murray J in Re Stockbridge Ltd, where it was held that schemes which accord with Chapter 5 should not be automatically viewed as methods of avoiding the operation of Chapter 6 unless there is further evidence to support that conclusion. Barker J also referred with approval to French J's supporting view in Re Foundation Health care Ltd [2002] FCA 742.

In the case at hand, his Honour agreed with the Applicant's submission that Chapter 5 was the preferred vehicle for ownership of the Applicant. Barker J accepted the Applicant's argument that any takeover conducted under the provisions of Chapter 6 would not guarantee Hamill Resources 100% ownership of the Applicant, a point fundamental to Hamill Resources, whereas the proposed scheme provided a greater level of certainty in reaching 100% ownership.

(4) Reasonable notice to ASIC

Barker J noted that the Court needs to be satisfied, having regard to section 411(2), that in all the circumstances ASIC has had a reasonable opportunity to examine the proposed scheme and make submissions to the Court (Re NRMA Ltd).

His Honour was satisfied that ASIC had received reasonable time to examine the proposed scheme and make submissions to the Court. Barker J accepted an affidavit from ASIC stating that it had no objection to the proposed orders being sought and instead informed the Court that it would review its final position in relation to the proposed scheme if and when the matter returns to the Court for a confirmation hearing in the later stage of the process.

(5) Conclusion

Barker J held that there was no good reason why the Applicant should not have the opportunity to seek member approval for the scheme of arrangement and that an order should be made to that effect.

Finally, his Honour considered an affidavit swearing that a Mr Sage and a Mr McMahon were both willing to act as chairperson of the meeting and have had no previous relationship or dealing with the Applicant or any person interested in the proposed arrangement except as disclosed in the affidavit. Both were directors and shareholders of the Applicant. Furthermore, the affidavit stated that they had no interest or obligation that gave rise to a conflict of interest. Both had undertaken to report the result of the meeting to the court. Barker J accepted that neither Mr Sage nor Mr McMahon fell within sections 411(7)(a) - (f) of the Act except to the extent disclosed by the affidavit.

(E) COMPANY DIRECTORS MUST HAVE AUTHORITY TO ISSUE STATUTORY DEMANDS  
(Annie Mooney, Blake Dawson Waldron)

Horizon Star Pty Ltd v Carina Holdings Pty Ltd [2003] WASCA 94, Supreme Court of Western Australia, Murray, Wheeler and McKechnie JJ, 7 May 2003

The full text of the judgments is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasca94.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/may/2003wasca94.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)

(1) Summary

At first instance, Horizon Star Pty Ltd (Horizon) applied in three separate applications to set aside the following statutory demands:

- Carina Holdings Pty Ltd (Carina) was for $145,700;   
- Wildbeach Corporation Pty Ltd (Wildbeach) was for $59,595; and  
- Janice Irene Franke (Mrs Franke) was for $14,432.08.

Section 459H(1)(a) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires the Court to be satisfied "that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates". It was alleged that Horizon owed Carina $145,700 (a debt admitted by Carina in a deed). Mrs Franke issued a statutory demand on behalf of Carina to Horizon Star Pty Ltd. At first instance, it was held by Master Bredmeyer that Horizon had not raised any genuine dispute (or offsetting claims) to the demands and that the applications to set aside the statutory demands should be dismissed.

Horizon appealed the decision of Master Bredmeyer. The relevant questions in the appeal were:

- whether Mrs Franke had authority to sign the notice of demand on behalf of Carina; and  
- whether the Master erred, at first instance, in failing to find there was a genuine dispute.

Ultimately it was held by McKechnie J (Murray and Wheeler J concurring) that the appeal should be allowed and the statutory demand issued by Mrs Franke set aside because Mrs Franke had not acted "on behalf of the creditor", Carina, when she issued the statutory demand. It was also held that the notice of contention raised by Carina could not be upheld because it was founded on technical points incapable of demonstrating that substantial injustice had occurred as required by section 467A of the Corporations Law.

(2) Issue 1 - Authority to issue a statutory demand

On 25 June 2001, Mrs Franke (one of two directors of Carina), signed a statutory demand in her capacity as director. A meeting of the board of directors had not been held to authorise the issue of the statutory demand. The appellant submitted that Mrs Franke lacked authority to issue the statutory demand on behalf of Carina, causing the statutory demand to be a nullity that should be set aside. McKechnie J (Murray and Wheeler JJ concurring) held that since the board of directors of Carina had not authorised Mrs Franke to issue the demand, she had no authority to do so.

(3) Issue 2 - Presence of a genuine dispute

McKechnie J (Murray and Wheeler JJ concurring) held that the deed of transfer of shares executed by Mr Reimers on 19 February 2001, revealed there was no dispute about the debt. The deed acknowledged that loans were advanced by Carina to Horizon. Furthermore, the deed also acknowledged that the loans were required to be repaid if the conditions precedent were not met. It transpired that the conditions precedent were not met, thereby triggering the obligation to repay the loans. McKechnie J (Murray and Wheeler JJ concurring) held that even though Horizon's accounts for the period ended 31 December did not show any liabilities to Carina, the subsequent deed clearly admitted the existence of the loans.

(4) An additional point - notice of contention: incompetence of proceedings

Carina filed a notice of contention. It claimed Horizon's application to set aside the statutory demand was incompetent because:

- section 459G(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) required the application to be filed within 21 days of the date of service of the statutory demand; and  
- Horizon did not file an adequate application within that timeframe because the affidavit filed in support failed to annexe a copy of the creditor's statutory demand sought to be set aside.

McKechnie J (Murray and Wheeler JJ concurring) noted that section 467A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) states that a Court should not dismiss an application merely because of a defect or irregularity in connection with the application unless substantial injustice has been caused that cannot be remedied. It was ultimately held that the application had been filed and served within time, the mistake had been rectified and no substantial injustice had been caused.

(F) LESSONS IN CORPORATE GOVERNANCE  
(By Robyn Sweet, Blake Dawson Waldron)

Host-Plus Pty Ltd v Australian Hotels Association [2003] VSC 145, Supreme Court of Victoria, Hanson J, 12 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/may/2003vsc145.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/may/2003vsc145.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)

(1) Proceeding

Host-Plus Pty Ltd (the Company) sought a court order that the Australian Hotels Association (AHA) appoint six new directors as required by the Company's constitution. There were also two related proceedings: (1) AHA applied to have the Company wound up on the just and equitable ground in s 461(1)(k) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act); and (2) The Australian Liquor, Hospitality and Miscellaneous Workers Union (the Union) sought relief under the oppression provisions of the Act.

(2) Decision

The Court held that, if all other things were equal, an order enforcing the requirement to appoint directors would seem warranted and appropriate.

The Court further held that it would be unfair and unjust to order the winding up in the circumstances. Although the judge considered that the proper, just and equitable disposition of the proceeding was that the Union acquire the AHA shares, he held this order over so that the parties might consider their positions and reach an agreement on future governance of the Company.

The Court held that it was not necessary to express any view on the oppression proceedings.

(3) The facts

The proceedings concern Host-Plus Superannuation Fund (the Fund). The Company was appointed trustee by deed upon the trust's establishment, for the period from 8 February 1998 to 5 March 2003. AHA and the Federated Liquor and Allied Industries Employees Union (now the Australian Liquor, Hospitality and Miscellaneous Workers Union (the Union) established by deed a superannuation fund for the employees of the hospitality industry. Both the above entities were subscribers to the Company's memorandum of association.

The articles of association provided for an equality of shareholding and directors between AHA and the Union. Each subscriber appointed 6 Directors.

Article 25 provided that:

- there must always be equal representation on the Board of Directors;  
- the subscribers may alter the size of the Board by Agreement; and  
- upon vacation of office of any Director, the subscriber must appoint another Director.

Article 33 provided that resolutions of Directors are carried on a two-thirds majority decision and Article 31 provided that a quorum of Directors is one half of the total number of Directors provided that at least one director appointed by each subscriber is present.

Sometime in 2001, differences between AHA and the Union directors began to surface. As a result, the Board experienced significant difficulty making decisions on important governance and administrative issues, including failing to agree on an operating budget for 2001/2002 and failing to appoint an asset consultant.

Matters came to a head with the beginning of the tender process for appointment of a fund manager in late 2001. AHA and the Union could not agree who to appoint. In order to attempt to deal with this deadlock, APRA issued a variation to the Company's instrument of approval to allow a resolution by simple majority. However, this was not of any use as the Board was split 6-6. The Board commissioned a report from Deloitte Touche Tohmahsu, who recommended AAS be appointed as fund administrator on the grounds of cost saving. By early 2003, the Board had still not come to a decision about this appointment, with the existing fund administrator's appointment to expire in March. The AHA Directors proposed a resolution to extend the appointment of the existing administrator but the Union Directors rejected the resolution. The AHA Directors resigned, claiming that the company could not function. On March 6 2003, APRA removed the Company as trustee of the Fund and appointed Ernst & Young as acting trustee.

The Union Directors entered into discussions with APRA regarding resolving the corporate governance issues and reinstating the Company as trustee. However, without AHA directors, the Board could not pass resolutions as it lacked a quorum.

In late March the Union's solicitors requested that AHA appoint replacement directors as required under Article 25 of the articles of association. AHA refused to do so.

(4) The legal proceedings

The Company sought a court order that AHA appoint six new directors as required by the Company's constitution.

AHA opposed the orders on the grounds that:

- AHA would not be able to find suitable people to act as directors in the circumstances; and  
- It was not appropriate to grant an injunction which required a person to be forced to act without their own consent.

The judge held that, if all other things were equal, an order enforcing the requirement to appoint directions would seem warranted and appropriate.

The judge also gave judgment regarding two related hearings.

(a) Application for winding up

AHA applied to have the Company wound up on the just and equitable ground (section 461(1)(k) of the Act). AHA submitted that there were irreconcilable differences between the parties, that the resignation of the AHA Directors meant that the Company could not operate as a company and that the Union Directors had refused to break the deadlock by their failure to agree to appoint independent Directors to the Board.

The Company and the Union opposed the application on the basis that AHA did not have clean hands - their Directors had created the problem by resigning. They suggested an alternative solution: if the Court found that the Company should be wound up, then it should order that AHA transfer and assign its shares in the Company to the Union for the consideration of $300.

AHA argued that the court did not have the power to make such an order for the transfer of shares. Counsel argued that under section 467 of the Act, the Court only had power to wind up the company, on the assumption that the just and equitable remedy was established.

Section 467 of the Act makes reference to the availability of any "other remedy". AHA's submission implied that this reference meant "legal" remedy. The judge did not express a concluded view. However, the judge indicated that "other remedy" in section 467(4) is to be understood as a course of action open to the party and is not restricted to a legal cause of action. Ultimately, a decision did not need to be made on this issue, as further submissions received after this matter was adjourned for judgment indicated that in fact AHA wished to continue to participate in joint control of the Company, provided that constitutional change was affected.

The Court held that it would be unfair and unjust to order the winding up in the circumstances. Although the judge considered that the proper, just and equitable disposition of the proceeding was that the Union acquire the AHA shares, he held this order over so that the parties might consider their positions and reach an agreement on future governance of the Company.

(b) Relief sought under the oppression remedy

The Union sought from AHA relief under the oppression provisions of the Act, in the form of a transfer and assignment to the Union of AHA's shares, rights and interests in the Company. The court did not express a view regarding the oppression remedy.

(5) Conclusion

The matter was stood over. On 23 May, self-executing orders were made for all three proceedings, stating that if no party made an application by 29 August 2003, the proceedings would be dismissed. No applications have yet been made.

(G) PAYMENT OF LIQUIDATOR'S REMUNERATION FROM TRUST ASSETS  
(By Eleanor Padman, Clayton Utz)

Australian Securities and Investments Commission v Rowena Nominees Pty Ltd [2003] WASC 112, Supreme Court of Western Australia, Pullin J, 11 June 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/june/2003wasc112.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/june/2003wasc112.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Introduction

Rowena Nominees Pty Limited ("Rowena") carried on a finance brokers' business under the name "Graeme Grubb Finance Broker" ("GGFB"). GGFB sourced potential investors for borrowers who wished to obtain finance for various ventures. If the venture required monies beyond the resources of an individual investor, several entities would contribute to make up the whole amount required. In return for their investment, investors were promised that they would be given a first mortgage by way of security over identified property. Oakleigh Acquisitions Pty Limited ("Oakleigh") acted as trustee for investors who had supplied the funds to Rowena. Often, the mortgage granted as security was registered first in the name of Oakleigh. Sometimes that mortgage would be transferred to the named investors. In other instances, the mortgage remained in the name of Oakleigh as trustee.

As part of the investment scheme, Rowena offered investors a "cash flow guarantee", namely a promise to pay the investors all monthly interest due to them regardless of whether or not the borrower had in fact paid GGFB. Rowena maintained a trust account and a separate account styled "cash flow guarantee account". If there was insufficient money in the cash flow guarantee account, the shortfall would be made up by transferring money from the trust account to pay investors. These transactions and others caused the trust account to be overdrawn on 84 occasions between June 1996 and May 1999.

On 4 May 1999 Rowena and its directors entered into an "Enforceable Undertaking" with ASIC by which Mr Conlan was appointed independent accountant of Rowena. Pursuant to that undertaking, Rowena and its directors were obliged to pay monies into a "Deficiency Account" to meet certain of Rowena's legal obligations and to pay Mr Conlan's fees. No money was paid into that account by the directors and accordingly Mr Conlan had not received any money under that arrangement.

Mr Conlan was appointed the provisional liquidator of Rowena on 24 May 1999 and of Oakleigh on 21 July 1999. On 23 July 1999, Mr Conlan was appointed supervisor of Rowena's finance broking business pursuant to the Finance Brokers Control Act 1975 (WA) ("FBC Act"). He became the liquidator of Rowena on 21 July 1999 and of Oakleigh on 25 August 1999.

The books and records of GGFB were in total disarray. This led to significant, if not insuperable, difficulties in chasing sums which had been paid in or out of its overdrawn trust account. This disarray had led to a raft of related litigation as Mr Conlan sought to set aside security or recover from borrowers amounts equal to payments made on their behalf by way of the cash flow guarantee. The result of these recovery efforts was to leave Mr Conlan with approximately $1.4 million in bank accounts maintained with the ANZ and St George banks, to be held on trust for distribution to beneficiaries, being investors or others, once Mr Conlan had carried out further investigations.

Following Mr Conlan's appointment as supervisor to Rowena, the Finance Broker Supervisory Board ("the Board") had written to him on 21 July 1999 setting out the terms on which he was to be appointed supervisor. The letter identified certain services that Mr Conlan was expected to perform, some of which may have extended beyond the duties of the supervisor as defined in the FBC Act and been more appropriately matters which a liquidator should have undertaken. However, clause 2 of the letter of 21 July provided that "the services shall not include any work that is solely referable to or reasonably incidental to any of the duties of the liquidator of Rowena or Oakleigh."

In addition to the funding provided to him by the Board, Mr Conlan made a number of separate applications to the Department of Consumer and Employment Protection ("DOCEP") for funding specific activities designed to preserve or recover assets of Rowena and Oakleigh. Some of these applications were granted and some refused.

On 1 February 2002, the Board wrote to Mr Conlan once more. He was instructed to extricate himself as supervisor from various legal proceedings then on foot and to cease billing DOECP in his capacity as supervisor for costs incurred in ongoing activities that could be undertaken by him as liquidator. On 15 July 2002, DOECP agreed to fund two actions that had been commenced by Rowena against St George Bank Limited but otherwise refused to fund his activities as liquidator.

(2) The application

Mr Conlan applied for directions permitting him to pay his remuneration and all related expenses from the money held on trust, since it appeared that the property of Rowena and Oakleigh would not be sufficient for that purpose.

The application was brought under section 479(3) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

It was met some resistance by a group of creditors.

(3) Contract with the Board

The creditors were of the view that Mr Conlan should enforce his contract with the Board even when some of the services for which he required remuneration appeared to have been of the type which should be carried out by a liquidator rather than a supervisor. This argument was rejected by Pullin J on the basis that clause 2 of the retainer made it clear that the contract between Mr Conlan and the Board did not extend to activities carried out by Mr Conlan as liquidator as opposed to supervisor.

(4) Abuse of process

The next argument raised was that the application was an abuse of process. This submission arose in relation to a judgment given by Owen J in related proceedings that Mr Conlan had commenced against one borrower, Sandgate Corporation Pty Limited. In that litigation, His Honour had remarked that he did not think it appropriate to say anything or give directions about the remuneration of the liquidator, which should await further argument once the issues relevant to the administration had become clearer. This remark had been seized upon by creditors. They submitted that it amounted to an interlocutory judgment which could only be contested by way of an appeal. Pullin J rejected this submission, commenting that Owen J's remarks said nothing about when an application of the present kind might be made.

(5) Application made too early

The creditors' next line of attack was that Mr Conlan was precluded from bringing the application because certain facts relating to questions concerning the liquidator's remuneration remained unknown. Whilst Pullin J acknowledged that the reasonableness of Mr Conlan's remuneration would be open to question at a later date, that did not preclude the liquidator from bringing an application now for directions.

(6) Section 479(3)

Pullin J then considered the nature and purpose of section 479(3). He noted that the only binding effect of any directions granted would be to protect the liquidator from liability for any alleged breach of duty to a creditor, contributory or to the company. The section dealt with administrative matters only and did not constitute a binding order in the nature of a judgment.

Distinguishing Re Suco Gold Pty Limited (in Liquidation) (1983) 33 SASR 99, Pullin J examined the rationale in Re Berkeley Applegate (Investment Consultants) Limited (in Liquidation) [1981] 1 Ch 32 where it was held that liquidators' expenses and remuneration could be paid out of trust assets on the basis that the Court has a discretion to permit such reimbursement where the work done is of substantial benefit to the trust property and to the persons interested in it in equity.

(7) Expenses of administration of trust and expenses of winding up

Pullin J then considered whether or not there was a distinction between general administration carried out by Mr Conlan concerning the winding up of Rowena and work relating to the administration of the trust assets. Following decisions in Re Berkeley Applegate, Re Crest Reality Pty Limited (No 2) (in Liquidation) [1977] 1 NSWLR 664 and Re GB Nathan & Co Pty Limited [1991] 24 NSWLR 674, Pullin J held that, provided a liquidator is acting reasonably, he is entitled to be indemnified out of trust assets for his costs and expenses. The trust creditors would in any event have personal claims against Rowena, as well as claims as beneficiaries to the trust property.

(7) Conclusion

Mr Conlan was entitled to have recourse to trust assets for the purposes of his remuneration. However, the reasonableness and amount of that remuneration would be decided in due course pursuant to section 473.

(H) INSIDER TRADING - THE RIVKIN CONVICTION  
(By David Perks, Mallesons Stephen Jaques)

Regina v Rivkin [2003] NSWSC 447, New South Wales Supreme Court, Whealy J, 29 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswsc447.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswsc447.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)

(1) Background

Mr Rene Rivkin was found guilty by a jury of an offence under section 1002G of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("the insider trading offence") on 30 April 2003. This judgment of Whealy J related to the sentencing of Mr Rivkin for the offence. This required Whealy J to make a finding of facts (consistent with the verdict of the jury), consider the relevant principles of sentencing and then impose a sentence. Because the offence occurred in April 2001, the offence committed by Mr Rivkin was under section 1002G rather than under the current insider trading provisions of the Corporations Act.

(2) Facts relating to the offence

In April 2001, a company owned and controlled by Mr Rivkin and his wife proposed to sell a property. Mr Gerard McGowan, the Chief Executive Officer of Impulse Airlines at the time, was interested in buying it. A meeting at the offices of a real estate agent was held on 24 April 2001 attended by Mr McGowan, an employee of the Rivkin Group assisting with the sale of the property, and other persons but not Mr Rivkin.

Mr McGowan could only make a conditional offer for the property as he anticipated funding the property purchase from a sale of business. During the meeting on 24 April 2001 Mr McGowan spoke by telephone to Mr Rivkin to explain the need for this conditionality. According to Mr McGowan, he said to Mr Rivkin "I am interested in purchasing your property. However, I am currently merging my Impulse business with Qantas. We are waiting for ACCC approval for that transaction." According to Mr McGowan, Mr Rivkin replied "I don't believe that the ACCC will approve such a thing". Mr McGowan said to Mr Rivkin "I believe they will approve it". He told Mr Rivkin that there had been several months of negotiation with the ACCC on a variety of matters and that he believed that they would approve the deal. He also said to Mr Rivkin "Obviously now that you are aware of this you cannot trade in Qantas shares". According to Mr McGowan, Mr Rivkin responded "Obviously a person of my standing would not contemplate such a thing". Whealy J was satisfied beyond reasonable doubt that the conversation occurred substantially in these terms.

Later in the afternoon on that same day, Mr Rivkin directed a stockbroker for Rivkin Discount Stockbroking to purchase 50,000 Qantas shares in the name of Rivkin Investments Pty Limited. 50,000 Qantas shares were acquired at an average price of approximately $2.78 per share.

Mr Rivkin instructed his stockbroker to sell the Qantas shares on 1 May 2001 at $2.85 per share. Later that day a joint announcement was made by Qantas and Impulse and the shares re-commenced trading at about $3.40 per share.

(3) Generally available and "price sensitive"

Section 1002G prohibits a person from purchasing securities where the person possessed information that was not generally available and the person knew, or ought to have known, that the information was not generally available and that if it were generally available, that information would have a material effect on the price or value of those securities.

Whealy J was satisfied beyond reasonable doubt that when Mr Rivkin instructed his stockbroker to buy Qantas shares he knew that the information which had been conveyed to him by Mr McGowan during the telephone conversation earlier on that day was information that was not generally available. Whealy J was also satisfied beyond reasonable doubt that at that time Mr Rivkin knew that if the information were generally available it might have a material effect on the price or value of the Qantas shares. Whealy J concluded that Mr Rivkin knew that the information was not generally available and was "price sensitive" because when he caused his stockbroker to buy the Qantas shares the statements made by Mr McGowan were virtually ringing in his ears, there was an express warning given to him by Mr McGowan not to trade in Qantas shares, and the entire circumstances surrounding the telephone conversation would have left him in no doubt that the information was of a confidential nature. Whealy J concluded that it was no mere co-incidence that the Qantas shares were bought on 24 April 2001.

(4) Sentencing principles and the imposition of sentence

Considerations relevant to sentencing are found in the common law and, in respect of federal offences, the [Crimes Act 1914 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default). Whealy J considered the nature and circumstances of the offence and stated that the insider trader offence committed by Mr Rivkin was by no means the most serious or even a very bad case of insider trading. This was because the profit made was modest, Mr Rivkin did not seek out the information which came into his possession, the transaction relating to the purchase of the Qantas shares was not concealed in any way and Mr Rivkin did not wait until the joint announcement on the day he sold the shares.

However, Whealy J decided that a serious content was imported into the circumstances of the offence because of the very significant position Mr Rivkin occupied in the stockbroking industry and the significant departure from proper standards notwithstanding a clear understanding of the insider trading laws and knowledge of the nature of the information he had been given.

Because Mr Rivkin had not expressed any contrition for his actions, he was not entitled to leniency. Whealy J confirmed that the attitude of contempt and disdain for the jury's verdict shown by Mr Rivkin should not and cannot play a role in increasing the sentence to be imposed. In considering sentence, Whealy J took into account disgrace, humiliation and economic impact that a conviction may have on Mr Rivkin, together with the deterrent effect it would have on Mr Rivkin.

Whealy J convicted Mr Rivkin of the offence and sentenced him to imprisonment for a term of nine months, such sentence to be served by way of periodic detention. In addition, a fine of $30,000 was imposed.

(I) VARIATION OF A STATUTORY DEMAND  
(Naomi Munz, Mallesons Stephen Jaques)

Chadah Pty Ltd v Kubota Tractor Australia Pty Ltd [2003] NSWSC 456, New South Wales Supreme Court, Campbell J, 6 June 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/june/2003nswsc456.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/june/2003nswsc456.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)

This decision relates to an application to set aside a statutory demand. Justice Campbell made an order to vary the statutory demand by substituting a lower amount (being the amount over which there was no dispute) for the amount for which the statutory demand was issued.

(1) Background

Chadah Pty Ltd ("Chadah") carries on a retail business selling goods to farmers and gardeners. The business was purchased in September 1999 from Greenfarm Sales and Service Pty Limited and operates under the name "Greenfarm Sales and Services".

Chadah and the defendant ("Kubota") entered into a dealership agreement on 20 September 1999. The agreement sets out the terms on which Chadah would acquire various agricultural, power, garden and construction equipment, and related attachments, accessories and service parts. The agreement distinguished between parts and 'wholegoods'.

On 6 January 2003, Kubota served a notice of termination of the dealership agreement on Chadah. On 30 January Kubota served on Chadah a statutory demand for $310,212.50 for "goods sold and delivered". Chadah sought to set aside the statutory demand.

(2) Addressee of the invoices

Some of the invoices which were included in the amount claimed in the statutory demand were addressed to Greenfarm Sales and Service Pty Ltd.

Justice Campbell found that there was no genuine dispute about Chadah being the entity which owed amounts referred to in invoices addressed to Greenfarm Sales and Service Pty Ltd. His Honour stated that, based on the evidence:

(a) there was no reason to believe that the company formerly known as Greenfarm Sales and Service Pty Ltd had anything to do with distributing products of Kubota after 1999; and

(b) the goods whose price makes up the amount claimed in statutory demand were ordered by Chadah and collected by a carrier arranged by Chadah.

(3) Time for payment

Chadah contended that, under the terms of the dealership agreement, the time for payment had not arrived for the vast majority of the invoices which made up the sum of $310,212.50 (the amount of the statutory demand). It was agreed that if the construction of the agreement proposed by Chadah was correct, an amount of $53,622.30 was due.

The parties disputed whether the goods provided by Kubota to Chadah under the terms of the dealership agreement were provided on bailment terms.

Chadah contended that while the dealership agreement provided for some products to be supplied on bailment, no products were ever supplied on bailment. It contended that the time for payment for the relevant products under the dealership agreement had not arrived by the date of the statutory demand.

Kubota submitted that, under the dealership agreement, any goods supplied were supplied on bailment terms as the agreement contained a clause which expressly required Chadah, until it had paid for any products, to hold those products as bailee for Kubota. His Honour had difficulty accepting this argument as the payment terms related to:

(a) products on bailment or products on consignment; or

(b) all other products (90 days or 180 days).

His Honour stated that the argument of Kubota is problematic as the terms "for all other products" would then serve no purpose.

Kubota relied on a provision of the dealership agreement which conferred a right to terminate the agreement if there was a default or delay in the payment of $5000 or more due to Kubota. Another clause of the agreement provided that if the dispute resolution clause (requiring referral to a mediator) has been complied with, all amounts owing must be paid immediately to Kubota by the dealer. Kubota argued that this provision is an acceleration provision which advances the time for payment of amounts owing.

His Honour did not accept this argument as he found that the evidence did not make it clear that there is no bona fide dispute about the validity of the termination. Further, there was no evidence that the dispute resolution procedure had been complied with and therefore there was doubt whether the acceleration clause applied.

(4) Set off

Chadah claimed that Kubota's termination of the dealership agreement was wrongful on the basis that the time for payment had not yet arisen in relation to at least part of the amount which was the basis of the termination.

Chadah claimed that it was entitled to an offsetting claim for breach of contract in terminating the dealership agreement and that the offset was more than the amount of $53,622.30 which was agreed to be due and owing. Kubota did not accept the submission in relation to the offsetting claim.

Section 459G(3) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires that an application to set aside a statutory demand be accompanied by "an affidavit supporting the application". His Honour cited a number of decisions in support of the assertion that "the supporting affidavit must disclose facts sufficient to show the ground relied upon in seeking to have the statutory demand set aside".

Justice Campbell found that while the affidavit supporting Chadah's application did state that the dealership agreement had been terminated by Kubota, the notice of termination was not annexed to the affidavit. Further, it was found that the affidavit could not be construed as claiming that the termination was in breach of contract or that any loss had been suffered as a result of the breach which was relied on as an offsetting amount in the application.

His Honour held that there was no offsetting claim which section 459G would permit to be taken into account.

(5) Verifying affidavit

Section 459E(3) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires a statutory demand be accompanied by an affidavit that "verifies that the debt, or the total of the amounts of the debts, is due and payable by the company".

Chadah submitted that there was insufficient verification that the amount was due and payable on the date of the statutory demand.

Chadah cited the decision of Barrett J in Main Camp Tea Tree Oil Ltd v Australian Rural Group Ltd [2002] NSWSC 219 in which Barrett J said, that "the creditor's contention that the debt, as well as being a debt (that is, owing), is both due and payable" is one of the matters in relation to which a statutory demand must provide notice to the debtor.

Justice Campbell distinguished the facts of the case before him from those which Barrett J was dealing with and found that no criticism could be made of the affidavit in the present case as the affidavit "specifically says the total amount of $310,212.50 is due and payable to the creditor by the debtor company". His Honour rejected Chadah's contention that, in order to verify the debt, the affidavit should have attached invoices, and prove the date of delivery of the goods.

Justice Campbell applied the decision in Azec Developments Pty Ltd v Frederick and Co Ltd (In liq) (1994) 14 ACSR 54 in which Hayne J held that "verify" in section 459E(3) meant "make a formal affirmation" rather than "prove or demonstrate by good evidence or otherwise substantiate".

(6) Decision

Justice Campbell found that there was a genuine dispute between Chadah and Kubota about the amount of the debt to which the statutory demand relates. His Honour found that $53,622.30 was the substantiated amount of the demand (which is above the statutory minimum of $2000).

Justice Campbell ordered that the statutory demand be varied to provide that the demand is for the sum $53,622.30 (rather than $310,212.50) and declared that the varied statutory demand had effect from the time when the statutory demand was served on Chadah.

(J) WHETHER A CURATIVE ORDER SHOULD BE MADE FOR AN INVALID RESOLUTION TO APPOINT AN ADMINISTRATOR AND WHETHER THE ADMINISTRATION SHOULD CONTINUE OR A PROVISIONAL LIQUIDATOR BE APPOINTED  
(By Jeremy McCarthy and Sarah Wilson, Corrs Chambers Westgarth)

Panasystems Pty Ltd v Voodoo Tech Pty Ltd [2003] FCA 428, Federal Court of Australia, Merkel J, 9 May 2002

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca428.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/may/2003fca428.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Summary

The Federal Court of Australia ("Court") used the general power to make orders under section 447A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to grant an order validating the appointment of an administrator in circumstances where the resolution purporting to do so did not comply with the requirements under section 436A(1)(a). It followed from this that the plaintiff's interlocutory applications for the appointment of a provisional liquidator and for a declaration that the appointment was invalid under section 447C were dismissed.

The Court found that as the administration was declared valid under section 447A and was already under way, the administration had the potential to provide more benefit to creditors than a liquidation and section 440A(3) applied. The applicant's interlocutory application for the appointment of a provisional liquidator was therefore dismissed.

Although the defendant was entitled to orders validating the administration, the Court held that the plaintiff's application would have otherwise succeeded had the Court not made orders under section 447A validating the failure to resolve insolvency under section 436A(1)(a). As the defendant's inadvertence and omission led to both applications, he was ordered to pay the costs of the parties in respect of those applications.

(2) Facts

Panasystems Pty Ltd ("Panasystems") applied to the Court to wind up Voodoo Tech Pty Ltd ("Voodoo") and to appoint a provisional liquidator pending the hearing of a winding up application. Panasystems also made an interlocutory application under section 447C of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("the Act") for a declaration that the purported appointment of Peter Ngan ("Ngan") as an administrator of Voodoo was invalid. Gregory Jones ("Jones"), the Chairman of Voodoo, applied to the Court under section 447A of the Act for an order that, in the event that the appointment of Ngan was invalid, the court validate the appointment.

Panasystems, through an agreement with Jones, was to acquire half the issued shares in Voodoo for $65,000 and would lend $225,000 to Voodoo. The purchase price and $165,000 was paid to Voodoo but no shares were transferred to Panasystems.

Despite the injection of funds from Panasystems, Voodoo did not trade profitably. A meeting of directors was conducted over the telephone, with Jones and his solicitor and accountant in Sydney, and Mr Williamson ("Williamson") who was also a director of Panasystems, his solicitor and other investors in Melbourne. Williamson's account of the meeting in his affidavit was that Jones acknowledged that Voodoo was in serious financial difficulty and should not continue trading. Jones moved a resolution that Ngan be appointed as voluntary administrator, "effective immediately". Jones voted in favour of the resolution and Williamson voted against it. Jones purported to exercise his casting vote as chairperson of the meeting pursuant to the Constitution of Voodoo. This was challenged by Williamson's solicitor as no chairperson had been appointed to the meeting.

Jones' account of the meeting differed in that prior to calling for a vote on the resolution, he stated to the meeting that Voodoo "did not have an ability to meet its debts as and when they fall due". Jones prepared minutes of the meeting which recorded that the resolution was passed.

The difference in Jones' and Williamsons' accounts was significant as section 436A(1) provides:

"A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:

(a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and

(b) an administrator of the company should be appointed."

Panasystems, on Williamson's account of the meeting, contended that the appointment of Ngan as the administrator was invalid as there was no resolution as required by section 436A(1)(a) of the Act. Jones, in reliance upon his account of the meeting, contended that, in context, the resolution was "to the effect" of the resolution required by section 436A(1)(a).

(3) Issues

The issue of fact for determination was whether there was a resolution passed to the effect that in the opinion of Jones, the director voting for the resolution, Voodoo was insolvent or was likely to become insolvent at some future time, thus complying with section 436A(1)(a), and, if not, could the Court use its power under section 447A to validate the order? Following this determination, the Court then had to consider whether to grant Panasystems' application for appointment of a provisional liquidator.

(4) Decision

(a) Section 436A(1)(a) - the resolution did not satisfy this section

Merkel J found that the requirements of section 436A(1) were not satisfied with the consequence that, subject to the application of Jones under section 447A, the appointment of Ngan would be invalid.

On Williamson's version of the meeting, there was merely a reference to the serious financial difficulties of Voodoo and no reference to any actual or prospective insolvency of Voodoo. While it may well have been that those attending the meeting had in mind such matters, Merkel J stated there must at least be an unequivocal statement to the meeting to the effect required by section 436A(1)(a).

Merkel J stated that if he was unable to determine which of the versions was to be preferred, it would follow that Panasystems, carrying the onus to make out its case of invalidity, would fail. However, Merkel J concluded that the account of the meeting proffered by Williamson was preferred. Firstly, Jones's reliability was found to be significantly undermined by the fact that even on his own version of events, no resolution was passed to the effect of the resolution he purported to record as the resolution passed in the minutes of the meeting. Second, the only contemporaneous notes of the meeting were taken by Williamson and Panasystems' solicitor, which contained no reference to a statement being made to the effect that Voodoo was insolvent. Jones's failure to produce the notes said to have been taken by one of the parties in Sydney enabled Merkel J to more confidently infer that those notes would not have been helpful to the version of the meeting proffered by Jones. Third, Jones's solicitor swore an affidavit which confirmed part of Jones' version of the meeting but did not confirm his alleged statements to the meeting concerning the insolvency of Voodoo. Merkel J regarded this to be a significant omission, in that neither solicitor who attended the meeting gave evidence consistent with Jones's version of events.

(b) Section 447A - a failure to comply with section 436A(1)(a) can be cured retrospectively

Merkel J concluded that where there is an unsuccessful attempt to pass a resolution in compliance with section 436A(1), the failure to pass a resolution may be cured by an order under section 447A.

Merkel J considered that recent case law supported the view that section 447A can operate retrospectively.

Merkel J decided that he should exercise the power under section 447A in the present case to overcome a statutory requirement for a valid appointment of an administrator because it was common ground between directors voting at the meeting that Voodoo was insolvent and that it was therefore necessary for the directors to take steps to deal with that situation. Accordingly, it was understood by the directors that the basis for the resolution appointing Ngan as administrator was Voodoo's insolvency, even if that was not expressly stated to be so. The failure to pass a resolution to the effect required by section 436A(1)(a) appeared to have come about as a result of inadvertence in the conduct of the meeting.

Also significant to Merkel J's decision was Panasystems' inability to point to any prejudice to any party that would occur if the power under section 447A was exercised.

(c) Section 440A(3) - the power of the Court to appoint a provisional liquidator was not exercised

Section 440A(3) provides:

"The court is not to appoint a provisional liquidator of a company if the company is under administration and the court is satisfied that it is in the interests of the company's creditors to continue under administration rather than have a provisional liquidator appointed."

Although the evidence was not altogether satisfactory, Merkel J was persuaded that in the interim period, the creditors were more likely to gain benefit from the administration continuing.

First, the administrator was likely to have a better prospect than a provisional liquidator of securing a contract for ongoing services which would be of benefit to creditors. Second, Ngan, acting as administrator, had already commenced the process of obtaining offers for Voodoo's business, a process the creditors were likely to benefit from if it continued. Third, there was no evidence that Ngan was not independent. Finally, no real prejudice had been demonstrated by Panasystems if the administration continued.

(K) EXAMINATION OF THE COURT'S POWER TO VALIDATE AN "INVALID" ISSUE OF SHARES AND TO CONFIRM THE TERMS OF THEIR ISSUE UNDER SECTION 254E OF THE [CORPORATIONS ACT](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)   
(Andrew Lumsden, Partner and Alessandra Saltos, Corrs Chambers Westgarth)

Onslow Salt Pty Ltd (ACN 050 159 558) [2003] FCA 429, Federal Court of Australia, French J, 28 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/april/2003fca429.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/april/2003fca429.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Summary

In Onslow Salt Pty Limited (ACN 050 159 558) [2003] FCA 429, French J validated three consecutive issues of redeemable preference shares in Onslow Salt Pty Limited ("Onslow Salt") to its major shareholder in circumstances where the issue of those shares was invalid due to a failure to comply with the requirement under the Corporations Law (as it then was) that the rights attaching to such shares be set out in the constitution of the company.

(2) Facts

The shareholders of Onslow Salt are Salt Asia Holdings Pty Ltd ("SAH"), as to 92 per cent of the shares, and Gulf Holdings Pty Ltd ("Gulf"), as to 8 per cent. In October 2000, Gulf initiated proceedings against Onslow Salt, SAH and other parties, in relation to, among other claims, a breach of the Subscription Agreement in place between those parties. The proceedings were settled by way of a Deed of Settlement and Variation which was executed by all of parties to the proceedings.

However, during the course of negotiating the settlement, an issue arose concerning the validity of the purported issue of redeemable preference shares in Onslow Salt to SAH. Contrary to section 200 of the Corporations Law (as it then was), there was no provision in the Memorandum or Articles of Association of Onslow Salt setting out the rights of the holders of preference shares issued in the capital of Onslow Salt. For this reason, the Deed of Settlement and Variation was expressed to be conditional upon:

- an order being granted by the Federal Court of Australia pursuant to section 254E of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act") validating or confirming the terms of the issue of the 19,725,000 redeemable preference shares (by 3 consecutive issues) in Onslow Salt; and  
- (subject to the granting of the above order) the 19,725,000 redeemable preference shares being converted into fully paid ordinary non-voting shares.

A resolution pursuant to section 249A of the Act was subsequently passed for the purpose of amending the Articles of Association of Onslow Salt to specify the rights attaching to redeemable preference shares issued in the capital of the company. The amendment was to be conditional upon:

- the directors of SAH passing a resolution consenting to the amendments;  
- the granting of orders by the Federal Court under section 254E(1) of the Act validating and confirming the terms of the purported issues of redeemable preference shares; and  
- the lodgment of copies of those orders with the ASIC.

(3) Analysis of development of the law governing the power to validate an issue of shares and to confirm the terms of their issue

The current position as to the power of the Court to validate an issue of shares and to confirm the terms of their issue is found in section 254E of the Act. Section 254E of the Act differs from its corresponding predecessors in the [Corporations Act 1989](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6668" \t "default), Corporations Act 1981 and the Uniform Companies Act 1961 in that section 254E makes no reference to the creation or allotment of shares, rather, it refers only to their issue or purported issue. While the distinction between issue and allotment is not always clear French J was of the view that there could be no doubt that there had been three consecutive purported issues of preference shares in Onslow Salt at the time those shares were taken up by SAH.

Further, section 254E of the Act has widened the range of cases in which the Court's power to validate an issue of shares or confirm their issue can be exercised. Under previous legislation, it was necessary to demonstrate the actual invalidity of the purported issue or allotment. However, under section 254E of the Act it is sufficient to demonstrate that the issue "is or may be invalid". In his Honour's view this extension of the Court's power enables the Court "to provide desirable certainty without the delay and expense that might otherwise be involved in a close consideration of whether or not a share issue was in truth invalid".

(4) Factors relevant to considering whether to apply section 254E of the Act

French J emphasised that the power to validate an issue of shares and to confirm the terms of their issue should be exercised with prudence. The power must be exercised having regard to the interests of all parties affected by the share issue particularly where a purported issue is contentious. In such cases the applicant must point to some factor, over and above the careless allotment, which justifies the validation (see Young J in Re Farnell Electronic Components Pty Limited (1997) 15 ACLC 1676 at 1678). Further, the Court must have regard to the public interest in ensuring compliance with the law and a company's constitution. Relevant considerations may include, whether there was a "reckless" or "blatant" disregard of the provisions of the Act or the constitution of the company, whether making a validation or confirmation order would prejudice a particular party, and whether prejudice could ensue in the absence of such an order being made.

(5) Decision

French J was of the view that there was no reason to suspect that the shares were issued other than with a careless failure to have regard to the requirements of the law as both shareholders supported the order sought. Further, there was no indication of any purpose, which could be characterised as being unworthy or contrary to public policy. Accordingly, his Honour was prepared to grant the orders sought.

6. NEW BOOK - EXPERTS' REPORTS IN CORPORATE TRANSACTIONS  
(By Laurie McDonald, Grant Moodie, Ian Ramsay and Jon Webster)

Experts' reports have become a key factor in providing shareholders and others with independent, objective information about many modern corporate transactions.  
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The authors include Professor Ian Ramsay, member of the Takeovers Panel and author of the recent report to the federal government on auditors' independence, and Jon Webster, a member of the ASX's Listings Advisory Panel and a former Chairman of the Law Council's Corporations Committee.

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(6) Defences & Limitations of Liability  
(7) Reliance by Directors on Experts' Reports  
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7. RECENT CORPORATE LAW JOURNAL ARTICLES

A Karl, A Kazakoff and L Chapple, 'Market response to offer information statements' (2003) 21 Company and Securities Law Journal 231

Offer Information Statements (OIS) were introduced in March 2000 to facilitate cost effective capital raising by small to medium enterprises (SMEs). This article assesses the success of the reform first from an ex ante theoretical perspective and secondly in an ex post setting, through the interpretation of responses to a questionnaire sent to the companies that employed the OIS procedure in their capital raising efforts during the first eight months. The conclusion drawn from our analysis is that while the aim of decreasing the costs involved in SME capital raising was achieved by the [Corporate Law Economic Reform Program Act 1999](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) reform, a myopic focus on reducing prospectus preparation costs resulted in the capital market realities of the reforms being largely ignored. This study highlights the factors to be recognised in building a cost effective capital raising regime for SMEs and will aid in the development and implementation of further reforms.

P Brown, M Foo and I Watson, 'Trading by insiders in Australia: Evidence on the profitability of directors' trades' (2003) 21 Company and Securities Law Journal 248

Do Australian corporate insiders profit from their trades? The authors answer this question by examining the empirical relationship between directors' trades (in shares of their own companies) and abnormal share price movements before and after the trades, for a sample of 1,526 "purchases" and 940 "sales" of ASX-listed shares made between January 1996 and June 2000. Directors' sales, especially of resource stocks, have been profitable in the sense that, by selling, they have avoided significant future losses; but the majority of their purchases do not appear to have been timed to capture future abnormal price rises, contrary to United States insiders' trades. Australian directors have not profited significantly from the information asymmetry usually ascribed to managers of smaller firms, and the size of the trade has been unrelated to the subsequent abnormal return.

J McConvill, 'The obligation of proxies to vote as directed: The present state of play and the need for a resolution' (2003) 21 Company and Securities Law Journal 262

At the 2002 Coles Myer Annual General Meeting, director Solomon Lew refused to vote approximately 117 million proxy votes of 170,000 Coles Myer shareholders who had appointed him proxy. Interestingly, Solomon Lew had personally solicited these proxy votes rather than being nominated as proxy through the company. Mr Lew's action raised for consideration an important question: was he obliged to vote as directed by the shareholders who had appointed him to be their representative at the meeting? Consideration of this issue brought to light a flaw in the way in which Australia's [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) regulates proxy voting: the chair of a company meeting is required to vote as directed when appointed as proxy, but any other person appointed as proxy does not have to vote as directed. In this article, the author discusses the problems with this present statutory approach, and proposes that amendments be made to the Corporations Act so that all proxies are obliged to vote as directed - reflecting the position at common law in Australia confirmed recently in ASIC v Whitlam (2002) 42 ACSR 407.

Note, 'Proposed corporate governance and regulatory reforms and the auditor' (2003) 21 Company and Securities Law Journal 273

Note, 'Tracking stock: Structure and corporate governance issues' (2003) 21 Company and Securities Law Journal 279

Note, 'The Panel and broker "inducement" fees - not too hot to handle' (2003) 21 Company and Securities Law Journal 285

D Kaplan, 'The Scope of Bar Orders in Federal Securities Fraud Settlements' (2002) 52 Duke Law Journal 211

L Yi, 'Road Shows on the Internet: Taking Individual Investors for a Ride on the Information Highway' (2002) 52 Duke Law Journal 243

L Bebchuk and A Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters' (2002) 112 Yale Law Journal 553

J Cox and R Thomas, 'Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?' (2002) 80 Washington University Law Quarterly 855

Washington University Law Quarterly, Vol 80 No 2, Summer 2002. Special Symposium Issue on Conflicts of Interest in Corporate and Securities Law. Articles include:

- No-one Can Serve Two Masters: Corporate and Securities Law After Enron  
- Threats and Safeguards in the Determination of Auditor Independence  
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X Nguyen, 'Commercial Law Collides with Cyberspace: The Trouble With Perfection - Insecurity Interests in the New Corporate Asset' (2002) 59 Washington and Lee Law Review 37

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R Grantham, 'Can Directors Compete with the Company?' (2003) 66 Modern Law Review 109

T Stratmann, 'Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation' (2002) 45 Journal of Law and Economics 345

M Sullivan, 'The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services' (2002) 45 Journal of Law and Economics 375

S Copp, 'Corporate Governance: Change, Consistency and Evolution - Part 2' (2003) 14 International Company and Commercial Law Review 115

Corporate Governance: An International Review, Vol 11 No 1, January 2003. Articles include:

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- Capital Structure and Investment Behaviour of Malaysian Firms in the 1990s: A Study of Corporate Governance Before the Crisis  
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- General Meetings: A Dispensable Tool for Corporate Governance of Listed Companies?

C Vaughn, 'Venture Capital in China: Developing a Regulatory Framework' (2002) 16 Columbia Journal of Asian Law 227

Bond Law Review, Vol 14 No 1, December 2002. Special Issue on Personal Property Security. Articles include:

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- Security Interests in Intellectual Property in Australia

A Forsyth, 'Corporate Collapses and Employees' Right to Know: An Issue for Corporate Law or Labour Law?' (2003) 31 Australian Business Law Review 81

J Rogers, 'Compulsory Acquisition Under Part 6A.2 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and Its Implications for Minority Shareholders' (2003) 31 Australian Business Law Review 97

C Kirchner and R Painter, 'Takeover Defenses Under Delaware Law, the Proposed 13th EU Directive and the New German Takeover Law: Comparison and Recommendation for Reform' (2002) 50 American Journal of Comparative Law 451

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R Daines, 'The Incorporation Choice of IPO Firms' (2002) 77 New York University Law Review 1559

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Journal of Corporation Law, Vol 28 No 1, Fall 2002. Articles include:

- Market Versus Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002  
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E Finnane and D Armstrong, 'Legislative Review: Repayment of Directors' Bonuses' (2003) 17 Commercial Law Quarterly 26

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