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| **Corporate Law Bulletin**  **Bulletin No. 75, November 2003**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au), Director, Centre for Corporate Law and Securities Regulation  Published by [LAWLEX](http://www.lawlex.com.au" \t "default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au" \t "_new), the [Australian Stock Exchange](http://www.asx.com.au" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au" \t "_new), [Clayton Utz](http://www.claytonutz.com" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au" \t "_new), [Freehills](http://www.freehills.com" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com" \t "_new), [Phillips Fox](http://www.phillipsfox.com" \t "_new).  ***Use the arrows to navigate easily across the bulletin***= back to Brief Contents = back to top of current section |
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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 UK Auditing Practices Board issues proposed ethical standards for auditors**  On 24 November 2003, the UK Auditing Practices Board (APB) issued for public comment five Exposure Drafts of proposed Ethical Standards (ESs) on the integrity, objectivity and independence of auditors.  The Standards will establish basic principles and essential procedures with which auditors will be required to comply in any audit of financial statements. When finalised, these Standards will replace the existing guidance for auditors, issued by the auditors’ professional bodies. The five proposed standards cover:           integrity, objectivity and independence;          financial, business, employment and personal relationships;          long association with the audit engagement;          fees, economic independence, remuneration and evaluation policies, litigation, gifts and hospitality;          non-audit services provided to audit clients.  Important new features include the roles of the audit firm’s ‘ethics partner’, the requirement for an ‘independent partner’ where the audit client is a listed company or other public interest entity, and the interaction with the Code of Corporate Governance.  To assist readers to understand the context for its proposals and the main features of the Exposure Drafts, the APB has produced an accompanying Consultation Paper, which:           provides background information on relevant regulatory and other developments;          outlines the key elements in the APB’s approach;          highlights significant issues in relation to the Exposure Drafts, especially in the complex area of the provision of non-audit services to audit clients; and          identifies a number of key questions on which views are invited.  The Exposure Drafts are available on the [APB website](http://www.accountancyfoundation.com/" \t "_new).  **1.2 APRA releases paper on second round of general insurance reforms**  Following the introduction of the new prudential framework for the supervision of general insurers in July 2002, the Australian Prudential Regulation Authority (APRA) released a discussion paper on a proposed second round of reforms on 20 November 2003.  The paper responds to a number of the recommendations made by the HIH Royal Commission in April this year, which have been supported by the Government and which also reflect initiatives proposed in APRA’s submission to the Commission in September 2002. The paper outlines proposals to:           revise the existing prudential standards and guidance notes in light of experience and market developments; and          increase disclosure about the activities of general insurers in order to promote market discipline.  The reforms introduced to the general insurance industry last year have strengthened requirements specifically in relation to financial soundness (liability valuation and capital adequacy) and risk management (particularly in relation to governance and reinsurance). They also established a three-layered system of regulation - the [Insurance Act 1973](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "default) (substantially amended by the [General Insurance Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58021" \t "default)), prudential standards and guidance notes. This system is supported by a regulatory reporting regime set out in reporting standards made under the [Financial Sector (Collection of Data) Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=57996" \t "default).  APRA Member, Mr Steve Somogyi, said that since the introduction of the reforms in 2002, APRA had identified a diversity of interpretations, and therefore practices, by general insurance companies in meeting APRA’s prudential standards.  “The 2002 reforms went a long way to strengthening the insurance industry in Australia. However, APRA considers it appropriate to refine, clarify and, in some cases, increase minimum prudential requirements,” he said. “The proposals in relation to disclosure aim to improve the transparency and usefulness of information disclosed by general insurers and APRA.”  He added: “Greater disclosure and, flowing on from that, the ability to more accurately assess the financial position and risk management practices of general insurers will benefit policyholders, and the protection of their interests is core to APRA’s mandate.”  Also in response to the HIH Royal Commission, APRA is developing a regime of consolidated supervision for general insurance corporate groups, which aims to minimise the risk of adverse developments in one area of a conglomerate damaging the overall soundness of the general insurance group. This will be the subject of a separate consultation paper to be issued in 2004.  In addition, APRA intends to release a separate consultation paper and draft prudential standard on “fit and proper” requirements in the general insurance, life insurance and the authorised deposit-taking sectors. This will also be issued in 2004.  Comments on the paper are invited by 27 February 2004. A copy of the discussion paper is available on [APRA’s web site](http://www.apra.gov.au/" \t "_new).  **1.3 Insider trading report**  On 20 November 2003, the Australian Corporations and Markets Advisory Committee released its Insider Trading Report, which is the culmination of a detailed review over the last two years.  In releasing the Report, the Committee’s Convenor, Richard St John, said:  “Clear and effective insider trading legislation is necessary to protect Australian financial markets and encourage investor participation in them. At the same time, the legislation needs to be appropriately focused to ensure that it does not unduly impede or discourage legitimate market activity.”  The 38 recommendations in the Report are designed to strengthen aspects of the law and related disclosure requirements, to overcome various anomalies and to clarify the application of the law to different financial markets as well as other aspects. They include:  **(a) Strengthen the reporting requirements for corporate officers**  Currently, directors must notify their trading in their own company’s securities (s 205G). This requirement helps to keep the securities market fully informed, while reducing the opportunity for directors to engage in insider trading in those securities without detection. However, this key disclosure law needs to be strengthened. For instance:           the disclosure obligation should extend to senior executives, not just directors          the disclosure period should be reduced from 14 days to 2 business days to ensure that the market is promptly as well as fully informed          corporate officers who resign should be obliged to disclose any transactions they undertake in their company’s securities before resigning and any such transactions they undertake within one month after they resign.  **(b) Clarify application to different financial markets**  The Committee notes difficulties in applying the insider trading provisions in their current form to some financial markets, and canvasses options to accommodate the differing characteristics of those markets.  A majority of the Committee considers that the insider trading law should take into account the differing disclosure expectations and requirements of various financial markets by:           focusing the insider trading prohibition on information that the market expects should be disclosed to all participants on an equal basis          in consequence, simplifying the test of when information is generally available. This will overcome problems associated with the current ‘readily observable matter’ test of when information is generally available.  A minority of the Committee, being the ASIC Chairman and, on some matters, one other member, does not support these proposed changes and prefers retaining the current law, with specifically designed defences or carve-outs to be introduced where necessary to meet any identified problems.  **(c) Remove overlaps in the regulation of share issues and buy-backs and exempt some private placements**  A majority of the Advisory Committee considers that new securities issues and most corporate buy-backs, both of which are already subject to comprehensive disclosure requirements, should not also be subject to the insider trading prohibition. This would remove regulatory overlaps, without weakening the obligation to keep the market fully informed. The majority also notes the general understanding prior to March 2002 that these types of transactions did not come within the insider trading law. The minority does not support any of these exclusions.  A majority of the Advisory Committee also recommends that private securities placements to wholesale investors be exempt from the insider trading provisions. Issuers and wholesale placees can negotiate the level of disclosure between themselves under an individual placement. Also, an exemption would not be out of step with overseas jurisdictions, which do not generally apply their insider trading laws to private placements. The minority does not support this exclusion.  **(d) Permit the use of non-discretionary trading plans**  A majority of the Committee supports an exemption, modelled on the US SEC Rule 10b5-1, to allow persons who are regularly exposed to inside information (such as directors and other senior corporate officers) to trade in their company’s securities under non-discretionary trading plans, subject to safeguards against abuse. The minority does not support this proposed exemption from the insider trading law.  **(e) Copies of the Report**  Copies are available on the [Committee’s website](http://www.camac.gov.au/" \t "_new).  **1.4 UK report on partnership law**  On 18 November 2003 the Law Commission of England and Wales and the Scottish Law Commission published a joint Report on Partnership Law.  This recommends the first statutory changes to partnership law since the principal Acts governing partnerships were passed in 1890 and 1907.  Partnerships, both small and large, continue to play an important role in the economy.  There are over 500,000 partnerships in the United Kingdom with a combined turnover of approximately £136 billion.  The main advantages of partnership as a business vehicle are its flexibility and informality.  The suggested reforms strive to ensure that these advantages remain.  One of the main disadvantages of partnership is its instability, in particular the rule that a firm ceases to exist on any change in its membership.  This is addressed in the recommended reforms.  The main thrust of the reforms is to encourage continuity of business and this is done by introducing the concept of separate legal personality for partnerships in England and Wales and clarifying that concept in Scotland.  By making the partnership itself a legal entity, the partnership would not automatically dissolve on any change of partners and would be able to enter contracts and hold property.  However, partners would continue to be personally responsible for the obligations of the partnership and would owe a duty of good faith towards the partnership and each of the other partners.  Larger partnerships are likely to know the kind of agreement they wish to enter into and will have access to advice to ensure that this is given effect to. Smaller partnerships may not.  The draft Bill which accompanies the report gives guidance in the form of a default code that will apply unless the partners choose to vary it. The default code deals with matters that partners would expect to be covered by a partnership agreement, such as the sharing of profits and losses, how differences between partners are to be settled and the financial entitlement of a partner on leaving the partnership.  When the time comes to break up a partnership, the partners themselves will usually carry out the winding up of a solvent partnership. However, where differences arise, the recommendations enable interested parties to appoint a new official, a partnership liquidator, to wind up the partnership.  The recommendations also clarify the law in relation to limited partnerships which were introduced by the Limited Partnerships Act 1907. These differ from general partnerships in that there must be at least one partner who does not wish to take part in the management of the partnership but merely to invest in it.  This partner’s capital is at risk to the extent of the investment.  With one exception, it is recommended that separate legal personality should apply to limited partnerships too.  Due to concerns expressed about the potential tax treatment overseas of limited partnerships with separate legal personality, it is recommended that, in English law only, there should be a category of special limited partnership which would not have separate legal personality.  The Report (Law Com No 283; Scot Law Com No 192) together with a summary are available on the Commissions’ websites at [www.lawcom.gov.uk](http://www.lawcom.gov.uk/" \t "_new) and [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk/" \t "_new).  **1.5 ASIC fee template take up rate impressive**  On 11 November 2003, the Investment and Financial Services Association (IFSA) released details of the Australian Securities and Investments Commission (ASIC) fee template take up rate. According to the IFSA, the roll out of Product Disclosure Statements (PDS’s) incorporating the ASIC Fee Table continues to gather momentum amongst IFSA member companies in the lead up to the 11 March 2004 deadline for final implementation of the Financial Services Reform measures.  “More than a month has passed since the release of the IFSA model PDS’s and the take-up rate amongst our members has been impressive”, said IFSA CEO, Richard Gilbert.  “The IFSA Model Managed Investment Scheme (MIS) and Superannuation PDS’s incorporate the recently released ASIC fee template, which was developed by ASIC in line with Professor Ian Ramsay’s recommendations and in consultation with IFSA, ASFA and other bodies.  “Several IFSA member companies are now using the model, which to date has been well received by consumers and members alike.”  “IFSA has committed its retail public offer, managed fund and superannuation industry members to using the ASIC fee model, which will become a mandatory IFSA Standard on 11 March 2004.”  “The fee template has meant the adoption of standardised terminology and standard fee tables, which are designed to facilitate comparison of products, with more transparency for consumers.”  “Universal adoption of the fee table should improve disclosure in the way Financial Services Reform intended it to do.”  “The rapid adoption of the fee template model has come about largely because there were no surprises. The high level of consultation and the amount of effort that went into the development of these soon-to-be Standards meant that we were able to arrive at a design consensus IFSA member companies were happy with”, Mr Gilbert concluded.  The Model PDS’s are available from the [IFSA website](http://www.ifsa.com.au/" \t "_new).  **1.6 Horwath study finds widening gap in corporate governance actions of Australia’s top companies**  A survey on corporate governance practices of Australia’s top 250 public companies has given a mixed scorecard with only 15 companies receiving a top rating, a survey by the University of Newcastle for chartered accountants firm Horwath has found.  The Horwath 2003 Corporate Governance study, released on 7 November 2003, analysed information from 2001/02 annual reports of Australia’s Top 250 companies, assessing reporting of governance issues of directors’ independence, auditor conflicts and remuneration practices. The study was conducted by Associate Professor Jim Psaros and Michael Seamer of the Newcastle Business School.  Associate Professor Jim Psaros said: “It was of concern that the independence levels of Australia’s top 250 company’s Boards of Directors and associated committees appear to have deteriorated since the 2002 report.  “This suggests that some companies are either unwilling or very slow to act. Accordingly, the ASX Corporate Governance Council Guidelines may be very necessary to prompt action by some companies,” he said.  The study establishes a star rating system to help investors understand a company’s publicly-reported governance capabilities and showed 54% of companies demonstrated ‘good to outstanding’ practices of governance, while 30% of companies clearly lacked structures and evidence of good practices.  Martin Bloom, chairman of Horwath, said the study proved that the gap is widening between well resourced, committed companies and others with less commitment to governance, with the top ranked companies improving their performance and accountability from last year, while the lower ranked companies were losing ground.  “It is obvious that a two-tiered society of governance is emerging in Australia. There is a great distinction between large, well resourced companies which commit to corporate governance as important to their business and there are other companies which simply pay lip service to good practices in this area,” said Mr Bloom.  Despite the trend that larger companies tended to score better ratings for their governance practices, a number of medium to smaller capitalised listed companies also performed well on the study’s comparisons, illustrating that governance is an issue for all companies.  The study’s detailed findings also found:           some evidence linking good corporate governance with improved share prices. On average, it was found that the share price of the “good to outstanding” corporate governance companies increased by 11.09%. In contrast, the average share price of the “adequate to poor” corporate governance companies decreased by 8.91%.          a small increase in the number of audit, remuneration and nomination committees since the 2002 report. However, this positive finding was negated by the decreased level of independence that was found on the Boards of Directors, audit, remuneration and nomination committees.          the proportion of non-audit fees paid by companies to their external auditors had decreased. Further, many companies commented that they had approved non-audit services only if they believed that the provision of these services did not impinge on their external auditors’ independence.  **1.7 Release of executive pay best practice principles**  On 6 November 2003, the Business Council of Australia released best practice principles to provide companies and their Boards guidance on developing and structuring executive pay packages.  Deloitte Touche Tohmatsu developed the principles in consultation with Business Council of Australia with the aim of supplementing existing regulatory and industry guidance such as the ASX Corporate Governance Council’s Principles of Good Corporate Governance and Best Practice Recommendations.  The key principles and related issues canvassed through this set of Practice Notes are as follows:           Board scrutiny and risk oversight          Building a strong remuneration philosophy and framework          The Board Remuneration Committee          Involving shareholders in executive remuneration          Managing remuneration disclosure and transparency          The value and composition of executive remuneration          Executive remuneration contracts and managing termination risks          External remuneration advisers.  The Guide is published as a set of Practice Notes. Each Practice Note addresses specific executive remuneration issues of concern to Australian companies, board members, chief executives, management and corporate governance practitioners. The intention is to update these from time to time as both Australian and global corporate governance develops, and as better approaches emerge. The Guide reports on proposed reforms contained in the CLERP (Audit Reform and Corporate Disclosure) Bill 2003, released on 8 October 2003.  The key principles are:  **(a) Board scrutiny and oversight**  The Board has ultimate oversight and responsibility for executive remuneration and this is widely understood and followed. The Board considers the risks arising from remuneration decisions including serious reputation risk and establishes appropriate controls.  **(b) A strong remuneration philosophy and framework**  The Board develops, implements and monitors remuneration policy and practice which will attract, retain and motivate executives to add value to the company but prevent the Board having to remunerate executives at levels which are not merited.  **(c) An effective Remuneration Committee or similar Board** **body**  The Board uses a Remuneration Committee or similar committee to develop, design and implement appropriate executive remuneration contracts and arrangements.  **(d) Shareholders concerns are managed by the Board**  The Board assists in eliminating or alleviating shareholder concern by disclosing information about the company’s remuneration policies and the costs and benefits of those policies and core entitlements, to enable investors to understand the link between remuneration paid to directors and key executives and corporate performance.  **(e) Transparency is promoted and disclosure managed**  There is a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual executives. No executive should be involved in deciding his or her remuneration.  **(f) Performance is rewarded, not failure**  At the outset of an executive contract, the Board considers the potential total cost of the appointment and termination in monetary terms. The value and composition of executive remuneration must reward performance not failure.  **(g) Effective executive contracts are used**  Executives require some form of contractual protection. Contracts must be carefully evaluated by the Board.  **(h) Independent advisers are used by the Board as required**  If the Board or Remuneration Committee wishes to seek advice from outside consultants, the Board or Committee should itself choose and appoint the consultants. Committee members should have direct access to independent remuneration specialists and outside survey data.  The principles and accompanying guide are on the [Business Council of Australia](http://www.bca.com.au/" \t "_new).  **1.8 SEC approves NYSE, NASDAQ strengthening of corporate governance standards for listed companies**  On 4 November 2003 the US Securities and Exchange Commission approved new rules proposed and adopted by the New York Stock Exchange (NYSE) and the NASDAQ Stock Market requiring widespread strengthening of corporate governance standards for listed companies.  The new rules establish a stricter, more detailed definition of independence for directors and require the majority of members on listed companies’ boards to satisfy that standard. In addition, the rule changes include a number of provisions that require and facilitate independent director oversight of processes relating to corporate governance, auditing, director nominations, and compensation.  SEC Chairman William Donaldson said, “These rule changes are at the core of a broad movement by our markets to enhance the corporate governance practices of the companies traded on them and I congratulate the NYSE and the NASD for their efforts. Investors will recognize significant benefits from these actions now and long into the future.”  The release approving the new rules may be found on the Commission’s web site at [www.sec.gov/rules/sro/34-48745.htm](http://www.sec.gov/rules/sro/34-48745.htm" \t "_new)  Following is a summary of summary of the new NYSE listing rules taken from the SEC release.  **(a) History**  In 1998, the NYSE and NASD sponsored a committee to study the effectiveness of audit committees. This committee became known as the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (“Blue Ribbon Committee”). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to enhance their effectiveness. In response to these recommendations, the NYSE and the NASD, as well as other exchanges, revised their listing standards relating to audit committees. In February 2002, in light of several high-profile corporate failures, the Commission’s Chairman at that time requested that the NYSE and NASD, as well as the other exchanges, review their listing standards, with an emphasis this time on all corporate governance listing standards, and not just those provisions relating to audit committees. After reviewing their corporate governance listing standards, the NYSE and the NASD, through NASDAQ, filed corporate governance reform proposals with the Commission in 2002.  In January 2003, pursuant to the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”), the Commission proposed Rule 10A-3 under the Exchange Act, which directs each national securities exchange and national securities association to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements specified in Rule 10A-3. Because the provisions concerning audit committees in the NYSE and NASDAQ corporate governance reform proposals, as filed with the Commission, did not conform in all respects with the audit committee requirements set forth in Rule 10A-3 as proposed by the Commission, both the NYSE and NASDAQ revised their proposals. In April 2003, the Commission adopted Rule 10A-3. In order to conform their proposals to the requirements of final Rule 10A-3, and to incorporate comments from the public and revisions suggested by the Commission’s staff, the NYSE and NASDAQ each filed further amendments to their proposals. Significant aspects of the proposed rule changes, as amended, are described below.  **(b) NYSE proposals**  According to the NYSE, the NYSE Corporate Governance Proposal is designed to further the ability of honest and well-intentioned directors, officers, and employees of listed issuers to perform their functions effectively. The NYSE believes that the proposal also will allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behaviour.  **(i) Independence of majority of board members**  NYSE Section 303A (1) of the NYSE Manual would require the board of directors of each listed company to consist of a majority of independent directors. Pursuant to NYSE Section 303A(2) of the NYSE Manual, no director would qualify as “independent” unless the board affirmatively determines that the director has no material relationship with the company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). The company would be required to disclose the basis for such determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company’s annual report on Form 10-K filed with the Commission. In complying with this requirement, a board would be permitted to adopt and disclose standards to assist it in making determinations of independence, disclose those standards, and then make the general statement that the independent directors meet those standards.  **(ii) Definition of independent director**  In addition, the NYSE proposes to tighten its current definition of independent director as follows. First, a director who is an employee, or whose immediate family member is an executive officer, of the company would not be independent until three years after the end of such employment relationship (“NYSE Employee Provision”). Employment as an interim Chairman or CEO would not disqualify a director from being considered independent following that employment.  Second, a director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, except for certain permitted payments, would not be independent until three years after he or she ceases to receive more than $100,000 per year in such compensation (“NYSE Direct Compensation Provision”).  Third, a director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company would not be independent until three years after the end of the affiliation or the employment or auditing relationship.  Fourth, a director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company’s present executives serve on that company’s compensation committee would not be independent until three years after the end of such service or the employment relationship (“NYSE Interlocking Directorate Provision”).  Fifth, a director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of $1 million, or 2% of such other company’s consolidated gross revenues, would not be independent until three years after falling below such threshold (“NYSE Business Relationship Provision”). The NYSE proposes to clarify this proposal with respect to charitable organizations by adding a commentary noting that charitable organizations shall not be considered “companies” for purposes of the NYSE Business Relationship Provision, provided that the listed company discloses in its annual proxy statement, or if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the Commission, any charitable contributions made by the listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, such contributions in any single year exceeded the greater of $1 million or 2% of the organization’s consolidated gross revenues.  The NYSE also proposes to clarify this proposal by adding commentary explaining that both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year, and that the look-back provision applies solely to the financial relationship between the listed company and the director or immediate family member’s current employer. A listed company would not need to consider former employment of the director or immediate family member.  The NYSE proposes to define “immediate family member” to include a person’s spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person’s home. The NYSE also proposes that references to “company” include any parent or subsidiary in a consolidated group with the company.  The NYSE further proposes to revise the phase-in of the look-back requirement that the NYSE had previously proposed by applying a one-year look-back for the first year after adoption of these new standards. The NYSE also proposes to change all of the look-back periods from five years to three years. The three-year look-back would begin to apply from the date that is the first anniversary of Commission approval of the proposed rule change.  **(iii) Separate meetings for board members**  NYSE proposes to require the non-management directors of each NYSE-listed company to meet at regularly scheduled executive sessions without management.  In addition, NYSE proposes to require listed companies to disclose a method for interested parties to communicate directly with the presiding director of such executive sessions, or with the non-management directors as a group.Companies may utilize the same procedures they have established to comply with Rule 10A-3(b)(3).  **(iv) Nominating/corporate governance committee**  NYSE proposes to require each listed company to have a nominating/corporate governance committee composed entirely of independent directors. The NYSE also proposes to require such committee to have a written charter that addresses, among other items, the committee’s purpose and responsibilities, and an annual performance evaluation of the nominating/corporate governance committee (“NYSE Nominating/Corporate Governance Committee Provision”). The NYSE further proposes to clarify that the committee would be required to identify individuals qualified to become board members, consistent with the criteria approved by the board.  **(v) Compensation committee**  NYSE proposes to require each listed company to have a compensation committee composed entirely of independent directors. The NYSE also proposes to require the compensation committee to have a written charter that addresses, among other items, the committee’s purpose and responsibilities, and an annual performance evaluation of the compensation committee (“NYSE Compensation Committee Provision”). The Compensation Committee also would be required to produce a compensation committee report on executive compensation, as required by Commission rules to be included in the company’s annual proxy statement or annual report on Form 10-K filed with the Commission. Further, the NYSE proposes to (1) delete the previously proposed statement that the compensation committee has the sole authority to determine the compensation of the chief executive officer (“CEO”), and provide that either as a committee or together with the other independent directors (as directed by the board), the committee would determine and approve the CEO’s compensation level based on the committee’s evaluation of the CEO’s performance; and (2) add a provision to the commentary on this section indicating that discussion of CEO compensation with the board generally is not precluded.  **(vi) Audit committee**  **         Composition**  NYSE Sections 303A(6) and 303A(7) would require each NYSE-listed company to have a minimum three-person audit committee composed entirely of directors that meet the independence standards of both NYSE Section 303A(2) and Rule 10A-3. The NYSE also proposes to delete the previously proposed commentary relating to NYSE Section 303A(6) and replace it with the following: “The Exchange will apply the requirements of Rule 10A-3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34-47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies with the opportunity to cure defects provided in Rule 10A-3(a) (3).”  In addition, the Commentary to NYSE Section 303A(7)(a) would require that each member of the audit committee be financially literate, as such qualification is interpreted by the board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee would be required to have accounting or related financial management expertise, as the company’s board interprets such qualification in its business judgment. The NYSE also proposes to clarify that while the Exchange does not require that a listed company’s audit committee include a person who satisfies the definition of audit committee financial expert set forth in Item 401(e) of Regulation S-K, a board may presume that such a person has accounting or related financial management experience.  If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, each board would be required to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company’s audit committee and to disclose such determination.  **         Audit committee charter and responsibilities**  NYSE Section 303A(7)(c) would require the audit committee of each listed company to have a written audit committee charter that addresses: (i) the committee’s purpose; (ii) an annual performance evaluation of the audit committee; and (iii) the duties and responsibilities of the audit committee (“NYSE Audit Committee Charter Provision”).  The NYSE Audit Committee Charter Provision provides details as to the duties and responsibilities of the audit committee that must be addressed. These include, at a minimum, those set out in Rule 10A-3(b)(2), (3), (4) and (5),as well as the responsibility to annually obtain and review a report by the independent auditor; discuss the company’s annual audited financial statement and quarterly financial statements with management and the independent auditor; discuss the company’s earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; discuss policies with respect to risk assessment and risk management; meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function), and with independent auditors; review with the independent auditors any audit problems or difficulties and management’s response; set clear hiring policies for employees or former employees of the independent auditors; and report regularly to the board.  **         Internal audit function**  NYSE Section 303A(7)(d) would require each listed company to have an internal audit function.  **(vii) Corporate governance guidelines**  NYSE Section 303A(9) would require each listed company to adopt and disclose corporate governance guidelines. The following topics would be required to be addressed: director qualification standards; director responsibilities; director access to management and, as necessary and appropriate, independent advisors; director compensation; director orientation and continuing education; management succession; and annual performance evaluation of the board. Each company’s website would be required to include its corporate governance guidelines and the charters of its most important committees, and the availability of this information on the website or in print to shareholders would need to be referenced in the company’s annual report on Form 10-K filed with the Commission.  **(viii) Code of business conduct and ethics**  NYSE Section 303A(10) would require each listed company to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and to promptly disclose any waivers of the code for directors or executive officers. The commentary to this section sets forth the most important topics that should be addressed, including conflicts of interest; corporate opportunities; confidentiality of information; fair dealing; protection and proper use of company assets; compliance with laws, rules and regulations (including insider trading laws); and encouraging the reporting of any illegal or unethical behaviour. Each code would be required to contain compliance standards and procedures to facilitate the effective operation of the code. Each listed company’s website would be required to include its code of business conduct and ethics, and the availability of the code on the website or in print to shareholders would need to be referenced in the company’s annual report on Form 10-K filed with the Commission.  **(ix) CEO Certification**  NYSE Section 303A(12)(a) would require the CEO of each listed company to certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE’s corporate governance listing standards. This certification would be required to be disclosed in the company’s annual report or, if the company does not prepare an annual report to shareholders, in the company’s annual report on Form 10-K filed with the Commission.  In addition, NYSE Section 303A(12)(b) would require the CEO of each listed company to promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of the new requirements.  **(x) Public reprimand letter**  NYSE Section 303A(13) would allow the NYSE to issue a public reprimand letter to any listed company that violates an NYSE listing standard.  **(xi) Exceptions to the NYSE corporate governance proposals**  There are a number of exceptions to the new rules. For example, the NYSE proposes to exempt any listed company of which more than 50% of the voting power is held by an individual, a group or another company from the requirements that its board have a majority of independent directors, and that the company have nominating/corporate governance and compensation committees composed entirely of independent directors. The other exceptions are outlined in the SEC Release.  **(xii) Application to foreign private issuers**  NYSE Section 303A would permit NYSE-listed companies that are foreign private issuers, as such term is defined in Rule 3b-4 under the Exchange Act, to follow home country practice in lieu of the new requirements, except that such companies would be required to:           have an audit committee that satisfies the requirements of Rule 10A-3;           notify the NYSE in writing after any executive officer becomes aware of any non-compliance with any applicable provision; and          provide a brief, general summary of the significant ways in which its governance differs from those followed by domestic companies under NYSE listing standards.  Listed foreign private issuers would be permitted to provide this disclosure either on their website (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States in accordance with Sections 103.00 and 203.01 of the NYSE Manual. If the disclosure is made available only on the website, the annual report would be required to state this and provide the web address at which the information may be obtained.  **(xiii) Proposed implementation of new requirements**  In NYSE Amendment No 2, the NYSE proposes a revised implementation schedule for the new requirements. Pursuant to the new schedule, listed companies would have until the earlier of their first annual meeting after 15 January 2004, or 31 October 2004, to comply with the new standards. However, if a company with a classified board is required to change a director who would not normally stand for election in such annual meeting, the company would be permitted to continue such director in office until the second annual meeting after such date, but no later than 31 December 2005. Notwithstanding the foregoing, foreign private issuers would have until 31 July 2005, to comply with any Rule 10A-3 audit committee requirements.  Companies listing in conjunction with their initial public offering would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and fully independent committees within one year. They would be required to meet the majority of independent board requirement within 12 months of listing.  Companies listing upon transfer from another market would have 12 months from the date of transfer in which to comply with any requirement to the extent the market on which they were listed did not have the same requirement. To the extent the other market has a substantially similar requirement but also had a transition period from the effective date of that market’s rule, which period had not yet expired, the company would have the same transition period as would have been available to it on the other market. This transition period for companies transferring from another market would not apply to the audit committee requirements of Rule 10A-3 unless a transition period is available under Rule 10A-3.  **1.9** **United States board of directors study compares board practices in Asia Pacific, Europe and North America**  According to Korn/Ferry International’s 30th Annual Board of Directors Study, released on 28 October 2003, due to the increased liability of serving on corporate boards, 23 percent of Board Directors on Fortune 1000 companies in the Americas turned down additional board roles in 2002, compared to only 13 percent the previous year.  Building upon three decades of corporate governance analysis, the Korn/Ferry survey was expanded this year to reflect and compare the opinions of board directors from around the world.  The Study findings are based on responses from 1,362 directors of Fortune 1000 companies and leading organizations from 15 nations.  **(a) Key findings in this year’s study**           The American Fortune 1000 boards lead the way in holding Executive Sessions (87 percent) without their CEO present. Japanese boards are least likely to gather without the CEO present (4 percent);           Individual director evaluation is most prevalent in Asia Pacific where 41 percent of boards formally evaluate their directors, while 29 percent of American boards conducted these reviews (up from 21 percent last year); and          Almost all of the American boards (98 percent) are in compliance with Sarbanes-Oxley; 63 percent of French boards report compliance with the Bouton Report; and 66 percent of UK boards satisfy the Higgs and Smith Reports on the issues of director independence.  “This has been a watershed year for board members worldwide. The increased scrutiny on governance has brought unprecedented complexity and demand on corporate boards, forcing directors to now spend on average between 19 and 25 hours per month on board matters.  In addition, personal risk has risen dramatically and the minimum acceptable participation level keeps rising,” said Charles King, head of Korn/Ferry’s Global Board Services Practice.  Korn/Ferry’s global survey also found that diversity among directors continues to rise for the Fortune 1000 boards. Women now occupy at least one seat on 79 percent of the Fortune 1000 boards, while African-American, Latino and Asian directors can now be found in 71 percent of Fortune 1000 boardrooms, up 4.4 percent over last year.  **(b) Compensation findings**           Average board member cash compensation of Fortune 1000 organizations rose 3.4 percent to $43,306 in 2002;          Audit Committee Chairmen received an 8.4 percent retainer increase to $5,779; and          Of the 906 Fortune 1000 companies examined, 784 include stock options and grants as part of director compensation.  “When we began this survey in 1972, only 4 percent of the companies polled provided some type of stock program in director compensation,” Mr. King said. “Furthermore, only 6.9 percent of the participants thought directors should be compensated with stock options.”  **(c) Other key survey findings**           Independence remains an essential concern of directors:  o        Ninety-two percent of Australia/New Zealand directors, 80 percent of U.S. directors and 71 percent of French directors say the former CEO should not sit on the board           Most American directors (81 percent) say their company’s CEO compensation program is effective compared to 65 percent in Germany and 53 percent in Non-Japan Asia  **1.10 AIMR survey provides insight regarding quality of financial information, effects of earnings guidance and the quality of investment research**  A survey released on 27 October by the global Association for Investment Management and Research, a nonprofit organization of almost 70,000 investment professionals, found that more than 80% of the analysts and portfolio managers who responded worldwide say that financial statements and footnotes are “extremely” or “very” important to their analysis and investment decision making. However, they only give public companies an average grade of “C+” for the overall quality of financial reporting and corporate disclosure.  The 2003 AIMR 2003 Global Corporate Financial Reporting Quality survey also found that 44% of respondents give companies a “B” for financial reporting quality but only 1% awarded them an “A.” Another 44% give companies a “C,” while 14% marks of “D” or “F.” When AIMR last conducted a similar survey, in late 1999, the majority of respondents (56%) rated corporate reporting quality a “B,” and 5% rated it an “A”, while only 37% gave it a “C” or lower.  When asked about the importance of certain types of financial information and the quality of that information, respondents stated that footnote disclosures are just as important as the balance sheet. Areas where there are large gaps between importance and quality are off-balance sheet assets and liabilities, extraordinary, unusual and non-recurring charges, and pensions and other retirement benefits.  **(a) Corporate balance sheets are seen as highly important, but need a boost in quality**  Investment professionals note sizable gaps between the importance of even core financial statements and their quality.  (Based on 1822 responses)   |  |  |  | | --- | --- | --- | |  | **Importance** | **Quality** | |  | Very or Extremely Important | Good(“B”) or Excellent (“A”) | | Annual audited financial statements | 82% | 44% | | Income statement | 87% | 42% | | Balance sheet | 90% | 44% | | Cash flow statement | 87% | 44% | | Statement of shareholder’s equity | 37% | 29% |   Asked about 15 additional sources of key financial information from public companies, investment professionals rated as top five:  1. Footnotes to the financial statements 2. Interim financial statements 3. Earnings releases 4. Management’s Discussion and Analysis (MD&A) 5. Conference calls and face-to-face meetings  Respondents were also asked to rate 33 specific types of information that may be found in the financial statements and related footnotes and disclosures. The top five:  1. Information about off-balance sheet assets or liabilities 2. Explanation of extraordinary, unusual or non-recurring charges 3. Information about pension and other retirement benefits 4. Contingencies, litigation, exposure to legal risk, etc. 5. Tie between explanation of accounting principles applied and explanation of revenue recognition criteria  **(b) Buy-side (in-house) analysts rated highest for research quality, importance**  Asked to rate non-corporate sources of information, portfolio managers and buy-side analysts clearly value their own in-house analysts the most, compared to six other possible sources listed.           Eight out of 10 (79%) buy-side investment professionals consider their in-house analysts to be very or extremely sources of information, compared to 52% who feel the same way about independent outside research and 45% who say research from brokerage firms is extremely or very important.          More than two thirds (68%) give their employer’s in-house analysts “As” or “Bs” for quality, compared to 47% for independent research firms and 30% for brokerage-firm research.           Only 13% said issuer paid research was important and quality was rated lower than other sell-side research.  **(c) Earnings guidance believed to lead to corporate manipulation of financial reports**  Seven out of 10 portfolio managers and securities analysts believe the practice of corporate managements giving “earnings guidance” increases “earnings management” (corporate manipulation of financial reports).           Only 26 percent believe that an alternative practice - general trend and performance information from management (without EPS forecasts or income targets) - increases “earnings management”.           Half (51 percent) believe “earnings guidance” from management also increases stock-price volatility, versus 29 percent who say it has the opposite effect of decreasing volatility, and only 12 percent who say it has no effect either way.  **(d) CFOs have an edge over CEOs with investment professionals** CFOs have a slight edge over CEOs as the most important and highest-quality communications source at the companies that portfolio/fund managers and securities analysts follow.  (Based on 1050 responses)   |  |  |  | | --- | --- | --- | |  | **Importance** | **Quality** | |  | Very or Extremely Important | Good(“B”) or Excellent (“A”) | | CFO, controller, treasurer, or equivalent | 74% | 43% | | CEO, president or equivalent | 65% | 35% | | Other senior executives | 52% | 30% | | Managers of business lines, product lines, geographic divisions, or other business segments | 46% | 27% | | Investor relations staff | 31% | 22% | | Board members | 25% | 13% | | Lower-level managers | 20% | 15% |   **1.11** **Global survey shows CEOs taking greater responsibility for corporate reputations**  In response to high-profile cases of corporate wrongdoing and diminished corporate reputations over the last two years, 65 percent of CEOs surveyed worldwide said it is their personal responsibility to manage their company’s reputation.  Only 14 percent of the corporate executives polled said their company’s board was responsible and just 12 percent considered corporate reputation a responsibility of their communications department, according to the Fifth Annual Corporate Reputation Watch survey of senior executives.  The survey, released on 3 October 2003 examined corporate executive level perspectives on issues such as the importance of corporate reputation, influencers of corporate reputation, threats to reputation, governance issues, and corporate social responsibility initiatives.  The survey revealed that corporate boards are putting more pressure on CEOs to build corporate reputation.  When choosing a CEO successor, the CEOs overwhelmingly agreed (97 percent) that boards place at least some weight on a candidate’s ability to protect and enhance the company’s reputation.     Among the global company CEOs, presidents, and chairmen who responded to the 2003 survey, 75 percent said their companies have improved internal controls in response to mounting revelations of corporate wrongdoing.  In addition, 64 percent said that their companies have reviewed auditor and accounting relationships and 55 percent said they have revised codes of conduct.    Reflecting a change in attitude from previous surveys, a vast majority of respondents agree that a company’s corporate reputation is more important today than it was five years ago, and more than half believe it is much more important today.  In the survey, CEOs overwhelmingly (78 percent) point to customers as the external force with the greatest impact on reputation, with print media (48 percent) and financial analysts (44 percent) rounding out the top three.  CEOs agreed that corporate social responsibility (CSR) initiatives contribute to corporate reputation.  Overall, eight out of 10 CEOs said that CSR initiatives contribute at least moderately to their companies’ reputation, but only three out of 10 said they contribute a “significant amount.”  European CEOs place a higher weight on CSR initiatives.  Ninety-four percent believe CSR initiatives contribute at least moderately to reputation.  CEOs overall cite the primary business objectives of CSR initiatives as recruiting and retaining employees (71 percent), favorable media coverage (51 percent) and promoting transactions and partnerships (40 percent).  Increasing sales and enhancing stock price are mentioned more frequently by CEOs as objectives of corporate reputation, than corporate social responsibility.  The vast majority of CEOs believe the recent focus on more stringent corporate governance and board oversight is going to be a permanent fixture in the corporate landscape.  While most CEOs believe boards of directors are doing a good or excellent job in performing an oversight role, a majority (68 percent) also believes that a higher proportion of independent directors will become a long-term outcome of increased corporate governance.  Methodology: The Fifth Annual Corporate Reputation Watch was conducted by ORC International in August and September 2003.  Executives with qualifying titles of CEO, president or chairman, along with North American, Asian and European executives were surveyed.  Two hundred fifty seven completed surveys were tallied, representing executives at 199 public and 54 private companies.  The overall sample has a +/- 5 percent margin of error.  To view the results of the Corporate Reputation Watch survey, visit [www.corporatereputationwatch.com](javascript:aLink('http://www.corporatereputationwatch.com/',true,0,0,640,580)" \t "_new)  **1.12 Executive pay & performance – latest Australian study**  Directors at Australia’s top 200 public companies are failing to link executive pay with performance, according to research commissioned by the Public Sector Superannuation Scheme and other superannuation funds. The research, published in October, examined 2001 and 2002 annual reports, accounting for more than 2400 directors. The research failed to find a link between pay and performance. The research also found that disclosure among the surveyed firms is poor, with 50% granting share options to executives without informing investors the value of the options, despite the fact that the options accounted for 12% of total pay. Seventy-four percent of the companies did not disclose what hurdles determine options grants. While 95% have remuneration committees, 30% said their committee includes executive members, and only 6 of those companies said the executive(s) did not participate in discussion of their own compensation. Another 25% did not disclose the details of their remuneration policies, and 7% did not disclose the pay data for all executives and directors.  Following is an extract from the research paper.  The governance of executive remuneration within listed entities has been, and remains, the subject of significant media and public policy attention. As a current issue of governance concern, remuneration stands head and shoulders above any other area of governance interest in the public arena. Risks emanating from this concern include increased regulation together with erosion of investor confidence.  Recent regulatory and other developments evidence heightened risk relating to remuneration governance disclosure:           Corporations Amendment Bill 2002 (Cth) — a bill for an Act to amend the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Key proposed amendments include amendments to strengthen s300 and s300A.          Corporations Law Economic Reform Program (CLERP) Paper No.9 — reform proposals are aimed at achieving further improvement in audit regulation and the wider corporate disclosure framework. A further recommendation to give shareowners the right to register a non-binding resolution on executive remuneration packages was subsequently included under the proposals.          The release of the ASX Corporate Governance Council Guidelines and Best Practice Recommendations in March 2003:  o        principle 9 of the Guidelines recommends companies ensure that the ‘level and composition of remuneration is sufficient and reasonable and that its relationship to corporate and individual performance is defined… it is important that there be a clear relationship between performance and remuneration, and that the policy underlying executive remuneration be understood by investors’. The ongoing relevance and effectiveness of the guidelines will be reviewed annually by the ASX Corporate Governance Council.  o        ASX Listing Rule 4.10.3 requires companies to provide a statement in their annual report disclosing the extent to which they have followed the best practice recommendations, on an ‘if not why not basis’.           [C](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=69309" \t "default)[orporations Amendment (Repayment of Directors’ Bonuses) Act 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=69309) passed on 11 April 2003. The Act adds a new category of ‘unreasonable director-related transactions’ to the categories of transactions that may be clawed back by a liquidator under the voidable transaction provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).          ASIC draft guidelines on the value of options in directors’ reports — to ensure shareholders are properly informed about the full value of the remuneration of the directors and executive officers, ASIC has issued final guidelines about the way Australian listed companies should include the value of options in the disclosure of directors’ and executive officers’ emoluments in the annual directors’ reports.  The main concerns driving potential community, regulatory and litigation risks are that:           Directors and executives seem to be being rewarded at the expense of shareowners; and          There should be significant ongoing systemic vigilance on these matters.  As a result of these concerns BT Governance Advisory Service (GAS) was mandated to test for correlation between levels of remuneration, remuneration governance structures and commonly accepted financial performance measures such as the Return on Equity (ROE).  The following governance criteria were applied:           Presence of a remuneration committee.          Remuneration committee composition (executive vs non-executive representation).          Disclosure of detailed remuneration policy.          Disclosure of remuneration data.          Discussion and evidence of alignment of remuneration policy to shareowner return.  To ensure research validity, the governance measures were selected to reflect the ASX Principles of Good Corporate Governance & Best Practice Recommendations, and the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) s300 and s300A in particular.  Other Australian guidelines drawn upon include:           IFSA Bluebook          ACSI Corporate Governance Guidelines          Corporate Governance International Remuneration Guidelines.  Research methodology 1 Rem = f (size, complexity, risk, industry, performance, governance structure).  The research universe was comprised of 172 S&P/ASX 200 Index companies listed in both 2001 and 2002  To establish the extent to which the universe of 172 listed companies adopted good corporate governance policies, the preliminary research found that in the  2002 reporting year:           Only 9 companies (5%) did not have a remuneration committee with a further 9 dealing with remuneration of executives and directors via alternative structures. (2001; 13 and 10 companies respectively).          51 companies (30%) had executives on the remuneration committee with only 6 companies stating that the executive did not participate in discussions on his/her own remuneration (2001; 58 and 8 companies respectively).          43 companies (25%) did not disclose a detailed remuneration policy (2001; 52 companies).          12 companies (7%) did not disclose all remuneration data for directors and executives (2001; 11 companies).          Only 45 companies (26%) disclosed information on individual performance hurdles and how hurdles link to shareholder value (2001; 41 companies).          Of the 107 companies that reported issuing options, 50 companies (47%) did not report the value of those options (2001; 125 and 82 companies respectively).  Although some improvement was achieved between the 2001 and 2002 reporting periods, these outcomes invite long-term shareowners to maintain vigilance of remuneration governance, particularly in the areas of effective disclosure and alignment of executive and shareowner reward.  Although 95% of the listed companies had an executive remuneration committee,  74% did not disclose information on individual performance hurdles and how the hurdles link to shareowner value. This suggests that despite having governance structures in place there is a lack of disclosure, signalling that the governance policies are not working and potentially leaving companies exposed to risk.           **Size** Larger companies do pay more. There is a significant relationship between company size and executive remuneration.          **Complexity** More complex companies do pay more. There is a significant relationship between company complexity and executive remuneration.          **Risk** Risk was not a significant factor for explaining CEO remuneration, but was significant for Senior Executives.           **Industry** Industry classifications were not found to be significant for explaining CEO remuneration, however finance industry executives and chairs were found to be paid significantly more than their counterparts in other industries.          **Performance** The research was unable to find a direct relationship between company performance and change in executive remuneration levels. Better or worse company performance did not relate to changes in executive remuneration levels.          **Governance** A direct relationship was found between company size and governance scores, noting that the larger companies had better governance policies in place.  Examples of poor disclosure during the 2002 reporting year include a significant number of companies (74%) not disclosing information on individual performance hurdles and their link to shareowner value. Of the 107 companies that reported issuing options 50 (47%) did not report on the value of those options. Such behaviours invite further regulatory and community risk with the potential to adversely impact long-term shareowner interests.  The research indicates that s300 and s300A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) are not having their intended effect. Remuneration disclosures, generally, do not discuss alignment with company performance. Options valuations in company disclosures are a strong candidate for improvement and have already attracted the attention of ASIC.  In order to manage risk and ensure effective governance of shareowner interests, companies — via their Board of Directors — should:           Review their remuneration committee (or alternative structure) to ensure that it operates to align the remuneration packages of executives with shareholder interests. If it is deemed that a remuneration committee is not required, then the company should communicate why this is the case with a level of detail commensurate with investor needs;           Report remuneration governance in accordance with both the form and spirit of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and ASX Listing Rules particularly ensuring adequate discussion of how remuneration is related to company performance over the longer term; and          Ensure remuneration levels and remuneration policy are reported in a form that is easily understood by investors and with a level of detail that is responsive to widely expressed concerns in relation to remuneration governance.  The research paper is available on the [Public Sector Superannuation Scheme website](http://www.pss.gov.au" \t "_new).  **1.13 French corporate governance of listed companies report**  In October 2003 two French bodies, the Association Française des Entreprises Privées (AFEP) and the Movement des Entreprises de France (MEDEF), released their combined report titled “The corporate governance of listed corporations”.  The principles for the corporate governance of listed corporations report are based on the Viénot reports of July 1995 and July 1999 and on the Bouton Report of September 2002. This collection of recommendations has been developed by working parties composed of Chairmen of French listed corporations, at the request of the Association Française des Entreprises Privées (AFEP) and the Mouvement des Entreprises de France (MEDEF). Thus, all three reports represented initiatives of the business community itself, which attached importance to defining certain principles of good operation and transparency intended to improve management practices and to reinforce the confidence of investors and the public.  The final report does not add to the Viénot and Bouton reports, the substance of which is retained. It brings together and orders the recommendations from the three reports, which are complementary and based on the same perspective. Certain passages which are in the nature of mere commentary and the recommendations made in 1995 or 1999 and having since become obsolete have not been repeated, however. This “consolidation” of texts produced by chairmen of leading French corporations is in response to the communication from the European Commission on corporate governance and corporation law, which recommends that each Member-State designate a code of reference with which businesses must comply or explain how their practices differ from it, and why.  The recommendations within the report have been written with reference to corporations with a Board of Directors, which remains the most common form of organisation. Corporations with a supervisory Board and management Board, as well as partnerships limited by shares will need to make adjustments as appropriate to implement them.  The report is structured in the following manner:           The board of directors: a collegial body          The board of directors and the market          Separation of the offices of chairman and chief executive officer          The board of directors and strategy          The board of directors and the meeting of shareholders          Membership of the board of directors: guiding principles          Representation of specific groups or interests          Independent directors          Evaluation of the board of directors          Meetings of the board and of the committees          Directors’ access to information          Duration of directors’ terms of office          Committees of the board          The audit committee          The compensation committee          The appointments or nominations committee          Deontology for directors          Directors’ compensation          Implementation of the recommendations  The report is available on the [MEDEF website](http://www.medef.fr/" \t "_new). The English version is available in PDF at [http://www.medef.fr/staging/medias/upload/55643\_FICHIER.pdf](http://www.medef.fr/staging/medias/upload/55643_FICHIER.pdf" \t "_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC proposes 'associate' relief**  On 25 November 2003, the Australian Securities and Investments Commission (ASIC) released a policy proposal paper (PPP), Associates: share acquisition agreements, for public comment.   The PPP proposes relief from the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) by modifying the definition of 'associate'. The associate definition is fundamental to the takeover provisions of the Act.   Under the PPP, parties who enter into an agreement to buy or sell shares in a company would not be associates merely because of the agreement.  The associate definition treats parcels of shares held by different associates as a single block. For example, it ensures that persons who collectively acquire shares cannot avoid the 20 per cent takeover prohibition.  The proposed relief means that one party's shares that are outside the sale agreement are not counted in the same block as the other party's shares. ASIC considers this modification to be consistent with the legislative intention behind the associate definition.  The type of agreements that would be covered by ASIC's relief include a share sale agreement, an option, a pre-acceptance agreement (where a holder agrees with the bidder to accept a takeover offer) and a right of first refusal.   Without the provision of this relief, for example, a bidder that acquires only enough shares to take it to 20 per cent in a company under a pre-acceptance agreement may breach the 20 per cent takeover prohibition, where the vendor holds additional shares not subject to the agreement.   The relief would not cover parties who have a common purpose of controlling the company. An example of a control purpose is where the parties agree that they will seek to remove directors of the company.   ASIC seeks comments on the PPP by Friday 6 February 2004.  Copies of the PPP are available from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.2 ASIC varies disclosure and continuous reporting requirements for issuers of managed investment warrants**  On 17 November 2003, the Australian Securities and Investments Commission (ASIC) issued a new Class Order, CO 03/957: ASX managed investment warrants – disclosure and reporting exemptions [CO 03/957], that addresses the inconsistent treatment of managed investment warrants, compared to the treatment of share warrants and stapled security warrants, under Part 7.9 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).   The class order harmonises the regulatory regime for warrants by removing the additional disclosure requirements that only applied to warrants over managed investment products under the Act.  The class order exempts all issuers of Australian Stock Exchange (ASX)-traded instalment warrants over managed investment products from:           compliance with the additional Product Disclosure Statement (PDS) content and procedural requirements under Part 7.9 (other than Division 6) of the Act that technically apply because of the legal characterisation of the warrants as ‘managed investment products’; and           the reporting obligations under Chapter 2M, and the continuous disclosure obligations under Chapter 6CA, and instead, bring these obligations within the continuous disclosure requirements of section 1017B.  The provision of this relief ensures that the disclosure obligations under Part 7.9 apply uniformly to warrants, regardless of the nature of the underlying product to which the warrants relate.  ‘There is no policy reason why warrants over managed investment products should be treated or regulated differently to warrants over other products. Warrants are a distinct and separate product from the underlying investment product. The underlying product is already subject to specific and separate regulation’, ASIC’s Director of Financial Services Regulation, Legal and Technical Operations, Ms Pamela McAlister said.   ‘The relief is consistent with the legislative objectives of promoting regulatory neutrality for functionally similar products and services’, Ms McAlister said.  Under the class order, issuers of managed investment warrants will be exempted from the PDS requirements that would otherwise apply to managed investment products to:           lodge the PDS with ASIC;           obtain the consent of all directors of the ‘responsible person’ to the PDS (s1015B);           not trade the managed investment warrants for the 7 to14 day exposure period (s1016B(1)); and           date the PDS the date it is lodged with ASIC (s1013G).  ASIC’s relief also addresses industry concerns that warrant issuers would be subject to reporting and continuous disclosure requirements under Chapters 2M and 6CA as the ‘disclosing entity’ in relation to managed investment warrants, merely because the managed investment warrant is an ED security.  As a consequence of the class order, warrant issuers will be exempt from the reporting and disclosure requirements applicable to ED securities in relation to the managed investment warrants only. The class order does not affect an issuer’s reporting and continuous disclosure requirements in relation to any other financial product to which these requirements may apply.  **2.3 ASIC gives limited class order relief for general advice in offer documents provided to wholesale clients**  On 12 November 2003 the Australian Securities and Investments Commission (ASIC) announced the release of a new Class Order [CO 03/911], which provides licensing relief for some entities that provide general advice in offer documents given to wholesale clients.  The relief applies to bodies that do not require a licence for dealing in particular financial products because of s766C(4) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the self dealing exception). Where an offer document given to wholesale clients by such a body contains general advice about its own securities, no licence is now required for the provision of that advice.  Existing relief already provides a licensing exemption for general advice contained in prospectuses, Product Disclosure Statements (PDS) and certain other regulated documents (see regulation 7.1.08A and ASIC class order CO 03/606: Financial Product advice – exempt documents). ASIC’s new class order [CO 03/911] is designed to complement that existing relief.  ‘Without this new relief, bodies that are entitled to the s766C(4) ‘self-dealing’ exception from licensing would most likely require an Australian financial services licence in order to provide offer documents to wholesale clients. This is because the broad definition of ‘financial product advice’ will often mean that these offer documents contain general advice’, ASIC Director of Financial Services Regulation, Legal and Technical Operations, Ms Pamela McAlister said.  ‘ASIC has provided this relief to promote commercial efficiency by giving full effect to the s766C(4) self-dealing exception’, Ms McAlister said.   A copy of the class order can be obtained from ASIC’s Infoline by calling 1300 300 630 or from the [ASIC website](http://www.asic.gov.au/co" \t "_new).  **2.4 ASIC Annual Report 2002-03**  On 5 November 2003, the Australian and Securities and Investments Commission (ASIC) 2002–03 Annual Report was tabled in Federal Parliament.   ASIC’s enforcement outcomes include:           29 criminals jailed for fraud, criminal breach of duties and insider trading (making a total of 73 jail terms served over the past three years); and           $506 million in funds protected, compensation orders or assets frozen for the public and creditors (making a total of $1,437 million over the past three years).  The annual report also shows more consumers turning to ASIC. Visits to the consumer website FIDO rose 79 per cent, public reports of misconduct rose 19 per cent, and database searches increased.  ASIC granted more than 1,400 approvals to facilitate commercial transactions and reduce business costs.  In key results from 2002–03, ASIC:           had 29 criminals jailed among 43 people convicted from briefs prosecuted by the Commonwealth Director of Public Prosecutions;           took 67 civil proceedings, resulting in orders against 151 people or companies; including $121 million in recoveries and compensation orders and $2 million frozen;           had fined or banned 16 people from directing companies, and banned 39 people from offering financial services;           disciplined 8 company auditors and liquidators for misconduct;           obtained 311 additional disclosures to the market, in prospectuses or product disclosure statements;           conducted 803 compliance checks of financial advisers and financial product issuers to test compliance with legal requirements, and obtained significant corrective or enforcement action;           received 875,000 visits to its consumer website, FIDO, up 79 per cent, and distributed 270,000 consumer publications; and           enabled 11 million searches of its databases, up 20 per cent.  Copies of ASIC’s Annual Report are available online from [www.asic.gov.au](http://www.asic.gov.au/" \t "_new)  **2.5 ASIC releases policy statement on Australian market licences for overseas market operators**  On 30 October 2003, the Australian Securities and Investments Commission (ASIC), released Policy Statement 177: Australian market licences: Overseas operators (PS 177), relating to the licensing requirements for, and obligations of, operators of financial markets in other jurisdictions who wish to operate their market in Australia.  PS 177 is part of ASIC’s ongoing development of regulatory policy related to cross border financial activity.  “This policy statement gives effect to the Government’s intention to enhance the flexibility of the regulatory regime for markets under the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) and facilitate the entry into Australia of overseas markets where the home regulatory regime for the overseas market is sufficiently equivalent to the Australian regulatory regime for comparable markets”, said Mr Malcolm Rodgers, Executive Director Policy & Markets Regulation.  “The policy statement applies to a range of overseas markets, from well-known exchanges to a variety of smaller markets. It gives guidance on when an Australian market licence is needed and how to apply for such a licence. It will also help overseas market operators to understand their obligations under Australian law if they obtain a market licence.”  Policy Statement 177 needs to be read with Policy Statement 172 - Australian market licences: Australian operators [PS 172], which was issued on 6 March 2002. The earlier policy statement sets out ASIC’s role in and approach to financial market regulation generally under Part 7.2 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), with specific emphasis on market operators whose principal place of business is in Australia.  **2.6 ASIC seeks comment on draft guidance on management of conflicts of interest**  On 29 October 2003, the Australian Securities and Investments Commission (ASIC) asked for comments on a draft guidance paper on the new conflicts management obligation for licensees proposed under the Commonwealth Government’s Corporate Law and Economic Reform Program (CLERP 9) proposals. ASIC’s consultation document is a policy proposal paper titled Licensing: Managing conflicts of interest.  “CLERP 9 proposes to impose, for the first time, a direct and specific obligation on licensees to have adequate arrangements to manage their conflicts of interest. Conflicts of interest can have a significant impact on the quality and integrity of services a licensee provides, so it is important they be adequately managed”, ASIC Executive Director of Policy & Markets Regulation, Mr Malcolm Rodgers said.  “There is widespread interest in the management of conflicts of interests for research report providers, such as securities analysts. If the new obligation becomes law, licensees will want to understand what arrangements they may need to have in place to comply. ASIC is providing early guidance on our thinking in this area, and will consult fully with industry, professionals and consumers about our approach to the new obligation.  “Our policy proposal paper calls for specific comments on our expectations about how analysts’ conflicts are managed’, Mr Rodgers said.  The proposals outlined in the draft have been prepared in light of domestic and international developments about research analysts. These include: The ‘Statement of Principles for Addressing Sell-side Securities Analyst Conflicts of  Interest’ published by the Technical Committee of the International Organisation of Securities Commissions (IOSCO), dated 25 September 2003; and ASIC’s recent surveillance report ‘Research analyst independence’, with a particular  focus on the campaign findings in section 5 of the report.  The Commonwealth Government proposes to amend the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to impose an obligation on licensees to have adequate arrangements to manage conflicts of interest. This obligation, proposed under s912A(1)(aa) of the Corporations Act, is contained in the Exposure Draft Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (draft CLERP 9 Bill).  The Commonwealth Treasurer published the draft CLERP 9 Bill on 8 October 2003 (see [www.treasury.gov.au](http://www.treasury.gov.au/" \t "_new)). The Treasurer asked for comments on the Bill by 10 November 2003. ASIC understands that the Government proposes to commence the new conflict management obligation on 1 July 2004 at the earliest.  Following are further details of ASIC’s policy proposal paper.  **(a) The policy proposal paper**  Licensing: Managing conflicts of interest (the paper) is based on the proposed conflicts management obligation (s912A(1)(aa)) contained in the draft CLERP 9 Bill. It explains how ASIC expects licensees to comply with the proposed obligation, once it commences.  To comply with the conflicts management obligation, ASIC expects licensees to: control, disclose and (as needed) avoid conflicts of interest; and have measures, processes and procedures to: identify conflicts of interest; assess and evaluate those conflicts; appropriately respond to those conflicts; and ensure that, regardless of any conflicts, the quality of the financial services they provide is not significantly compromised.  Some existing licensee obligations also deal with conduct that is affected by conflicts of interest. This paper may assist licensees in their compliance with these existing obligations.  **(b) Research report providers**  The paper includes more detailed guidance and ASIC’s expectations for research report providers taking into account domestic and international developments (in Schedule 2).  ASIC’s proposals on research report providers cover: structure and general practices (eg. having separate compliance units, the need for formal communications policies, how to deal with the potential conflict when preparing research about a company who you provide non-research services to and appropriate internal information barriers); monitoring and supervision of staff (eg. having separate reporting lines for research and non-research staff, and the need for robust review processes for research reports); benefits and remuneration (eg. ensuring that research staff remuneration is not tied to corporate finance and other transactions); trading restrictions (eg. managing conflicts around the research report provider or its staff holding shares in companies they publish research about, the need for non-trading (quiet) periods around the publication of research reports and avoiding staff trading inconsistently with research published by the research report provider); other steps to prevent inappropriate conduct (eg. having a reasonable basis for research, ensuring research reflects the author’s views and offering favourable research); specific disclosure (eg. the need to disclose: interests in the issuer covered in the research report; benefits and relationships with issuers; the currency of research reports; the reasons for a recommendation or opinion); and other disclosure matters (eg. disclosing which issuers the research report provider covers from time to time, and disclosing the performance of previous research). |
| **3. Recent ASX Developments** |
| **3.1 Analyst independence**  ASX released its second draft business rule guidance note on analyst independence on 5 February 2003 (refer participant circular 044/03). Since that time there have been many developments both internationally and locally which impact on the area. These include developments in the US, Europe and UK, the release of the IOSCO statement of principles of 25 September 2003. Of particular interest is the ASIC draft policy proposal paper entitled “Licensing: Managing conflicts of interest” released on 29 October 2003. ASX’s participant circular 494/03 dated 30 October 2003 notes that ASX will defer finalisation of its draft guidance note until submissions on the ASIC draft policy proposal have been received.  **3.2 New business rules**  In preparation for the end of the transition for FSR compliance and in order to restructure its clearing and settlement services to streamline the provision of those services, ASX has undertaken a comprehensive restructure of its business rules for markets, clearing and settlement.  A final date as to when the 3 new sets of rules (clearing, settlement and trading rules) will be brought into effect is subject to obtaining the appropriate regulatory approvals regarding the licences and the draft rules, but will be by 11 March 2004 at the latest.  To assist participants with understanding and transitioning to the new framework, preparatory material is also being developed to outline a customer’s new participation structure, to provide support to customers regarding these new structures and to discuss compliance implications under the new rules and licenses.  A key issues document describing the changes is available on the [ASX website](http://www.asx.com.au/" \t "_new).  **3.3 Annual regulatory reporting**  The Annual Regulatory Report for ASX and ASXF for the 2002/2003 financial year, required under Section 792F of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) was submitted to ASIC on 30 September. The report details compliance by ASX and ASXF with all statutory and licence obligations as market licensees.  The Annual Regulatory Report for ASTC and OCH for the 2002/2003 financial year, required under Section 821E of the Corporations Act was also submitted to ASIC and to the Reserve Bank of Australia on 30 September. The report details compliance by ASTC and OCH with all statutory and licence obligations as CS facility licensees and compliance by each with the RBA stability standards.  These reports are available on [ASX’s website](http://www.asx.com.au/" \t "_new). |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Richfield Group Limited: Panel not to conduct proceedings**  On 21 November 2003, the Panel announced that it had considered the application (Application) by Mr Chak Chew Tan (CC Tan) dated 30 October 2003 alleging that unacceptable circumstances exist in relation to the affairs of Richfield Group Limited (Richfield). The Panel decided not to conduct proceedings in relation to the Application.  **(a) Application**  CC Tan is a director of, and 29.57% shareholder in, Richfield. He acquired his stake in Richfield in December 2002, after shareholders approved a placement to him in exchange for approximately $1.35 million cash in Richfield (Placement).  The Application alleges that certain shareholders in Richfield (Alleged Associates), some of whom are directors of Richfield, have formed an agreement to control or influence the Richfield board. CC Tan submits that some of the Alleged Associates now have relevant interests in up to 60% of Richfield.  The Application asserts that unacceptable circumstances exist because:           the agreement between the Alleged Associates contravenes section 606 (the 20% threshold) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act); and           the Alleged Associates have contravened section 671B (the substantial holding provision) of the Act by failing to lodge notices disclosing their voting power in Richfield.  The Application alleges that a purpose of the agreement is to prevent Richfield entering into a transaction proposed by CC Tan (Proposed Transaction). The Proposed Transaction involves Richfield acquiring a business or company from CC Tan in return for which CC Tan and his associates would be issued further shares in Richfield such that their relevant interests in Richfield would exceed 50%. CC Tan wants Richfield shareholders to vote on the Proposed Transaction at Richfield’s next general meeting. The Application asserts that CC Tan and Richfield (or some of its directors) agreed to the Proposed Transaction in or before December 2002 and that it was approved in principle by shareholders at the time.  CC Tan has sought an order that certain directors of Richfield be restrained from voting at a board meeting convened to consider whether shareholders should be asked to approve the Proposed Transaction.  **(b) Court overlap**  The matters alleged to be unacceptable circumstances in the Application, namely the alleged breaches of sections 606 and 671B, are squarely before the Supreme Court of Western Australia in ongoing proceedings brought by CC Tan against some of the Alleged Associates and Richfield.  In those proceedings, CC Tan seeks substantially similar orders, including an order compelling Richfield to put the Proposed Transaction to shareholders at its next general meeting.  The Court has already made interim orders on some of the matters raised in the proceedings.  The Application does not raise any significant issues that are not in issue before the Court.  CC Tan has given the Panel no reason to doubt that he had standing to bring those proceedings or that the Court has jurisdiction to deal with them, and he has not terminated them, although the Court has adjourned part of them indefinitely at his request.  The overlap between the Panel application and the Court proceedings is so extensive that it would be impossible to separate any issues from the Application which are not before the Court.  The Panel has already published its views on whether it will conduct proceedings on matters which are also the subject of Court proceedings. The Panel will generally not commence proceedings on an issue on which the Court has jurisdiction and has already commenced proceedings.  **(c) No basis for making orders sought**  The Panel also considers that, were it to conduct proceedings on the matters raised in the Application, the material given to it by CC Tan would not be a sufficient basis for it to make the order sought by CC Tan restraining members of the Board of Richfield from opposing a decision to recommend the Proposed Transaction to shareholders.  **(d) Decision**  Accordingly, under regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default), the Sitting Panel declines to conduct proceedings on the application.  If substantive issues remain between CC Tan, the Alleged Associates and Richfield after conclusion of the Court proceedings (and any appeal) and if those issues are suitable to be considered by the Panel, any of those parties may then make a further application to the Panel.  The sitting Panel is Nerolie Withnall (sitting President), Brett Heading (deputy President) and Irene Lee.  **4.2 National Can Industries 01(R) - Review Panel confirms Initial Panel decision**  On 17 November, the Panel advised that the National Can Industries 01(R) Review Panel (Review Panel) has confirmed the decision of the National Can Industries 01 Panel (Initial Panel) in relation to the affairs of National Can Industries Limited (NCI).  Visy Industrial Packaging Holdings Pty Ltd (VIPH), a substantial shareholder in NCI, alleged that unacceptable circumstances arose from an implementation agreement under which ESK Holdings Pty Ltd (ESK) would acquire control of NCI through a scheme of arrangement.  It sought among other things, a declaration of unacceptable circumstances and orders for cancellation of the implementation agreement, repayment of a break fee (First Break Fee), cancellation of an agreement to pay a further break fee (Second Break Fee) and variation of a modification provided by ASIC.  ESK is a company controlled by Michael Tyrrell, the managing director of NCI, and is associated with Tyrrell family members and companies (Tyrrell Interests) which together have a controlling interest in NCI.  On 17 October 2003, the Initial Panel declined to make any orders and agreed  to accept undertakings from ESK (Undertakings):           to increase the consideration offered under the scheme of arrangement by 1.5 cents per NCI share so that the total offer price is $1.565 per NCI share;          to repay the First Break Fee to NCI if, before the scheme proposal is considered by shareholders, another person announces a bid for NCI with a cash value in excess of $1.565 per NCI share which subsequently leads to a change in control of NCI; and          not to enforce its right to receive or accept payment from NCI, of the Second Break Fee; and           an undertaking from NCI, subject to ESK’s undertaking as set out above, not to pay all or any part of the Second Break Fee to ESK.  The Initial Panel found the agreement to pay the First Break Fee unacceptable because of the circumstances in which it was entered into, despite the immateriality of the amount.  However, the Initial Panel found that the Undertakings overcame the adverse effects of the payment of the First Break Fee on competition and efficiency in the market for shares in NCI and generally.  On 20 October 2003, VIPH sought a review of the decision of the Initial Panel, to accept the Undertakings.  VIPH sought an order either:           setting aside the decision and substituting a new decision to impose orders so that:           ESK was required to repay the First Break Fee immediately; and          ESK would only receive payment of the First Break Fee if NCI shareholders who were not associated with the Tyrrell Interests approved the payment of the First Break Fee (by way of ordinary resolution); or           setting aside the decision and substituting a new decision to impose appropriate orders that will remedy the unacceptable circumstances which were found to exist by the Initial Panel.  VIPH’s review application asserted that the Undertakings did not remedy the effects caused of the payment of the First Break Fee as described by the Initial Panel.  Specifically, it asserted that the Undertakings enable unacceptable circumstances to continue by not allowing the non-associated shareholders of NCI to vote to consider whether the First Break Fee should have been paid.  **(a) National Can Industries 01(R) Decision**  The Review Panel took into account that ESK is part of the Tyrrell Interests, which together have a controlling shareholding in NCI, and that the acquisition proposal was initiated by ESK to take NCI private under ESK’s control.  In those circumstances, the agreement of ESK and the directors of NCI to pay the First Break Fee would have been unacceptable in the absence of the Undertakings, where the First Break Fee:           was payable in circumstances other than rejection of the acquisition proposal by shareholders; and,          in particular, could become payable upon withdrawal of the recommendation of the acquisition proposal by any non-associated director, without reference to shareholders.  However, the Review Panel concluded that this unacceptability was sufficiently addressed by the Undertakings so that no declaration of unacceptable circumstances or orders should be made.  In forming this conclusion, the Review Panel took into account the potential unfairness to ESK of requiring repayment of the First Break Fee after it had increased its offer by 1.5 cents per NCI share on the basis that the fee would not be repayable except in accordance with the Undertakings.  Justice Robert Austin, (sitting President), John King and Alice McCleary are the Review Panel. The Panel will post its reasons for this decision on its [website](http://www.takeovers.gov.au/" \t "_new) when they have been settled.  **4.3 BreakFree 03 and BreakFree 04 proceedings - conclusion of both proceedings**  In Takeovers Panel Media Release 106 (the Media Release) dated 27 October  2003, the Panel announced that it had made a declaration of unacceptable circumstances (the Declaration) in the BreakFree 04 proceedings in relation to an announcement (the Announcement) by S8 Limited (S8) on 8 October that it would not proceed to make offers under its scrip takeover bid (the Scrip Proposal) for BreakFree Limited (BreakFree) which was announced on 11 July 2003. The resolution of the question of what orders should be made in BreakFree 04 was left to be determined in light of the resolution of the BreakFree 03 proceedings.  The Panel has now received, and reviewed, submissions from the parties concerning the resolution of the outstanding issues in BreakFree 03 and the question of what orders should be made in BreakFree 04. The results of this submissions process were announced on 12 November 2003.  **(a) The relationship between the proceedings**  The Panel is of the view that its decisions concerning the BreakFree 03 and outstanding aspects of the BreakFree 04 proceedings are closely related.  Consequently, this summary discusses the Panel’s resolution of both proceedings.  **(b) The BreakFree 03 proceedings**  The BreakFree 03 proceedings concerned the adequacy of the disclosure contained in the bidder’s statement for the Scrip Proposal (the Scrip Bidder’s Statement).  The first Scrip Bidder’s Statement was provided to ASIC, BreakFree and the Australian Stock Exchange (ASX) on 19 August, and a consolidated amended statement was provided on 2 September.  Although copies of the Scrip Bidder’s Statement are available on the ASX website, the Panel understands that it has not been sent to BreakFree shareholders.  Both BreakFree and ASIC submitted to the Panel that there were material deficiencies in the Scrip Bidder’s Statement which meant that it could be misleading, and therefore should not be dispatched to BreakFree shareholders without correction.  In previous media releases, the Panel has advised the market that, principally because of S8’s decision to proceed with a cash bid instead, it has not received complete submissions from all of the parties in relation to a single version of the Scrip Bidder’s Statement (although the Panel has received various submissions from S8, BreakFree and ASIC over the course of the proceedings).  The Panel has decided to conclude the BreakFree 03 proceedings at this time (without finalizing the submission process) because:           the issues outstanding in those proceedings have been overtaken by the events the subject of the BreakFree 04 proceedings.  In particular, the Announcement stated that S8 would not be proceeding to make offers under the Scrip Proposal, but would instead proceed with a cash takeover bid.  S8 has confirmed to the Panel that this remains its intention; and          as offers will not be made under the Scrip Proposal, no useful purpose within the Panel’s jurisdiction would be served by continuing the proceedings.  As the process of receiving evidence and submissions in BreakFree 03 was suspended before completion, the Panel does not express any concluded views on the issues raised by BreakFree and ASIC.  However, the Panel is of the view that those issues would have warranted further consideration by the Panel had it not been for the S8’s decision not to proceed with the Scrip Proposal.  As no declaration of unacceptable circumstances was made by the Panel in the BreakFree 03 proceedings, no orders (including any orders for costs) were made in those proceedings.  **(c) The BreakFree 04 proceedings**  The Panel has decided not to order S8 to dispatch the Scrip Bidder’s Statement.  For various reasons (including the unresolved allegations made by BreakFree and ASIC in the BreakFree 03 proceedings, and the fact that the most recent version of the Scrip Bidder’s Statement is now more than 6 weeks old) the Panel does not believe that it could ensure the reliability and accuracy of any document that it could order S8 to dispatch in relation to the Scrip Proposal.  The Panel decided that no cost orders should be made in the BreakFree 04 proceedings.  **(d) The BreakFree 03 and BreakFree 04 Panels**  The sitting Panel in each of the BreakFree 03 and BreakFree 04 proceedings was Kathleen Farrell (sitting President), Peter Cameron (deputy President) and Meredith Hellicar.  The Panel will post its full reasons for this decision on its website at [http://www.takeovers.gov.au/Content/Decisions/decisions.asp](http://www.takeovers.gov.au/Content/Decisions/decisions.asp" \t "_new) when they have been settled.  **4.4 QR Sciences Limited – Panel accepts undertaking**  On 31 October, the Takeovers Panel decided not to make a declaration of unacceptable circumstances in relation to the affairs of QR Sciences Ltd (QR Sciences) because of an undertaking given by QR Sciences which resolved any issue of unacceptability which the Panel had observed.  The application concerned a non-renounceable 2-for-3 rights issue in QR Sciences (Rights Issue), where the number of shares to be issued was limited to one third of QR Science’s issued capital, with acceptances being scaled back if the offer was oversubscribed (Scaleback).  The Panel considered that the Rights Issue did not comply with Item 10 of section 611 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act) (the rights issue exception to the 20% threshold prohibition)because the Scaleback meant that shareholders were not necessarily being offered the same percentage of shares as they held before the Rights Issue.  In addition, shareholders did not necessarily have an equal opportunity to participate in the Rights Issue. The inability to predict the number of shares likely to be subscribed for by the two major shareholders in QR Sciences meant that shareholders were unable to determine the number of shares for which they needed to apply to preserve their proportionate interest in QR Sciences.  The Panel observed that in the particular circumstances of this matter a disclosure document for an issue like the Rights Issue should contain a clear statement of the intention and ability of the 51% shareholder in QR Sciences, QR Sciences Holdings Ltd (Holdings), to subscribe for shares under the Rights Issue. The particular features of the control relationship between the two companies, the commonality of their senior management, the structure of the Rights Issue to include what was, effectively, an underwriting element dependent on the levels of acceptances, and the proposed use of a majority of the capital to be raised to repay a debt to Holdings, meant that other shareholders would require this information to ensure that any acquisition of a substantial interest by reason of the Rights Issue would occur in a properly informed market. The Panel noted that, in those cases where a capital raising involves issues under Chapter 6 of the Act, the issuer should concurrently satisfy both the disclosure obligations of Chapter 6D or Part 7.9 (as applicable) and the information principles set out in sections 602(a) and (b)(iii) of the Act.  After the Panel informed the parties of its views, QR Sciences undertook not to issue any shares under the Rights Issue.  The sitting Panel was Braddon Jolley (sitting President), Marian Micalizzi (deputy President) and Tro Kortian.  **4.5  Panel publishes for comment draft guidelines on financing arrangements for takeover bids**  On 30 October 2003, the Takeovers Panel released for public comment a draft Guidance Note on financing arrangements for takeover bids. The Guidance Note aims to assist bidders and the market to determine the funding arrangements that may give rise to unacceptable circumstances. The Guidance Note also provides some guidance on the obligation to disclose funding arrangements in bidder’s statements.  The principle underlying the Guidance Note is that a bidder should only announce a takeover offer after careful and responsible consideration and when it has every reason to believe that it will be able to implement the offer.  If a bidder proposes to pay for shares with borrowed funds, it must have funding arrangements in place with a lender when it announces and makes its offers. Although those arrangements need not necessarily at those times be formally documented or free of conditions precedent, they need to provide the bidder with a reasonable basis for believing that it will be able to pay for acceptances under the bid. Formal documentation should be completed prior to the offers being sent to target shareholders.  It will be unacceptable for a bid to be declared unconditional with material conditions to the funding remaining outstanding unless the bidder has reasonable grounds for believing that those conditions will be satisfied and unless the status of those conditions is properly disclosed.  Deficient funding arrangements will create unacceptable circumstances because they will lead to a false market in the target’s securities, contrary to the policy in section 602 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) of having efficient, competitive and informed markets.  Comments are sought on the policy by Thursday 11 December 2003. The policy is available on the Panel’s website at:  [http://www.takeovers.gov.au/Content/consultation/consultation.asp](http://www.takeovers.gov.au/Content/consultation/consultation.asp" \t "_new) |
| **5. Recent Corporate Law Decisions** |
| **5.1 Liability for the conduct of authorised representatives who offer financial planning advice**  (by Ursula Gil, Freehills)  Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd [2003] FCAFC 244, Federal Court of Australia, Full Court, Branson, Jacobson and Bennett JJ, 5 November 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fcafc244.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/november/2003fcafc244.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)  **(a) Summary**  This case involved an appeal from a decision of the Administrative Appeals Tribunal (the “Tribunal”) setting aside orders made by a delegate of the Australian Securities and Investments Commission (“ASIC”) on 30 October 2001 revoking the securities dealers licence of Saxby Bridge Financial Planning Pty Ltd (“Saxby Bridge”) and ABS Securities Pty Ltd (“ABS”) and also setting aside a banning order against Jeffrey Joseph Braysich (“Braysich”) (together, the “Respondents”).  **(b) Facts**  Saxby Bridge held a securities dealers licence since 28 October 1996 and ABS held a securities dealers licence since 27 May 1998. Self-employed financial planners provided investment advice as proper authority holders under ABS’s securities dealers licence. Braysich did not personally hold a securities dealers licence.  On 8 May 2001 ASIC issued a notice of concern with respect to each of Saxby Bridge, ABS and Braysich. The notice in relation to Saxby Bridge expressed concern that Saxby Bridge as a licensed dealer in securities:                       may have contravened the requirements of section 849 of the Corporations Law (imposing a requirement that the client be told if the adviser’s interests may influence the recommendation);                       may have contravened the requirements of section 851 of the Corporations Law (requiring that the adviser have a reasonable basis for recommendations to a client);                       may not have performed efficiently, honestly and fairly the duties of a holder of a securities dealers licence; and                       will not perform those duties efficiently, honestly and fairly.  The notice alleged that Saxby Bridge had in various ways placed its interests in conflict with those of its clients, made inadequate disclosure of commissions and interests and recommended inappropriate investment products to clients without conducting adequate research into the products or the investment objectives and financial needs of its clients.  In relation to ABS, the notice issued by ASIC expressed the same concerns about its conduct as a licensed dealer in securities as were expressed in the notice concerning Saxby Bridge. The ABS notice noted that the management of ABS’s business had been undertaken by Saxby Bridge and that Saxby Bridge’s conduct had given rise to the concerns particularised in the ABS notice. The notice issued in respect of Braysich held Braysich responsible for the conduct particularised in the notices concerning Saxby Bridge and ABS respectively.  ASIC conducted a single hearing and on 30 October 2001 revoked the securities dealers licences of Saxby Bridge and ABS and prohibited Braysich from doing an act as a representative of a dealer or investment adviser for a period of 5 years.  Saxby Bridge, ABS and Braysich lodged an application with the Tribunal for review of the decision.  The Tribunal:                       found a number of minor and one specific breach of the section 849(2) disclosure requirements;                      found no breach of section 851;                      was not satisfied that that Saxby Bridge, ABS or Braysich had not performed their duties efficiently, honestly and fairly. As such, the power to revoke Saxby Bridge’s and ABS’s securities dealers licence and to impose a banning order on Braysich was not open to the Tribunal; and                      ordered that Saxby Bridge’s and ABS’s securities dealers licence be reinstated and the banning order against Braysich be lifted.  ASIC appealed.  **(c) Decision**  The appeal was dismissed with costs.  **(i) The Notice of Appeal**  Section 44(1) of the [Administrative Appeals Tribunal Act 1975 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7115" \t "default) (the “AAT Act”) provides that:  “A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding”.  Order 53 of the [Federal Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "default) which regulates the practice and procedure to be followed in respect of appeals from the Tribunal requires that a notice of appeal must specify (amongst other things) the question or questions of law to be raised on appeal.  Branson J held that most if not all of the questions stated in the notice of appeal in this matter were impermissibly drawn in a way calculated to cause the Court to review the decision of the Tribunal rather than to answer stated questions of law. A strict application of O 53 r 3(4) of the Federal Court Rules would render the questions unarguable with the leave of the Court.  Jacobson and Bennett JJ held that most of the questions put to the Court in the notice of appeal did not constitute questions of law and that to the extent that they were questions of law, no error of law was disclosed in the Tribunal’s reasons. For these reasons, Bennett and Jacobson JJ held that the appeal could be determined without deciding the question of the proper construction of sections 849 and 851 of the Corporations Law. Only Branson J addressed this issue.  The power of the Court to make orders on an appeal from a decision of the Tribunal are set out in sections 44(4) and (5) of the AAT Act. The orders that may be made include an order setting aside the decision of the Tribunal. Where an applicant seeks to have a decision of the Tribunal set aside, its notice of appeal should say so explicitly.  **(ii) Liability of authorised representatives**  ASIC’s main contention was that the conduct of an authorised representative of the holder of a dealers licence is to be treated as the conduct of the licence holder for the purposes of sections 849 and 851 of the Corporations Law.  Branson J held that it was not possible to address the questions stated in the notice of appeal without first giving consideration to the accuracy of the assumption that underlies them. Branson J considered it appropriate in the circumstances for the Court to give consideration to this issue.  Her Honour held that except for the liability created by section 819, Division 4 of Part 7.3 does not create liabilities to third persons or to ASIC; it assumes that the conduct of the representative of another person could give rise to a liability. That assumed liability must arise either from statute or the common law. As between the principal and a third party, section 817 discloses an intention that the principal should be vicariously liable for the conduct of its representative.  The construction of section 849 which ASIC contends applies would mean that the holder of the dealers licence could be guilty of an offence even though it had no knowledge of the conduct giving rise to the contravention. On the construction for which ASIC contends, her Honour noted that the holder of a dealers licence could be guilty of an offence notwithstanding that the conduct giving rise to the contravention was engaged in in disregard of clear instructions given by the licence holder. Where the language of a provision is unclear, it is legitimate to favour a construction which avoids an extension of a penal provision (citing R v Adam (1935) 53 CLR 563 at 568 to 8 and Beckwith v R (1976) 12 ALR 333 at 339).  Branson J held that the holder of the dealers licence did not contravene section 849 of the Corporations Law by reason only of the fact that an authorised representative of the licence holder failed to make the disclosures required by section 849(2). The language of section 851 suggests against an intention that the section apply to a person who is not in fact involved in making the relevant recommendation. The fact that section 848 does not have an operation in respect of section 851 speaks strongly against that intention. The language of section 851 does not seem calculated to accommodate the possibility that the “securities adviser” whose conduct is in issue is the principal of the adviser who makes the relevant recommendation. In Branson J’s view, substantial difficulties of construction arise if, for example, the terms of section 851(2) are sought to be applied to a licence holder in circumstances in which one of its authorised representatives has, contrary to the instructions of the licence holder, disregarded the result of investigations of the investment product the subject of the recommendation.  Her Honour stated that the regulatory scheme contained in Chapter 7 does not require a licence holder to be strictly liable for the conduct of its authorised representative and the words of section 817 disclose an intention that the conduct of the representative of a licence holder is not to be attributed to the licence holder for the purposes of the regulatory powers of ASIC.  Jacobson and Bennett JJ held that in the absence of full oral and written argument directed specifically to this issue, they did not wish to express a concluded view on this issue.  **5.2 Claims for commissions under a pyramid scheme not recoverable on a winding up**  (by Nghi Tran, Philips Fox)  Sherman re Giraffe World v ACCC [2003]  NSWSC 996, Supreme Court of New South Wales, Barrett J, 5 November 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswsc996.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/november/2003nswsc996.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Introduction**  The plaintiff was the liquidator of Giraffe World Australia Pty Ltd (‘Giraffe World’) which was subject to the form of creditors voluntary winding up that arose pursuant to section 446A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) as a sequel to voluntary administration under Pt 5.3A. The liquidator sought directions from the court as to whether certain claims should be accepted by the liquidator on the winding up of Giraffe World. These claims were in connection with a selling scheme operated by Giraffe World earlier found to be in contravention of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) (‘TPA’).  **(b) Earlier proceedings brought by the ACCC**  In September 1999, in proceedings brought by the Australian Competition and Consumer Commission in the Federal Court, Giraffe World was found to have operated a ‘referral selling’ and ‘pyramid selling’ scheme contrary to provisions of the TPA.  The Federal Court proceedings were heard before Lindgren J. Lindgren J held that Giraffe World contravened section 61 of the TPA which relates to pyramid selling. Giraffe World as the promoter of the selling scheme known as the ‘Giraffe Club’ and the ‘Grow Rich System’, contravened section 61 when it induced persons to make payments to Giraffe World to become participants in the selling scheme. Giraffe World held out to participants that commissions could be earned by successfully introducing new participants to the selling scheme.  Lindgren J also held that Giraffe World contravened section 57 of the TPA which relates to referral selling. Giraffe World contravened section 57 when it induced consumers to acquire its ‘ion mat’ and obtain the benefits associated with membership of the ‘Giraffe Club’ and the ‘Grow Rich System’. The inducements were representations that they would receive commissions for successfully assisting Giraffe World to supply the ion mat and the benefits of the Giraffe Club and the Grow Rich System to other consumers.  **(c) Directions sought by the liquidator**  The liquidator sought the opinion of the court on two questions:           whether it was appropriate for claims made in respect of ‘commissions’ to be accepted by the liquidator and paid to the members of Giraffe World; and          whether it was appropriate for claims for ‘refunds’ to be accepted by the liquidator and paid to members of Giraffe World.  The term ‘members’ in this context was used to describe those creditors of Giraffe World who claimed a refund of money paid to Giraffe World for an ion mat or claimed a refund of membership fee paid to join the selling scheme or claimed payment of ‘commissions’ under the terms of the Giraffe Club and the Grow Rich System arrangements.  In relation to the first question, the liquidator submitted that the payment claims for commissions should not be met because either the agreements to pay commissions were impliedly prohibited by the TPA or, if not so prohibited, were made to effectuate a purpose made unlawful by that Act.  In relation to the second question, the liquidator submitted that refunds should be made since the joining of the Giraffe Club and the Grow Rich System were not of themselves illegal acts and public policy would be offended if the promoter of an illegal scheme were allowed to keep the membership fees or the money paid for the ion mat.  **(d) Decision**  On the question of commissions, Barrett J analysed the purpose of sections 57 and 61 of the TPA. His Honour thought that the purpose of sections 57 and 61 were clear enough. The aim of section 57 is to shield consumers from attempts to persuade them to acquire goods or services on the basis that they will receive commissions upon introducing prospective customers. Similarly, the aim of section 61 is to protect consumers from inducements to pay money to join a selling scheme in which they have a right to earn commissions by recruiting new members to the scheme. Barrett J was of the opinion that sections 57 and 61 should be seen as impliedly precluding both the giving and the receiving of commissions. His Honour considered the submission of the liquidator with respect to the claims for commissions to be correct. Barrett J held that the purported contractual right of the scheme participants to receive commissions was inoperative as a source of recovery on the winding up.  On the question of refunds, these were claims by persons who paid the purchase price of the ion mat or the membership fee to join the selling scheme. These sums were paid by people as, in effect, a price for the opportunity to earn commissions by introducing new participants to the scheme. By and large, people paid these moneys without receiving anything in return, because, as explained above, the right to receive commission was unenforceable due to its illegality. Barrett J held that the TPA did not preclude claims by persons seeking to recover refunds. It would be a matter for the liquidator to consider each claim for a refund and deal with it according to the particular circumstances. If the liquidator was satisfied that, on ordinary contract and unjust enrichment principles, the claimant had shown grounds for recovery, then a refund should be made. It was open to the liquidator not to make a refund where a particular person did in fact receive commissions and thereby enjoyed some quid pro quo for the outlay of the sums.  Barrett J answered the specific questions asked by the liquidator as follows:           it was not appropriate for claims made in respect of commissions to be accepted by the liquidator and paid to the members of Giraffe World; and           no provision of the TPA should be regarded as making it inappropriate for claims for refunds to be accepted by the liquidator and paid to the members of Giraffe World.  **5.3 Surrender of security by election**  (by Amelia Tooher, Blake Dawson Waldron)  Surfers Paradise Investments P/L (in liq) v Davoren Nominees P/L [2003] QCA 458, Supreme Court of Queensland, Court of Appeal, Williams and Jerrard JJA and Dutney J, 24 October 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/october/2003qca458.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/october/2003qca458.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)  **(a) Summary**  In this case the Queensland Court of Appeal held that the banking of a dividend cheque amounted to an election by the respondent mortgagee to surrender its security.  **(b) Facts**  The appellant company was the registered proprietor of three lots comprising a large vacant corner allotment. The appellant mortgaged the land in favour of the respondent as security for an advance of $1.8 million. An administrator was subsequently appointed to the appellant and the respondent served a default notice to exercise its power of sale, and contracted to sell two of the lots for $1.3 million.  The company went into liquidation and the liquidator invited the appellant’s creditors to lodge formal proof of debts. The respondent lodged a proof of debt in the sum of $2,205,498.00 and disclosed the mortgage without attributing any value to it. The respondent then sent a Notice of Completion to the appellant, referring only to the sale of two of the three lots secured as “comprising the whole of the property subject to [the mortgage]”. The respondent provided the liquidator an amended schedule showing the current debt as $1,101,887.66.  On 11 February 2002, the liquidator forwarded a dividend cheque to the respondent to the sum of $53,992, representing 4.9 cents in the dollar on the revised admitted debt. The cheque was received and banked by the respondent. Unknown to the liquidator, the respondent entered into a contract to sell the third lot on 12 February 2002.  The appellant sought a declaration and other ancillary relief, claiming that the respondent had surrendered its mortgage over the third lot.  **(i) Section 554E of the Corporations Act**  The appellant relied on section 554E of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Section 554E, which is derived from bankruptcy legislation, provides that a secured creditor may choose between (1) surrendering the security and proving for the whole debt; (2) realising the security and proving for any deficiency; or (3) valuing the security and proving for any estimated deficiency.  **(ii) The appellant’s argument based on surrender of the security**  The appellant argued that the respondent made a binding election to surrender the security. It argued that the intention to surrender must be objectively viewed from the perspective of the liquidator.  The respondent’s election was discernible by:                       the lodgement of the proof of debt, identifying the mortgage but not attributing any value to it;                      the Notice of Completion referring to the sale of the two lots as constituting “the whole of the property subject to [the] mortgage”;                      the lodgement of the amended schedule of debt, without attributing any value to the mortgage over the third lot; and                      the banking of the dividend cheque, which was based on the whole of the remaining indebtedness without any allowance for the security over the third property.  Accordingly, the respondent’s efforts to sell the third property were irrelevant, as they were not communicated to the liquidator.  **(c) Decision**  The Court unanimously allowed the appeal and declared that the respondent had surrendered the mortgage as security for any principal and interest outstanding pursuant to the mortgage. It further declared that the appellant was entitled to the net proceeds of sale of the third lot and awarded costs against the respondent.  The Court referred to section 554E and noted that the respondent was only entitled to receive and retain the dividend payment if the debt on which the dividend was based, was the balance due after realising, valuing or surrendering the security. The respondent had not realised the security over the third lot, nor had it placed any value on the security. Dutney J accepted the reasoning of Jessel MR in Moor v Anglo-Italian Bank (1879) 10 Ch D 681 at 689-690, where the Master of Rolls said in relation to a person who proves for the full amount without valuing or realising the security, “as he cannot provide for the full amount and receive a dividend except on the theory of giving up the security, he shews by that an intention to give up his security; and, if he so proves and receives a dividend or votes, he shews pretty conclusively that he has finally elected to give up his security and take his dividend”.  **(i) Principles of election**  Dutney J referred to the comments of Mahoney JA (with whom Street CJ agreed) in Champtaloup v Thomas [1976] 2 NSWLR 264, which identified two types of election. The first type involves a conscious act of election communicated to the other party. The second involves an act which is of such a nature that irrespective of actual intention, the relevant party is treated by the law as having exercised its election. This imputation of election may occur even though the party does not subjectively know that he has the right to elect, or even where he does not intend to elect. His Honour further noted that election of the second type requires unequivocal conduct in the face of necessary choice.  On the facts before the Court, on receipt of the dividend cheque, the respondent was required to choose between accepting the cheque or returning it and notifying the liquidator that a mistake had been made regarding its proof of debt. Since the respondent was only entitled to accept the cheque if it surrendered its security, the assertion of a right to retain the dividend, evidenced by banking the cheque and retaining the proceeds (in the context of earlier communications between the parties), amounted to “the unequivocal adoption of one of two inconsistent rights”. Accordingly, the Court held that the election occurred by operation of law.  **(ii) Other matters**  Williams JA (along with Jerrard JA) agreed with Dutney J’s reasoning. His Honour noted that the trial judge had placed insufficient weight on the objective test. He also indicated that while there was an election at the time the dividend cheque was banked, it is possible that the election could have occurred prior to this time. Further, Dutney J raised the possibility of the consequences of the election being avoided by resort to the doctrine of mistake. Neither of these issues was considered further.  **5.4 National Exchange Offer – Failed acceptance**  (by Clayton Barrett, Clayton Utz)  National Exchange Pty Ltd and David Arthur Vane [2003] VSC 361 Supreme Court of Victoria, Osborn J, 23 October 2003.  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/october/2003vsc361.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/october/2003vsc361.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)  **(a) Summary**  The case highlights the need to ensure that:   *          letters of offer clearly specify acceptance requirements;           any directions or instructions in accompanying documents such as transfers are consistent with the letter of offer.   **(b) Facts**  National Exchange Pty Ltd (“National Exchange”) offered to purchase shares from Mr Vane which Mr Vane held in AXA Asia Pacific Holdings Ltd (AXA). The letter of offer stated in regard to acceptance:  “How to Accept this Offer:  This offer is accepted when you sign the enclosed transfer form and it is received in our office. Please also enclose your issuer sponsored holding statement in the enclosed envelope.  We will post a cheque to you THE SAME DAY we receive these documents.  The transfer form enclosed with the letter of offer included, at its foot, beneath the words  “IMPORTANT INSTRUCTIONS”:  “1. PLEASE SIGN & DATE this Transfer Form between the crosses above. In the case of joint holders all must sign.  2. Place the signed Transfer Form and Issuer Sponsored Statement in the reply paid envelope.  3. Mail the documents to arrive no later than the closing date of this offer.”  Mr Vane signed the transfer form and returned it to National Exchange before the closing date for the offer. However, he subsequently found out that the National Exchange price was less than the price at which AXA shares were trading and did not deliver the holding statement.  National Exchange alleged a binding contract had been formed on the return of the transfer form and sued Mr Vane for damages.  **(c) Decision**  **(i) Valid acceptance required compliance with Transfer Form Instructions**  Osborne J said that the transfer form, having to be signed to accept the offer, formed part of the offer. Further, completing the transfer in accordance with its terms required compliance with the “IMPORTANT INSTRUCTIONS”. Those instructions required the seller to forward both the holding statement and the signed transfer by mail so that the documents arrived on or before the offer’s closing date.  That conclusion was supported by Osborne J’s construction of the documents as contemplating that Mr Vane’s performance of the contract would be complete upon acceptance. To accept the offer, Mr Vane had to perform his part of the contract by providing both documents by the offer’s closing date.  Therefore, as Mr Vane had not provided the holding statement before the offer’s closing date, he had not validly accepted the offer.  **(ii) Waiver not applicable to defects in acceptance**  National Exchange submitted that even if providing the holding statement was required for acceptance, National Exchange had waived Mr Vane’s non-compliance with that requirement.  Osborne J rejected this submission, applying the principle that an offeror cannot waive non-compliance with the acceptance requirements of an offer. Although the term “waiver” is sometimes used in the context of defective acceptances, what is really meant is that an offeror may accept a counter offer made by an offeree when the offeree’s acceptance fails because of delay or the addition or variation of terms by the offeree.  As National Exchange had argued its case on the basis that a contract had been created when Mr Vane returned the transfer, and there was no evidence that the return of the signed transfer was accepted by National Exchange as a counter offer, National Exchange’s submissions failed.  **5.5 Directors may commence proceedings in the name of the company after the appointment of receivers and managers**  (by Louise Camenzuli, Corporate Advisory Solicitor, Corrs Chamber Westgarth)  Ernst & Young (Reg) v Tynski Pty Limited (ACN 008 162 123) (Receivers and Managers Appointed) [2003] FCAFC 233, Federal Court of Australia, Full Court, Branson, Marshall and Stone JJ, 21 October 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/october/2003fcafc233.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/october/2003fcafc233.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) The decision**  The Federal Court has confirmed that directors of a company may commence proceedings in the name of the company to challenge the validity of an appointment of receivers and managers to the company without the receivers and managers’ consent.  **(b) The facts**  National Australia Bank (“NAB”) provided to the Gartner Family Group various financial facilities which allowed the group to withdraw a total of $24.9 million secured by a charge over all of the group’s assets. When the Gartner Family Group allegedly defaulted under this arrangement, NAB appointed receivers and managers to deal with the group’s assets.  Subsequently, the directors of the Gartner Family Group commenced proceedings, against NAB, in the names of the Gartner Family Group companies to challenge the validity of those appointments.  NAB argued that the directors of the Gartner Family Group had no authority to commence such proceedings without the consent of the appointed receivers and managers as those receivers and managers now controlled the Gartner Family Group companies. NAB further argued that the receivers and managers could only provide such consent if the directors agreed to indemnify the receivers and managers against the costs of providing such consent.  **(c) Primary judge’s reasons**  Mansfield J held that the directors of the Gartner Family Group had authority to commence proceedings, against NAB, in the names of the Gartner Family Group companies without the receivers and mangers’ consent because there was no “apparent clash” between what the directors of the Gartner Family Group regarded as being in the best interests of the Gartner Family Group and what the receivers and managers of the group regarded as being in the best interests of NAB, as their appointer. He added that “If there were such a clash, its resolution would depend upon the terms of the several debentures, the terms of appointment of the receivers, and their statutory powers”.  Mansfield J also held that receivers and managers may consent to directors commencing proceedings in the name of the company only if the directors agree to indemnify the receivers and managers against any costs incurred in relation to providing such consent. However, this is a matter for the receivers and managers to decide and not a matter of law. In this case, the receivers and managers did not make such demands.  **(d) Appellant court’s reasons**  The Full Federal Court, like the primary judge, held that the directors of the Gartner Family Group had authority to commence proceedings, against NAB, in the names of the Gartner Family Group companies without the receivers and mangers’ consent but for a different reason - because the proceedings related to the appointment of those receivers and managers. This Court was silent on whether the directors of a company could commence proceedings in the name of the company if the proceedings related to other matters.  The Full Federal Court, like the primary judge, held that receivers and managers may consent to directors commencing proceedings in the name of the company only if the directors agree to indemnify the receivers and managers against any costs incurred in relation to providing such consent. However, this is a matter for the receivers and managers to decide and in this case, the receivers and managers did not make such demands.  **(e) Practical implications**  Directors of a company may commence proceedings in the name of the company to challenge the validity of the appointment of receivers and/or managers without those receivers and managers’ consent. However, it is not clear (at least from this case) whether directors of a company may do the same in relation to other matters.  Additionally, receivers and managers may consent to the directors of the company commencing proceedings in the name of the company and may or may not require the directors to indemnify those receivers and managers against the costs of providing such consent.  **5.6 Availability of presumption of insolvency upon failure to comply with a statutory demand**  (by Michael Gregory & Lisa Struthers, Corrs Chambers Westgarth)  Deputy Commissioner of Taxation v Tixana Pty Ltd [2003] NSWSC 968, Equity Division of the New South Wales Supreme Court, Austin J, 20 October 2003.  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/october/2003nswsc968.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/october/2003nswsc968.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Background**  Under section 459E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the “Act”), the plaintiff served a statutory demand against the defendant on 28 October 2002 by post, requiring it to satisfy relevant debts. On 22 November 2002, the defendant applied to have the statutory demand set aside under section 459G of the Act.  This application was found to be invalid because it was made out of time. Section 459G requires that an application to set aside a statutory demand may only be made within 21 days after the demand is served. The High Court has held that this 21 day limit is mandatory and cannot be extended under section 1322 of the Act: David Grant & Co Pty Limited v Westpac Banking Corporation (1995) 184 CLR 265. Master Macready held that the statutory demand had been served on 30 October 2002. Therefore, the defendant’s application to set aside the statutory demand was invalid because it was made outside the 21 day time limit.  **(b) Current Proceeding**  The plaintiff applied for a winding up order in respect of the defendant on 21 August 2003 under section 459P of the Act. Section 459P allows creditors to apply to the Court to wind up a company on the grounds of insolvency.  The plaintiff wished to rely on a statutory presumption of insolvency arising under section 459C(2)(a). The presumption arises after a defendant fails to comply with a statutory demand, and in the context of winding up proceedings places the burden upon the defendant to prove its solvency. However, the presumption is only available for a three month period after the company has failed to comply with the demand.  The key issue in the current proceeding was whether the plaintiff could access this presumption of insolvency. In order to determine this, Austin J had to establish when the defendant had “failed to comply” with the statutory demand.  Generally under section 459F, a company will be deemed to have failed to comply with a statutory demand where it has not complied within 21 days of the demand being served. However, section 459F(2) indicates that where the company applies to have the demand set aside under section 459G, this period of time to comply with the demand may be extended. Where such an application to set aside the demand is made, the defendant will have until 7 days after the date of determination of the application to comply, or if applicable, until the date set by the court.  In this case, could the defendant’s period of compliance be extended under section 459F(2)? The defendant had applied on 22 November 2002 for an order to set aside the demand under section 459G. However the application was held to be out of time because the plaintiff failed to apply within the requirements set by section 459G (ie within 21 days).  If the period of compliance could not be extended, the defendant would be deemed to have failed to comply 21 days after the demand was served on 30 October 2002. Since the plaintiff did not apply for the winding up order until 21 August 2003, the statutory presumption of insolvency would no longer be available to the plaintiff for the purpose of the current proceedings.  **(c) Decision**  Austin J held that the presumption of insolvency under section 459C(2)(a) was not available to the plaintiff for the purposes of the winding up order. Section 459F clearly indicated that the time period for compliance with a statutory demand could only be extended where the application to set aside the statutory demand has been made “in accordance with” section 459G. One of the requirements of section 459G is that the application must be made within the mandatory time limit of 21 days.  The defendant’s application to set aside the demand had not been made “in accordance with” section 459G because it had been made outside the time constraints imposed by the Act. Consequently, the 21 day period for compliance with the statutory demand could not be extended under section 459F(2).  Therefore the statutory presumption of insolvency was no longer available in the current proceeding. Since the defendant failed to comply with the demand 21 days after it was served on 30 October 2002, and more than three months had elapsed from the date 21 days after the demand had been served, the presumption no longer operated.  Austin J noted that in certain situations, this interpretation of section 459F(2) could result in hardship for plaintiffs seeking a winding up order and wishing to rely upon the statutory presumption of insolvency arising from a failure to comply with a statutory demand. However, the meaning of the wording of section 459F(2) was so clear that no other interpretation was possible. He noted that law reform could be considered on this issue.  **5.7 Voluntary administration: admitting proofs for voting at a creditors’ meeting**  (by Jennifer Johnson, Mallesons Stephen Jaques)  Selim v McGrath [2003] NSWC 927, Supreme Court of New South Wales, Barrett J, 17 October 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgment/states/nsw/2003/october/2003nswsc927.htm](http://cclsr.law.unimelb.edu.au/judgment/states/nsw/2003/october/2003nswsc927.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Following a recall of its products, Pan Pharmaceuticals Limited (“Pan”) became subject to a voluntary administration. The plaintiff, a director of Pan, claimed orders that various steps taken in relation to the second meeting of creditors (including rejection of 417 proofs, notification of the meeting and failure of the chairperson to unilaterally seek an adjournment), should be reviewed. Barrett J found that the actions of the administrators and the chairperson in relation to the meeting were consistent with the requirements imposed by legislation.  **(b) Facts**  Pan was a manufacturer of medicines. On 28 April 2003, following an audit of Pan’s manufacturing process, the Therapeutic Goods Administration suspended Pan’s licence to manufacture, and required Pan to take immediate steps to recover all products manufactured and supplied by it since 1 May 2002.  Pan became subject to voluntary administration under Part 5.3A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) on 22 May 2003. The defendants, Mr McGrath and Mr Honey, became the administrators.  At the second meeting of creditors (required by section 439A), a proposed resolution that the meeting be adjourned so that the administrators could seek directions from court on the admissibility of certain votes, and a proposed resolution that Pan execute a deed of company arrangement propounded by the plaintiff, were not passed. A proposed resolution that Pan be wound-up was subsequently passed.  The plaintiff’s main contentions were:           417 proofs (relating mainly to consumers but also to some retailers and health professionals), had been wrongly rejected for voting purposes. There was no basis to distinguish these 417 proofs from Pharmacy Guild proofs that had been admitted. Had these votes been admitted or rejected together, the result of the voting at the meeting on the deed of company arrangement would have been different;           Having regard to the breadth of the creditor base, the defendants, as administrators, did not adequately and properly discharge their duty to give notice of the meeting;          The chairperson acted wrongly in not adjourning the meeting or suspending proceedings to obtain guidance from the court under section 447D as to the correct course to adopt in relation to the 417 proofs.  **(c) Decision**  Several issues about the operation of Part 5.3A were raised in the course of the proceedings.  **(i) Who are to be regarded as “the companies creditors” for the purposes of section** **439A(1) of the Corporations Act?**  Barrett J noted that the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) does not define “creditors” for the purposes of Part 5.3A. Creditors for the purposes of a sections 439A meeting are all persons who have, as against the company concerned, “debts” or “claims” provable in a winding up. The boundaries are set by section 553(1) which refers to “all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages)…”. Barrett J commented that persons having a claim for damages pursuant to the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) or in tort are creditors for the purposes of Part 5.3A.  **(ii) The role of the Corporations Regulations in a voluntary administration**  Regulations 5.6.12 to 5.6.36A apply to a meeting convened under Part 5.3A subject to regulation 5.6.11(3) which provides that these regulations do not apply if they are “inconsistent with a particular requirement of the Act, these Regulations or the rules”. Barrett J commented that the effect of regulation 5.6.11(3) in the case of an inconsistency is to disapply regulations 5.6.12 to 5.6.36A only to the extent necessary to resolve the inconsistency.  **(iii) The requirements as to notice of meeting**  The leading requirement concerning notice of a section 439A meeting is imposed by section 439A(3)(a) which provides that the administrator must give written notice of the meeting “to as many of the company’s creditors as reasonably practicable”. Regulation 5.6.12 requires notice in writing to be given to every person “appearing on the company’s books or otherwise” to be a creditor. Barrett J commented that this requirement does not extend to one-to-one notification beyond those creditors for whom a means of direct contact is readily ascertainable.  The second notification requirement is that, pursuant to section 439A(3)(b), a notice of meeting must be published in a “national newspaper” or in a daily newspaper of general circulation in each State or Territory in which the company has its registered office or carries on business.  The plaintiff submitted that the administrators, having formed a view that certain classes of persons were within the “creditor” concept, were bound to take steps to seek out those persons. Barrett J held that no such legal duty exists. (Barrett J distinguished the present case from circumstances where there are identified persons with identified potential claims such as occurred in In re Armstrong Whitworth Securities Co Ltd [1947] 1 Ch 673).  **(iv) Proof of debts in voluntary administration**  Proofs of debts and claims in a voluntary administration are for voting purposes only. Barrett J undertook an analysis of how regulations 5.6.13 and 5.6.26 operate.  A person is not entitled to vote as a creditor at the meeting unless either:           the person’s debt or claim has been admitted wholly or in part by the administrator (regulation 5.6.23(1)(a)); or,           the person has lodged particulars of the person’s debt or claim with either the chairperson of the meeting or a person named in the notice of meeting as the person who may receive such particulars (regulation 5.6.23(1)(b)).  The entitlement to vote under regulation 5.6.23(1) therefore turns upon the prior act of the administrator (admission of the debt or claim wholly or in part) or receipt of either particulars or, “if required”, a formal proof by either the chairperson or a person specifically named in the notice of meeting.  Under regulation 5.6.26, the chairperson may either admit or reject “particulars of the debt or claim” or “a formal proof of the debt or claim” at the meeting. Barrett J noted that regulation 5.6.23 does not expressly contemplate admission or rejection of particulars in the way regulation 5.6.26(1) describes. Barrett J commented that lodgment as referred to in regulation 5.6.23(1)(b) is the essential first step and that secures the voting entitlement, subject to that entitlement being negated by rejection under regulation 5.6.26.  The power conferred on the chairperson by regulation 5.6.26(1) is merely a power to admit or reject, no process of evaluation is envisaged beyond a decision whether or not the debt or claim exists. If the chairperson entertains the kind of doubt referred to in regulation 5.6.26(2), the proof must be admitted, but on a marked basis.  If the administrator causes a person’s debt or claim to be “admitted wholly or in part”, that person attains the regulation 5.6.23(1) entitlement to vote without the need for any action of the chairperson under regulation 5.6.26(1).  Regulation 5.6.23(2) provides that a creditor may not vote in respect of a debt or claim of each of the descriptions in paragraphs (a) to (d) unless a “just estimate” of the “value” of the debt or claim has been made.  Barrett J noted that there is some difference of opinion in the decided cases as to who is to make the “just estimate”: Young v Sherman (2002) 170 FLR 86; Bovis Lend Lease Pty Ltd v Wily (2003) 45 ACSR 612; Re Ansett Australia Ltd (2002) 115 FCR 395; Re Pasminco Ltd [2002] FCA 231; Petrochemical Industries Ltd v Dempster Nominees Pty Ltd (WASC, 24 November 1994, unreported, Murray J). Barrett J commented that the estimate is probably to be made by the chairperson.  Barrett J stated that regulation 5.6.23, in requiring a just estimate to be made, does not contemplate any detailed inquiry. If the factual material the claimant provides, provides reasonable grounds for ascribing a particular figure to the particular claim, that position will be accepted. If, on the other hand, there is little or no material from which a conclusion as to value can be drawn, a just estimate may be zero or the nominal amount of $1.00.  Implicit in the regulations is an assumption that the ‘particulars’ provided by a person asserting creditor status, must set out facts, or alleged facts sufficient to show, at least at a prima facie level, the existence of the asserted debt or claim.  **(v) Rejection of the 417 proofs and admission of the Pharmacy Guild Proofs**  Barrett J found that the 417 rejected proofs lacked evidence that the products listed were Pan products, lacked date of purchase details and lacked evidence that it was the claimant who had paid for the product and suffered loss. These deficiencies went beyond “doubt” of the regulation 5.6.26(2) kind. The 417 proofs did not contain sufficient particulars to convey any reliable claim at all.  Barrett J found that the Pharmacy Guild Proofs were produced in circumstances where the administrators’ solicitors and the solicitors for the Pharmacy Guild had established a framework for the Pharmacy Guild pharmacists to calculate their claimed losses and submit proofs. Whilst if viewed in isolation the particulars may be insufficient, the decision maker had reliable and credible information about the proofs.  Barrett J commented that decision making as to creditor eligibility to vote pursuant to regulations 5.6.23 and 5.6.26 is undertaken against the background of all relevant contextual matters of which the decision maker is aware: Spiteri v Lindholm [2003] VSC 42.  **(vi) Unilateral adjournment or suspension**  The plaintiff submitted that the chairman should, of his own motion, have adjourned the meeting so that he could make an application to the court for directions in relation to the questions surrounding the admission of the various proofs.  Barrett J found that the chairman did not act inappropriately in this respect on the basis that:           the meeting had specifically declined to approve an adjournment for this purpose;          the power of a chairperson to adjourn without the direction or consent of the meeting (as envisaged by regulation 5.6.18) is narrow and is an emergency power exercisable in cases where the consent of the meeting cannot be obtained as a practical matter;          courts are reluctant to determine questions of entitlement to vote in advance; and          regulation 5.6.26 creates an express right of appeal to the court against a decision of the chairperson to admit or reject a proof for voting purposes.  **(d) Conclusion**  Barrett J concluded that the actions of the administrators and the chairperson in relation to the section 439A meeting were consistent with the requirements imposed by legislation. Further, due process had not involved unconscionability or manifest injustice that would warrant an order under section 447A or 447E.  **5.8 Deadlock: a just and equitable ground for the winding up of a company**  (by Sarah Doyle, Articled Clerk, Phillips Fox)  Johnny Oceans Restaurant Pty Ltd v Page [2003] NSWSC 952, Supreme Court of New South Wales, Palmer J, 16 October 2003 (revised 24 October 2003)  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/october/2003nswsc952.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/october/2003nswsc952.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case involved a successful cross-application by Mr Page, a shareholder of Johnny Oceans Restaurant Pty Ltd (‘the Company’), to wind up the Company on ‘just and equitable grounds’ under section 461(k) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (‘the Act’). The basis for Palmer J’s decision to make the order was that the shareholders had reached a deadlock which prevented the business of the Company from being carried on.  The original application, which was an application by Mr and Mrs Tervenski to have a statutory demand issued by the defendant set aside, was deferred by the consent of the parties.  **(b) Facts**  The Company, incorporated for the purpose of a restaurant venture, comprised four shareholders: Mr and Mrs Tervenski, Mr Page and Mr Lindsay. Under the ‘Shareholder Agreement’, the Tervenski’s were to be the sole directors of the Company and responsible for the running of the Company on a day to day basis, while Mr Page and Mr Lindsay were to finance the venture. Any share capital was to be distributed equally amongst the four shareholders, and all major decisions (i.e. those which involved the spending of more than $2,500) required the approval of at least three shareholders.  As agreed, Mr Page and Mr Lindsay put up about $80,000 and provided an overdraft facility of $20,000 to establish the restaurant venture on the assurance that that would be the total investment required of them. Prior to their investment of capital, the Tervenski’s gave a further assurance to the two investors that the Company would be able to secure a long-term lease.  Within a month of the restaurant opening in June 2002, the whole $80,000 and the overdraft facility had been exhausted and Mr Page and Mr Lindsay were approached for further funds. An additional $5,000 was provided by them jointly in June and a further $5,000 was provided by Mr Page in July. They were again approached for more funds in September but by this time they had resolved not to put any more money into the Company. This exacerbated the already strained relationship between the parties.  In December 2002, the lessor of the premises occupied by the Company gave notice to the Company to vacate, on the basis that the Company had only a week by week lease which could be terminated at will by the lessor’s giving notice. The Tervenski’s did not vacate the premises as requested and the Company was eventually locked out in the following month, when the lessor took possession of the premises.  Without consulting either Mr Page or Lindsay, the Tervenski’s brought an action on behalf of the Company in the Administrative Decisions Tribunal seeking a determination that there was in place a binding lease.  His Honour considered that as legal costs for the application would be at least $2,500, it constituted a ‘major decision’ within the meaning of the Shareholder Agreement and accordingly, that the application was made in breach of that agreement.  Mr Page argued that the shareholders of the Company had reached a complete deadlock such that it had become impossible to conduct business. He pointed to a number of incidents to demonstrate the breakdown of the relationship between the parties, including an altercation that had taken place between Mr Tervenski and himself, which resulted in Mr Tervenski seeking an apprehended violence order against him (which was later compromised by undertakings given by Mr Page and Mr Tervenski to conduct all further dealings though their lawyers). The altercation had taken place in the context of the unauthorised auctioning by the Tervenski’s of the plant and equipment from the restaurant.  Mr Page further relied on the near insolvent state of the Company, which had accumulated debts of $20,000 to the ATO for overdue GST payments.  The Tervenskis disputed the assertion that the relationship between the shareholders had completely broken down, and argued that, in any event, the Shareholder Agreement provided that the management of the Company was under their sole control, so that the business of the Company could still be legitimately conducted by them without interference from Mr Page and Mr Lindsay.  They further submitted that the Company should not be deprived of the opportunity of securing a valuable asset, namely the lease of the new premises, before the hearing of the proceedings instituted in the Administrative Decisions Tribunal.  **(c) Decision**  Palmer J did not accept that the business could be managed with any success, finding that there was no real prospect that the parties could work together so as to reach the necessary agreement to be able to conduct business in the future. This was especially the case bearing in mind that the Shareholder Agreement required that all important decisions relating to the running of the business have the consent of all, or at least 75%, of the shareholders. On this basis, his Honour decided that there was no option other than to order that the Company be wound up.  Palmer J then turned to section 461(k) of the Act, which, when read together with section 467(4), requires the court to consider any alternative remedies that may be available to the applicant in determining whether to make an order to wind up a company on just and equitable grounds. The Tervenskis argued that Mr Page had another remedy available to him within the meaning of section 467(4), and that he was therefore acting unreasonably in seeking to have the Company wound up. That remedy was a right to commence proceedings against the directors for oppressive conduct and accordingly to seek an order under section 233 of the Act for the compulsory purchase of his shares by the alleged oppressors, although the Tervenskis denied that they were guilty of any oppressive conduct.  His Honour took a pragmatic approach to this argument, and found that the prospects of the Tervenskis being financially able to purchase the shares of Messrs Page and Lindsay was unlikely, so that it could not properly be said that there was another remedy available to Mr Page.  In concluding that the Company should be wound up in accordance with the application, Palmer J also considered it relevant that an order to that effect did not necessarily equate with an end to the proceedings in the Administrative Decisions Tribunal. A liquidator appointed to wind up the Company could and would, if there was a reasonable chance of success, bring those proceedings on the Company’s behalf.  **5.9 Circumstances in which an administrator of a deed of company arrangement can seek directions from the court**  (by Carla Alviano, Blake Dawson Waldron)  Rathner v Global Communications Technologies Pty Ltd [2003] VSC 390 Supreme Court of Victoria, Hansen J, 15 October 2003  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/october/2003vsc390.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/october/2003vsc390.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)  **(a) Summary**  Gideon Isaac Rathner (deed administrator under a deed of company arrangement of Advanced Communications Technologies (Australia) Pty Ltd (ACTA) dated 17 October 2002), sought, by originating process, a direction pursuant to section 447D of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act) in relation to his entry into a proposed litigation funding agreement. The directors of Global Communications Technologies Pty Ltd (GCT) (who are also the directors of ACTA) opposed the application on the basis that the administrator should have sought the views of creditors if he was to act in their best interests. The Court, using a principle enunciated in Re Ansett Australia Limited v Korda, decided that because the administrator’s propriety and good sense were being questioned, it was appropriate that the court intervene to give directions on the best course of action.  **(b) Facts**  Rathner was initially appointed as administrator on 18 July 2002 pursuant to section 436A(1) of the Act after the Deputy Commissioner of Taxation (Commissioner) filed a writ against ACTA seeking the winding up of ACTA in insolvency based on a failure to respond to a statutory demand. The Commissioner subsequently filed for ongoing injunctions to restrain ACTA from dealing with or disposing of its assets. By virtue of a fixed and floating charge held by GCT over the property and assets of ACTA, GCT, on 29 July 2002, appointed receivers and managers to ACTA. The receivers and managers to later added as defendants pursuant to a court order.  A deed of settlement of proceedings was produced alongside consent orders on 11 September 2002. Final orders were adjourned until 7 February 2003. In the orders, the Court ordered that the receivers and managers were authorised to enter into an agreement to sell ACTA’s shareholding in a company called Australon, pursuant to an agreement dated 27 August 2002. The purchaser of the shares was Asia Infotech.  On 17 October 2002 a Deed of Company Arrangement was entered into after ACTA’s creditors resolved to accept the Deed proposed by the company’s directors. This Deed proposed that payment in full was to be made to approved creditor’s claims. The funds to pay the creditors were to be sourced from the sale of ACTA’s equity in Australon and from any successful litigation the company is participating in. The Deed also provided that the directors, GCT and the Australian Taxation Office were to be non-participating creditors, but were to preserve their claims in all other respects. The Deed was signed by Rathner (as deed administrator), ACTA, GCT and the directors.  Clause 9.3 of the Deed stated that the order of application of the property of the fund was: firstly in respect of the administrator’s remuneration and expenses, secondly in respect of the deed administrator’s remuneration and expenses, thirdly to priority creditors, fourthly to unsecured creditors and lastly any balance is to be returned to ACTA. Clause 10 of the deed stated that the deed administrator may convene a meeting of creditors at any time, and must do so if requested to in writing by the creditors (whose debts are not less than 10% of the value of all debts). Clause 12 stated that the deed administrator may at any time apply to the Court for directions in relation to any matter arising under the Deed.  On 1 February 2003, the date for completion under the sale agreement had passed with Asia Infotech only having paid the first $3M only. At this time, the receivers and managers served a notice of termination on the basis that Asia Infotech had failed to satisfy all the conditions precedent to the sale. In response, Asia Infotech filed a writ seeking specific performance of the sale agreement or the return of the $3M. The claim for specific performance was later abandoned, Asia Infotech agreeing that the sale agreement had been validly terminated.  In early March the Court heard an application by the receivers and managers’ solicitor for a variation of the various injunctions which restrained dealings in or the disposal of ACTA’s assets so as to allow the receivers and managers to enter into a litigation funding agreement. The Court ordered that the injunctions be dissolved. This allowed the receivers and managers to enter into the litigation funding agreement which would provide funds for the costs of the proceeding and any further litigation arising in respect of the Australon shares and any potential liability of ACTA to disgorge the $3M paid by Asia Infotech under the sale agreement.  On 25 June 2003 the deed administrator’s solicitors sought advice from the receivers and managers’ solicitors as to when the fund would be established. In response, the receivers and managers’ solicitors presented an affidavit in support of an application to extend the date of the establishment of the fund to 30 November 2003.  On 4 July 2003, the payment required under clause 7(a) of the deed had not been made and the fund had not yet been established. In the circumstances the deed administrator was unsure of the course of action he should take, ie whether he should seek to have the creditors agree to an extension of the date for payment or whether he should terminate the deed. In the present circumstances the deed administrator did not have any funds with which to either operate the fund or to pay his own expenses as administrator and deed administrator.  On 5 August the receivers and managers’ solicitors notified the deed administrator that the Asia Infotech litigation had been settled during May 2003 and had not been disclosed to the deed administrator because of it containing confidentiality provisions. The deed administrator was told that the settlement had established a structure that would enable ACTA to access its proportionate entitlement to the underlying shares owned by Australon. Once this occurred, shares could be sold to make funds available under the Deed of Company Arrangement. This restructure was to occur prior to the end of November 2003.  On 12 August 2003 Rathner filed a summons seeking a direction pursuant to section 447D of the Act concerning the actions he should take in response to the actual breaches of the Deed of Company Arrangement in order to act in the best interests of creditors. Rathner also gave a notice to produce in respect of the documents concerning the confidential terms of settlement of the Asia Infotech litigation. Furthermore, on 19 August 2003 Rathner instructed his solicitors to demand an amount of $3.25M (an amount sufficient to pay administrative costs and repay priority creditors) from GCT and the company directors which they owed under clause 7(a) of the Deed. Acting on advice, Rathner decided also to commence proceedings against GCT and the directors for the $3.25M, which is an action he believed to be in the best interests of ACTA’s creditors, especially when considering the long term nature of ACTA’s insolvency.  In early September 2003 Rathner filed a summons seeking a direction in relation to a proposal that he enter into a litigation funding agreement to fund the above proceedings. On 26 September the defendants presented Rathner with some proposed amendments to the Deed of Company Arrangement. These amendments reduced the obligation for ACTA to pay and increased the time frame in which payment was required.  The proceedings were adjourned until 19 September and were eventually heard on 1 October to allow the administrator to consider the amendments. In his affidavit, Rathner stated that he believed that taking the possible options to a meeting of creditors was inappropriate considering that the defendants (GCT and the directors) were also creditors.  **(c) Decision**  The Court considered the situations in which it would be appropriate for an administrator to seek directions from the Court. Counsel for Rathner relied on the statement of Goldberg J in Re Ansett Australia Limited v Korda (Ansett) in which it was said that in order for the administrator to be allowed to seek directions there must be more than the mere making of a business or commercial decision - there must be some legal issue of substance or procedure or an issue of power, propriety or reasonableness – an issue that requires the exercise of legal judgment.  Counsel for the defence argued that the decision to be made by Rathner did not involve an issue that required legal judgment, was premature and should be placed before the creditors for a decision. Counsel for Rathner, however, argued that a legal issue of substance was raised regarding the interpretation of clause 7(a) of the Deed and whether it should be rectified to reflect the amendments suggested by the defendants. The Court agreed with this contention stating that a legal issue had been raised under the principle in Ansett because there had been an attack on the propriety, reasonableness and good sense of the administrator by the defendants. In such a situation, stated the Court, it would be appropriate for the administrator to seek directions from the Court.  The defendants argued that, as they had given a request that the administrator call a creditors meeting pursuant to clause 13, he should have done so. However, Rathner argued that this request was defective due to the wrong clause being cited in the notice. The defendants then submitted a second request during the hearing of the proceeding. Rathner said in evidence that he would consider the request. The defendants argued that the administrator’s actions indicated that he wanted to by-pass the creditors in the decision-making process. Rathner, however, argued that directions were sought so as to balance the scales between the administrator and the defendant creditors’ interests.  The Court concluded that in all the circumstances and considering that the deed administrator had acted honestly and reasonably, the direction sought should be given. |
| **6. Recent Corporate Law Journal Articles** |
| **(a) Company and Securities Law Journal**  Vol 21, No 8, November 2003  E Armson, The frustrating action policy: Shifting power in the takeover context  The Takeovers Panel has recently developed the frustrating action policy under which the directors of a target company must seek shareholder approval for action that would frustrate a takeover bid. This policy operates in addition to the target directors’ duties under common law and the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Although consistent with the takeovers policy requirement that target shareholders must have a reasonable opportunity to benefit from a takeover bid, the frustrating action policy represents a significant shift in the respective powers of the players in a takeover. Two key changes involve the transfer of responsibility for corporate decisions from target directors to shareholders and the increased power given to bidders through the focus of the frustrating action policy on the defeating conditions set by the bidder. In balancing the different interests involved, there remain a number of uncertainties as to how the policy will operate.  T Middleton, The difficulties of applying civil evidence and procedure rules in ASIC’s civil penalty proceedings under the Corporations Act  The meaning of the words “civil evidence and procedure rules” in section 1317L of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) is unclear. There is a wide variety of civil evidence and procedure rules that may apply in civil proceedings under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and [ASIC Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default). This wide variety and consequent lack of clarity encourages procedural challenges. Recent litigation concerning such procedural challenges is discussed in this article, from the perspective of the public interest (in protecting investors, creditors and corporations and promoting the confidence of such persons) which underpins ASIC’s enforcement activities. It is undesirable that the meaning or scope of section 1317L be resolved on a case-by-case basis. There would be greater certainty in the law and a reduction in delays and costs for both ASIC and defendants if a uniform civil code was adopted for the purposes of all Corporations Act civil proceedings (including civil penalty proceedings contemplated by section 1317L) and ASIC Act civil proceedings.  Some of ASIC’s officers and the Australian Law Reform Commission (in the context of customs prosecutions and perhaps in a wider context) have suggested that the practical result of the courts applying a variable standard of proof in the more serious civil penalty proceedings (such as those arising under the Corporations Act) is that there is little difference between the variable civil standard of proof and the criminal standard of proof. However, there is no clear indication from the recent ASIC cases discussed in this article that the courts have misapplied the variable civil standard of proof or that the courts have adopted the criminal standard of proof in civil penalty proceedings.  In some recent civil penalty proceedings under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) the courts have adopted some procedural rules more applicable to criminal proceedings. Such an approach ignores the requirement in section 1317L that the courts apply “civil evidence and procedure rules”, involves a blurring of the distinction between civil and criminal proceedings, raises the concern that the courts may not, in practical terms, give ASIC an enforcement option in the more serious civil penalty proceedings that is much different to criminal proceedings, and raises the question of whether the courts are giving effect to Parliament’s original reasons for introducing the civil penalty regime.  Vol 21 No 7, October 2003  R Bollen, Research analysts and the Australian insider trading and misleading or deceptive conduct regimes  Australia has had regimes governing insider trading and misleading or deceptive conduct for several decades. Allegations have been made both here and overseas that reports by research analysts have been significantly compromised by conflicts of interest. This article considers to what extent the Australian regimes already address the key issues highlighted overseas.  This article argues that front running of a research report and distribution of insider information through the publication of research reports are both prohibited by the current Australian insider trading regime. Publication of research reports that do not reflect the views of the person or firm that published them would at least prima facie be misleading or deceptive within the meaning of section 1041H of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). A limited reasonable basis obligation can also be drawn from the case law on misleading and deceptive conduct.  This article also identifies some implications for further Australian law reform in the area of Chinese walls and a positive reasonable basis obligation. However, it concludes that the structure of the Australian regime is in some ways a number of years ahead of comparable overseas regimes in its application to research analysis.  J Routledge and P Slade, The company dividend restriction: Does it promote good corporate governance?  This article considers aspects of the development of the law associated with the dividend payment restriction. The motivation for the article is to assess whether the existing substantive law is effective in promoting sound decision-making by corporate officers who are required to determine the timing and quantum of dividend payments. The authors’ analysis suggests that the existing provision in s 254T of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) is unlikely to have a significant positive effect on dividend decisions. This is due to its failure to provide meaningful guidance to decision-makers; its divergence from contemporary accounting practice; and its imposition of unnecessary complexity to the dividend decisions. The shortcomings identified suggest that reform of the existing provision is appropriate. 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