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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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EDITOR'S NOTE

This is the final issue of the Bulletin for 2002. The next issue will be published in February 2003. I would like to take this opportunity to thank the supporters of the Bulletin - ASIC, ASX and, in particular, our sponsoring law firms listed above.

I wish all of our readers an enjoyable Christmas and a happy and prosperous New Year.

Professor Ian Ramsay  
Editor

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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) AuASB ISSUES GUIDANCE ON AUDITOR INDEPENDENCE AND OTHER SERVICES

On 16 December 2002 the Australian Auditing & Assurance Standards Board (AuASB) announced it has issued a Guidance Note "Auditor Independence and Other Services", which clarifies auditors' responsibilities in relation to independence related matters.

AuASB Chairman, Mr Bill Edge, said: "Auditor independence is a crucial determinant in the delivery of audit quality. A key aspect of auditor independence is ensuring that other services provided to an audit client do not impair the auditor's objectivity."

Australia's principal Accounting Bodies, CPA Australia (CPAA) and The Institute of Chartered Accountants in Australia (ICAA), issued a new internationally harmonized standard for professional independence Professional Statement F1 "Professional Independence" to their joint Code of Professional Conduct earlier this year, with mandatory application for financial years ending on or after 31 December 2003. This means that in effect, compliance with the new Professional Statement F1 will be required from 1 January 2003.

The new Professional Statement F1 covers a number of aspects related to independence, including business and financial relationships, and it applies to all ICAA and CPAA members. Professional Statement F1 is tailored to reflect Australian community expectations and is based on the standard agreed and issued by the International Federation of Accountants (IFAC).

The Guidance Note is available on the AuASB website at <http://www.aarf.asn.au/>

For further information contact:

Mr Bill Edge  
Chairman, Auditing & Assurance Standards Board  
Tel: (03) 8603 3649

Mr Richard Mifsud  
Executive Director  
Australian Accounting and Research Foundation  
Tel: (03) 9641 7433

(B) PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES RELEASES REPORT ON THE REVIEW OF THE MANAGED INVESTMENTS ACT 1998

On 12 December 2002 the Australian Parliamentary Joint Committee on Corporations and Financial Services released a report titled "Review of the Managed Investments Act 1998". Following is a list of the recommendations from the Report.

(1) The Compliance Committee

Recommendation 1

The Committee recommends that:

- the definition of 'external director' and 'external member' in sections 601JA and 601JB respectively of the Corporations Act 2001 should be amended to ensure that:  
-- they are independent;  
-- relatives and de facto spouses of ineligible individuals are ineligible to act on the compliance committee (whether as the board or an external compliance committee); and  
- the meaning of 'material' be clarified.

Recommendation 2

The Committee recommends that the Responsible Entity (RE) of managed investment schemes be required to:

- report all appointments, retirements, resignations or removals of compliance monitors (whether as members of the board or of a separate compliance committee) to ASIC within a specified period (eg 5 business days);  
- disclose annually to scheme investors the names of all current compliance monitors; and  
- disclose annually to scheme investors the names of compliance monitors who have retired, resigned or been removed in the previous year and the reasons for all resignations and removals.

Recommendation 3

The Committee recommends that ASIC be empowered to remove a member of a compliance committee where ASIC forms the view that the member is not performing adequately or otherwise should not be on the committee. The removal would be subject to reasonable notice requirements and rights to administrative review of ASIC's decision.

Recommendation 4

The Committee recommends that the Corporations Act 2001 be amended to ensure that:

- the requirements in the compliance plan dealing with the arrangements which a compliance committee must make regarding membership, holding of meetings and so on, as far as appropriate, be expressly applied to the board when acting in the compliance monitoring role; and  
- the functions and duties applicable to the compliance committee, as far as appropriate, be expressly applied to the board when acting in the compliance monitoring role.

Recommendation 5

The Committee recommends that the Corporations Act 2001 be amended so that the RE of a registered scheme must establish a compliance committee if a majority of its directors are not external directors.

Recommendation 6

The Committee recommends that the Corporations Act 2001 be amended to allow a corporate compliance entity to act as a member of a registered scheme's compliance committee.

Recommendation 7

The Committee recommends that the Corporations Act 2001 be amended to require:

- the compliance plan of a registered scheme to set out detailed minimum standards of competency and integrity which each compliance monitor must meet;  
- any amendments to the compliance plan regarding these minimum standards be approved by a majority of compliance monitors before lodgment of the amendments with ASIC. The copy lodged with ASIC should also be signed by the compliance monitors; and  
- the RE to disclose details of the minimum standards annually, preferably at the same time as details of compliance monitors are disclosed.

Recommendation 8

The Committee recommends that ASIC, in consultation with industry, develop guidelines and model minimum standards for competency and - if considered necessary - integrity, for in-house compliance monitors.

(2) Compliance plan auditing

Recommendation 9

The Committee recommends that the Corporations Act 2001 be amended to strengthen the independence of compliance plan auditors to include:

- a general statement of principle requiring the independence of compliance plan auditors;  
- a requirement for compliance plan auditors to report to ASIC annually about their management of independence issues according to benchmarks developed by ASIC; and  
- a requirement for compliance plan auditors to report to ASIC any attempts to corrupt the integrity of the audit.

Recommendation 10

The Committee recommends the application of qualified privilege and whistleblower protection to employees of the RE and, if not already covered by subsection 601HG(8) of the Corporations Act 2001, to employees of the compliance plan auditor who report any suspected breaches of the law to ASIC in good faith and with reasonable cause.

Recommendation 11

The Committee recommends that the Department of the Treasury, in consultation with ASIC and relevant industry stakeholders, look into the feasibility of opening up the field for compliance plan auditors where it is considered that persons other than registered company auditors as defined under the Corporations Act 2001 could effectively carry out the requirements of a compliance plan auditor.

Recommendation 12

The Committee recommends that the Corporations Act 2001 be amended to accommodate ASIC's proposals to:

- require the compliance plan auditor to report to scheme members;  
- clarify that the auditor's opinion relates to a scheme's performance for the entire year being audited;  
- require a compliance plan audit of a newly registered scheme within the first year of its registration;  
- require an auditor's opinion on the adequacy of the compliance plan to be included with a scheme's application for registration; and  
- clarify that the compliance plan audit need only focus on material issues.

The Committee further recommends that the Department of the Treasury and ASIC should develop a test of materiality.

(3) Other checks and balances

Recommendation 13

The Committee recommends that ASIC review its NTA and insurance requirements for REs to determine whether they should be subject to periodic adjustment to take into account, for example, CPI rises or the quantum of funds under management.

(4) Costs and fees

Recommendation 14

The Committee recommends that the Government commission an independent cost/benefit analysis with a view to determining the impact of the Managed Investments Act 1998 and other relevant legislation. This will then establish a useful benchmark for future studies. The analysis should specifically look at:

- Australia's performance on costs and fees compared with major overseas financial centres;  
- whether and to what extent the MIA has limited or stimulated competition within the industry; and  
- whether understanding, transparency and disclosure for consumers has improved and/or is sufficient with regard to managed investments costs and fees.

Recommendation 15

The Committee recommends that the Corporations Act 2001 be amended to provide for a 'fair' treatment criterion in lieu of 'equal' treatment but only to provide for differential fees.

The Committee further recommends that what constitutes 'fair' treatment should be developed through consultation between the Department of the Treasury, ASIC and industry groups. The Committee notes that the Department is presently consulting with regard to this issue.

(5) Third party custodianship

Recommendation 16

The Committee recommends that the current provisions of the Managed Investments Act 1998 relating to third-party custodianship, should be monitored by ASIC with regular reports being made to the Parliamentary Joint Committee on Corporations and Financial Services with particular regard to:

- the number of entities opting into third-party custodianship; and  
- providing some qualitative comparative analysis of the performance of those entities with, and those without, third-party custodians.

The Committee further recommends that on the basis of these reports, the Committee should regularly review the efficacy of the current opt-in provisions in the Act compared with an alternative opt-out provision regarding optional third-party custodianship.

The full report is on the Committee's website at <http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm>(C) CORPORATIONS LEGISLATION AMENDMENT BILL 2002, CORPORATIONS (FEES) AMENDMENT BILL 2002 AND CORPORATIONS (REVIEW FEES) BILL 2002

On 12 December 2002 a package of proposed legislation was introduced into the Australian Federal Parliament comprising the Corporations Legislation Amendment Bill 2002, the Corporations (Review Fees) Bill 2002 and the Corporations (Fees) Amendment Bill 2002.

The changes proposed to be implemented by these Bills flow from the Government's Corporate Law Economic Reform Program. The Bills will implement the seventh stage of the Corporate Law Economic Reform Program, known as 'Streamlined Lodgments and Compliance' or CLERP 7.

The CLERP 7 reforms are intended to simplify document lodgment and compliance procedures for companies under the Corporations Act 2001. The Bills will provide a user pays system of servicing by the Australian Securities and Investments Commission (ASIC) and facilitate a more efficient and competitive business environment. In particular, the Bills will improve the efficiency of corporate regulation and reduce regulatory burdens on business.

The ASIC changes will be of particular benefit to small business. Around one million proprietary companies will no longer need to provide ASIC with an annual return, significantly reducing paperwork. A streamlined approach will be adopted to enable companies to update ASIC's database.

The quality and integrity of ASIC's Register of Companies will be protected by the use of an Extract of Particulars. The Extract of Particulars, setting out a company's details as recorded on the Register, will be issued to all companies together with an Annual Fee invoice. This will be done electronically, except where a company lodges in paper form.

Companies would still need to notify ASIC of certain basic changes in company details as they occur. However, if there are no changes, no paperwork will need to be lodged. In practice, this will reduce compliance burdens for a large number of small businesses that typically do not notify changes during the course of the year.

The measures will not only reduce the paper compliance burden for business, but also assist ASIC by reducing the volume of returns requiring processing, while maintaining the quality and integrity of its company database.

The CLERP 7 reforms include proposed modifications to the Corporations Act fee system. The Corporations (Review Fees) Bill 2002 will permit a fee known as a 'review fee' to be imposed.

Under the Bills, companies will no longer lodge an annual return with ASIC. An annual review fee will replace the present annual return fee. The review fee will be payable two months after the anniversary of a company's registration or an alternative date nominated by the company and approved by ASIC.

The Corporations (Fees) Amendment Bill 2002 will modify the regulation-making power under the Corporations Act to expand the range of fees that may be prescribed. However, the Government announced in the 2002 Budget that the annual fee for proprietary companies would remain capped at $200 until 30 June 2004.

The Corporations Legislation Amendment Bill also contains some miscellaneous amendments to the Corporations Act and the Australian Securities and Investments Commission Act 2001 (the ASIC Act). The Bill will repeal section 201C of the Corporations Act to remove the prohibition on the election or re-election of directors of a public company (or a subsidiary of a public company), who have reached 72 years of age. The Bill will amend the Corporations Act to remove charges over uncertificated securities from the application of the charges provisions of the Corporations Act (Chapter 2K).

The Bill will also make minor, miscellaneous amendments to the ASIC Act to increase the financial cap in paragraph 137(l)(a) of that Act from $250,000 to $1 million before Ministerial approval is required for ASIC to enter into contracts, and to enable another member of ASIC or a senior employee of ASIC to attend meetings of the Corporations and Markets Advisory Committee (CAMAC) in place of the Chairperson of ASIC.

(D) PRESIDENT BUSH NOMINATES WILLIAM DONALDSON TO BE COMMISSIONER OF THE SECURITIES AND EXCHANGE COMMISSION

On 10 December 2002 President George W Bush announced his intention to nominate William H Donaldson to be Commissioner of the Securities and Exchange Commission and upon confirmation, designate Chairman, for the remainder of a five-year term expiring June 5, 2007. Mr Donaldson is currently the Chairman of Donaldson Enterprises, an investment firm he founded in 1981. Throughout his career, Mr Donaldson has held senior positions in business, academia and government.

Prior to resuming work with Donaldson Enterprises in 2001, he served as Chairman, President and CEO at Aetna Inc. In 1990, he was nominated Chairman and CEO of the New York Stock Exchange, and served in that capacity until 1995. He was a founder of Yale University's Graduate School of Management, served as its first dean and held a tenured chair as the William S Beinecke Professor of Management from 1975 to 1980. From 1973 to 1975, he served as United States Undersecretary of State under Henry Kissinger, and then went on to be counsel to Vice President Nelson Rockefeller. Mr Donaldson co-founded the international investment banking firm of Donaldson, Lufkin & Jenrette in 1959 and served as CEO until 1973.

(E) BANKRUPTCY CRACKDOWN

On 10 December 2002 the Australian Federal Parliament passed bankruptcy reforms designed to prevent people using bankruptcy in an improper way.

The Bankruptcy Legislation Amendment Act 2002 will also encourage people who can or should avoid bankruptcy to consider other options.

Changes under the Act include:

- the removal of early discharge provisions that have permitted some people to be bankrupt for only six months;  
- an increase in the debt agreement income threshold by 50 per cent, to about $46,800 after tax, to encourage more use of debt agreements as an alternative to bankruptcy;  
- a new discretion for Official Receivers to reject a debtor's petition where it appears that the debtor can afford to pay their debts and the petition is an abuse of the bankruptcy system;  
- the strengthening of trustee powers to object to the discharge from bankruptcy of uncooperative bankrupts after the standard three-year bankruptcy period; and  
- the confirmation of the Court's power to annul a bankruptcy if the bankruptcy petition was an abuse of process, even if the debtor is insolvent.

The reforms will also streamline the operation of the bankruptcy system so that it works more effectively and efficiently.

(F) FUND MANAGERS INCREASE FOCUS ON CORPORATE GOVERNANCE

On 10 December 2002 the Investment and Financial Services Association (IFSA) released its revised guidelines on corporate governance for fund managers and corporations, known as the "Blue Book".

IFSA is a national not-for-profit organisation, which represents the retail and wholesale funds management and life insurance industry. IFSA's members manage approximately $640 billion on behalf of superannuation members and retail clients. IFSA members' investment in the Australian domestic market accounts for nearly 25% of the capitalisation of the Australian Stock Exchange. Fund managers are significant shareholders in Australian listed companies on behalf of over 9 million Australians.

The Blue Book includes guidelines for fund managers and corporations.

Key guidelines for fund managers include:

- fund managers should establish direct contact with companies to discuss performance and corporate governance matters;  
- fund managers should vote on all material issues where they have the authority to do so;  
- a corporate governance policy should be developed and include polices  
regarding voting; and  
- fund managers should report to clients on their voting practices.

The Blue Book guidelines for corporations cover a wide range of issues including:

- competency of the board of directors;  
- a majority of the board of directors should qualify as independent directors;  
- limitations on the number of directorships an individual may hold;  
- the role of key board committees, including an audit committee which should be comprised solely of independent directors;  
- annual board formal performance evaluation; and  
- board and executive remuneration policy and disclosure.

The guidelines are on the IFSA website at <http://www.ifsa.com.au>

(G) NEW DIRECTOR PAY GUIDELINES

Non-executive directors should not be granted options or partly paid shares in incentive schemes, according to new best practice guidelines for non-executive directors released on 10 December 2002 by the Australian Institute of Company Directors (AICD).

In addition to the recommendation against granting options or partly paid shares, it is also recommended in the guidelines that:

- Non-executive director retirement allowance schemes, other than superannuation, should be gradually phased out. These allowances are rare internationally and are not consistent with shareholders' best interests.   
- Individual directors should have the freedom to determine how their remuneration is proportioned by way of fees, superannuation, and shares.  
- Given that ownership of company shares by its directors aligns with shareholder interests, directors are encouraged to purchase shares at market price in lieu of fees.  
- The directors' remuneration should be presented to shareholders in a transparent and simple manner at all times. As a minimum, the board's remuneration policy and quantum of remuneration should be set out in the company's annual report and the level of remuneration for the board must be approved by the shareholders.  
- Boards should seek professional advice on the structuring of remuneration.  
- The level of remuneration should take account of: the company's existing remuneration policies, the time involved in the position, the risks of the position, the qualifications and experience of the person, industry comparisons, the size of the company, the complexity of the company's operations, and any additional sub-committee responsibilities.   
- The level of remuneration for each director should be assessed individually.  
- Extra contributions made by directors in response to particular corporate situations or events should be remunerated, subject to board approval.

(H) M&A ACTIVITY SET TO DROP MORE THAN 50% IN 2002 AS WORLDWIDE SLUMP REACHES AUSTRALIA

Total merger and acquisition activity in Australia is set to drop by more than 50% in 2002, according to research released on 5 December 2002 by KPMG Corporate Finance. The drop in M&A activity in Australia reflects a worldwide drop in M&A activity.

M&A Transactions 1999-2002 ($A billion)

1999  
Total No: 615  
Total Value: $56.7

2000  
Total No: 522  
Total Value: $79.9

2001  
Total No: 474  
Total Value: $117.6

2002 (11 months)  
Total No: 366  
Total Value: $45.6

Source: KPMG Corporate Finance, based on industry data compiled by Thomson Financial. Unlike M&A data publicly released by Thomson, the KPMG research includes deals where an Australian company is merging with, or acquiring, an offshore company.

(I) AUSTRALIAN ACCOUNTING STANDARDS BOARD EXPOSURE DRAFT ON BUSINESS COMBINATIONS, IMPAIRMENT OF ASSETS, AND INTANGIBLE ASSETS RELEASED FOR COMMENT

On 5 December 2002 the Australian Accounting Standards Board (AASB) released for public comment proposals on how entities should account for business combinations, impairment of assets and intangible assets. The proposed changes to accounting standards are contained in Exposure Draft ED 109 which the AASB anticipates mandating for application in reporting periods beginning on or after 1 January 2005.

ED 109 relates to the International Accounting Standards Board (IASB) Exposure Draft ED 3 "Business Combinations"; and the IASB's Exposure Draft of Proposed Amendments to IAS 36 "Impairment of Assets" and IAS 38 "Intangible Assets".

The key proposals within ED 109 which will have an effect on Australian financial reporting include:

- a non-amortisation/impairment-only approach for goodwill, and identifiable intangible assets with indefinite useful lives;  
- cash flows required to be discounted to their present value in determining the recoverable amount of assets;  
- prohibition on recognising internally generated brands, mastheads, publishing titles, customer lists and items similar in substance as assets; and  
- revaluations of intangible assets restricted to fair value determinations by reference to an active market.

ED 109 contains the IASB material together with additional AASB material. This includes issues relating to transition for Australian reporting entities to the proposed international standards and specific issues affecting not-for-profit entities such as the measurement of impairment of assets that are not primarily dependent on net cash flows.

Commenting on the proposed changes Keith Alfredson, Chairman of the AASB, said:

"Many preparers will welcome the proposed abolition of mandatory amortisation of goodwill and the non-amortisation of identifiable intangible assets with indefinite useful lives. However, regard must be had to the proposed impairment testing of goodwill and other assets and the restriction on revaluing identifiable intangible assets.

"Some of these proposals represent a significant difference from existing Australian practice.

"We are therefore very keen that the Australian business community and other stakeholders take time to study the implications of these proposals and make their views known to the AASB and the IASB."

It is expected that the IASB will issue International Financial Reporting Standard (IFRS) X "Business Combinations" , the revised IAS 36 and the revised IAS 38 during the second half of 2003. The requirements within the proposed Standards are inextricably linked; hence the alignment of the proposed application dates within each.

Given the extent of the inter-relationships between the three proposed Standards which are the subject of this Exposure Draft (ED 109), and other IASB standards, the AASB proposes to mandate the application of the three proposed Standards (that are the subject of ED 109) for reporting periods beginning on or after 1 January 2005 (in accordance with the Australian Financial Reporting Council's strategy for converging AASB standards with IASB standards).

This follows the issuing in August 2002 by the AASB of ED 107 "Request for Comment on IASB ED 1 First Time Application of International Financial Reporting Standards (IFRS)."

The AASB expects to issue the Australian converged Standards arising from ED 109 at the same time as their counterpart IASB Standards.

Under the Corporations Act 2001, an entity may elect to apply the Australian converged Standards earlier than the AASB's proposed mandatory application date. Given the inter - relationships between the three proposed Standards, consistent with the proposals of the IASB, the AASB proposes that all three Standards must be applied at the same time. Consequently, if an entity elects to early adopt, it would need to adopt all three proposed Standards.

To ensure the views of Australian entities are considered in the AASB's submission to the IASB it has set an early date of 10 March 2003, for closure of responses to its ED 109. In respect to the IASB deadline, constituents have until 4 April 2003 to comment on the IASB's ED 3 and the IASB's ED of Proposed Amendments to IAS 36 and IAS 38.

ED 109 is available on the AASB's website at <http://www.aasb.com.au>

A preliminary draft AASB submission commenting on the IASB proposals will be available on the AASB website towards the end of January 2003.

For further information contact:

Keith Alfredson  
Chairman  
AASB  
Tel: (03) 9617 7618

(J) ACCI LAUNCHES CORPORATE GOVERNANCE POLICY

On 4 December 2002, in a statement issued by Mr Peter Hendy, Chief Executive of the Australian Chamber of Commerce and Industry (ACCI), Australia's peak business organisation, announced its policy on corporate governance and responsibility.

The Chamber advocates strong and effective systems of corporate governance as essential to the sustained competitive advantage of commerce and industry, and to the nation as a whole. However, the Chamber rejects the view that equates business failure with poor corporate governance. Good corporate governance does not prevent business failure; nor does business failure necessarily mean poor corporate governance. Indeed, the foundation of the limited liability system of corporate law is that failure alone is not culpable, and risk is acknowledged and shared by those participating in a business. In the view of the Chamber, optimising corporate performance, and through this shareholder value, requires a business environment driven by market forces and robust competition.

Ten key points of the policy are:

(1) The Chamber strongly supports as a matter of fundamental principle the need for the highest possible standards from company directors.

(2) The composition and size of Boards should be tailored to the requirements of individual businesses, although the Chamber prefers to see Boards having a clear majority of independent/non-executive directors and chairman.

(3) While there should not be mandatory limits on the number of directorships or chairmanships an individual can hold, those holding directorships must be able to devote the time required to perform their functions properly.

(4) Board committees, focusing on matters such as audit, remuneration and risk, can have merit, and the Chamber considers they should be formed, again, within the broader context of the needs of the individual business.

(5) The Chamber does not accept the simple proposition that the provision of different professional services by a single provider, such as an auditor, inherently means a conflict of interest.

(6) The Chamber does however encourage the relevant professional bodies to place a strong focus on dealing with conflict of interest matters.

(7) The Chamber also supports in principle the mandatory rotation of auditors at least every 5 years.

(8) The Chamber considers that an effective system of continuous disclosure of material information is essential for the proper functioning of a well-informed market.

(9) Chief executive and other senior executive remuneration packages, such as share options, should be provided in a transparent manner, with appropriate disclosures in company financial reports.

(10) The Chamber urges institutional shareholders to play a greater role in corporate governance and performance issues.

For further information contact:

Mr Peter Hendy  
Chief Executive  
ACCI  
Tel: (02) 6273 2311  
Mobile: 0419422650

(K) SURVEY OF CONFIDENCE IN CORPORATE REPORTING

Shareholders and the Australian public believe a range of parties have contributed to corporate collapses in Australia. However, company boards and chief executives carry the bulk of the responsibility, according to survey results released on 3 December 2002 by CPA Australia, the country's largest finance and accounting body.

The survey explored the factors impacting on confidence in corporate reporting in Australia. Questions were put to the public, shareholders, analysts, auditors, members of company boards and senior management.

(1) Confidence drops in share markets, but not so much in Australia

The survey revealed that recent corporate collapses have contributed to marked declines in public and shareholder confidence in local and international share markets. However the lack of confidence in overseas markets is more widespread than for Australia.

(2) Corporate collapses - who is responsible?

The survey rejected the view that any one function had failed investors and the broader public.

Of particular note were analysts responses with the Board, CEO and CFO perceived to be responsible to a 'great degree' by more than 73% of those surveyed.

(3) Financial reports - just a piece of advertising?

The survey revealed:

- only 1 in 5 people read financial reports in detail, with the majority scanning the reports;  
- only 11% of respondents believe the users of financial reports would 'not be at all confident in them';   
- nearly two-thirds of analysts believed users could be quite confident.

There was a marked variation in the perceived value of corporate reports, with more than half of shareholders and nearly two-thirds of the public believing financial reports are just another piece of company advertising. Nearly two-thirds of shareholders and nearly three-quarters of the public believe financial reports are too complex to be useful.

(4) Qualifications enhance confidence

Companies can enhance confidence in their business by ensuring key members of the Board, senior management and external auditors hold a professional accounting qualification. Shareholders and analysts agreed that a professional accounting qualification enhanced their confidence in the company and especially where the designation is held by individuals in the roles of CFO (public: 81%, shareholders: 81- 82%, and analysts 75%), Chair of the Audit Committee (public: 74%, shareholders: 75%, and analysts 72%) and external auditor (public: 79%, shareholders: 79-82%, and analysts 82%).

Around two-thirds of respondents from all groups surveyed, believed at least one member of the Board should hold a recognised professional accounting qualification from an accounting body.

The survey is available on the CPA website at <http://www.cpaaustralia.com.au/>

(L) GOVERNMENT AIMS TO REMOVE 100-MEMBER RULE FOR SPECIAL GENERAL MEETINGS

On 2 December 2002 the Parliamentary Secretary to the Treasurer, the Hon Senator Ian Campbell MP, announced that the Government intended to remove the rule allowing 100 shareholders of a company to call special general meetings.

Under the proposed change, a minimum of five per cent of total voting rights would be required before directors had to call a meeting.

"The current 100-member test gives disproportionate influence to minority shareholders and fails to recognise the substantial size difference between public companies," Senator Campbell said.

"The law as it stands is inequitable. It gives a power to minority members that is out of all proportion to their economic interest in the company. Allowing a small minority of shareholders to call an extraordinary general meeting for narrow interests can be costly and penalise the majority of shareholders.

"The proposed change would not dilute the powers of individual shareholders wishing to raise issues of genuine concern. Those issues could still be raised at annual general meetings."

Senator Campbell said the fact that 12 extraordinary meetings seeking the removal of directors had been called at the NRMA during the past two years demonstrated the need to change the law.

"In the NRMA's case, where there are about two million members, special meetings were able to be requisitioned by a mere .005 per cent of members. The cost of each of the meetings held was several million dollars.

"Commonsense says a law which allows that to happen needs to be changed. The Government believes that its proposed amendment will result in a fairer system for calling special meetings of shareholders of public companies."

Senator Campbell said economic interest should be the key prerequisite to being able to force special meetings. Australia was out of step with the rest of the world by having a rule which allowed it to be overridden.

He said the requirement in the United States and United Kingdom was 10 per cent, 5 per cent in Canada and New Zealand and between 5 and 20 per cent in Europe.

The proposed amendment to section 249D of the Company Law Review Act 1998 will be contained in the draft Corporations Legislation Amendment Bill (No 2). The draft Bill will be released for public comment shortly and is expected to be introduced in the first Parliamentary sitting next year.

Under the provisions of the Corporations Agreement between the Commonwealth and the States, the proposed changes require at least three votes from the States and the Northern Territory.

An earlier attempt by the Government to replace the 100-member threshold with a 5 per cent voting rights provision was rejected by the Senate in June 2000.

(M) NEW ZEALAND SUBSTANTIAL SHAREHOLDING NOTICE REQUIREMENTS

The New Zealand Ministry of Economic Development has issued a Discussion Paper on that country's substantial shareholding notice requirements. Following is a summary of the three parts of the paper.

Part I discusses the policy justification for having a substantial security holder disclosure regime. It outlines the objectives of substantial security holder disclosure regimes, such as promoting open dealings and ensuring that public issuers and the market are kept informed of the ownership of significant holdings of shares.

Part II outlines the current disclosure regime set out in the Securities Amendment Act 1988. It outlines the obligations of substantial security holders, the definition of "relevant interest", the information that must be disclosed, the obligations of public issuers, and the remedial orders for breaches of the regime.

Part III discusses a number of issues that the Ministry of Economic Development is seeking comment on. These include:

- Whether the current definition of "relevant interest" is still appropriate or whether an approach focused on the control of voting rights is more appropriate;  
- Whether the circumstances in which a relevant interest can be disregarded should be improved or changed;  
- Whether the reference to convertible securities in the definition of "voting securities" should be removed or amended;  
- Whether the 5% threshold for the substantial security holder regime is still appropriate and whether the threshold should be different for collective investment schemes;  
- Whether the definition of "substantial security holder" should be amended so as to provide for situations involving differential voting rights, and, if so, what the replacement definition should be;  
- Whether the substantial security holder disclosure regime should apply to collective investment schemes;  
- What the time period for disclosure should be and whether the requirement for a substantial security holder to give notice should arise only when they have actual knowledge that they should disclose or when they ought to have known that they should disclose;  
- What penalties and remedies should be available for a breach of the substantial security holder provisions and what role the Securities Commission should play in the regime; and  
- Whether any other improvements could be made to the regime to make disclosure easier and to reduce compliance costs.

The discussion document (46 pages including appendices) is available at <http://www.med.govt.nz/buslt/bus_pol/bus_law/ssh/index.html>

This discussion paper has been prepared by the Ministry of Economic Development following consultation with other government officials and agencies. Written submissions on the issues raised in the discussion paper are invited from all interested parties. After receipt of submissions they will be evaluated and further comments sought as required before the Ministry develops recommendations for the government to consider.

Submissions should be sent by email in Microsoft Word 2000 format or a lower version of Microsoft Word to dean.seymour@med.govt.nz or in hard copy to:

Substantial Security Holders Review  
Ministry of Economic Development  
PO Box 1473  
Wellington  
New Zealand  
(Attention: Dean Seymour)  
Tel: 0011 64 614-470 2318  
Fax: 0015 64 614-471 2658

(N) INDEPENDENCE OF AUSTRALIAN FINANCIAL PLANNERS DOUBTFUL - MAJORITY OWNED BY INSTITUTIONS SAYS CPA AUSTRALIA SURVEY

On 28 November 2002 CPA Australia released a new study the findings of which reveal an overwhelming 72% of Australia's top 50 financial planning dealer groups are wholly or partially institutionally owned, highlighting a trend that independent financial advice is becoming a rarity in Australia.

Truly independent financial advice is diminishing and an industry predisposed to selling packaged products and services is becoming the de facto standard in Australia's financial planning landscape, with the onus on investors to scrutinise independence, warns CPA Australia.

The extent of consolidation in Australia's financial planning industry is demonstrated by the CPA Australia survey of the top 50 dealer groups, which manage a total of 12 262 financial planners. 60% of the top 50 dealer groups are wholly institutionally owned, 12% part institutionally owned, 20% privately owned and 8% listed on the ASX.

Out of the 10 privately owned dealer groups only one ranked in the top 10, two in the top 20 and the rest (7) towards the last 50.

Highlights of results indicated:

Of the approximate total of 16 000 financial planners active in Australia:

- nearly 56% or 8931 planners operate through wholly or partially owned institutions within the top 50;   
- nearly 12% or 1898 planners operate through privately owned dealers;   
- less than 9% or 1433 planners are managed by listed entities; and   
- nearly 34% or 5398 planners operate through major financial institutions led by AMP and followed by National Australia Bank, Commonwealth Bank and AXA.

Of the total 12 262 financial planners servicing the top 50 dealer groups:

- 73% or 8931 planners operate through wholly or partially institutionally owned dealer groups;   
- 15% or 1898 planners operate through private groups; and   
- 12% or 1433 planners operate through listed dealer groups.

CPA Australia's Financial Planning Policy Adviser, Ms Carolyn Mooney, says the research demonstrates the decline of privately owned financial planning dealers and consolidation of larger institutionally operated dealers.

'Most importantly, it raises questions on the credibility of independent financial advice in Australia with an industry predisposed towards products and services over sound independent advice,' Ms Mooney said. 'We found that a majority of the top 50 financial dealer groups have completely ceased using the term independent, unbiased and impartial when describing their counsel.'

The full survey and a summary of the key findings are available on the CPA website at <http://www.cpaaustralia.com.au/>

(O) NEW ZEALAND PRINCIPLES OF CORPORATE GOVERNANCE AND FINANCIAL REPORTING

On 28 November 2002 the New Zealand Securities Commission published principles that it believes should underlie the practices of all participants in the securities market.

The principles include:

- financial reporting, corporate governance and market regulation should align with international best practice;   
- boards and management should have high ethical standards and be mindful of their responsibilities to their investors;   
- investors should be able to have confidence in the quality of audits;   
- an independent oversight body should monitor issues of audit quality and auditor independence;   
- regulators should take a rigorous approach to monitoring the securities market and enforcing the law; and  
- regulators should identify regulatory gaps and recommend reform of the law.

The Commission encourages all participants in New Zealand's capital markets to examine their practices and to make changes to improve their corporate governance and financial reporting.

The Commission's statement of principles, Strengthening Confidence in New Zealand's Capital Market - A Statement on Certain Aspects of Corporate Governance and Financial Reporting, is available on the Commission's website at <http://www.sec-com.govt.nz/>

(P) EUROPEAN UNION ANTITRUST REFORM

On 26 November 2002 the European Commission welcomed the adoption, by the Competitiveness Council, of the most comprehensive antitrust reform undertaken since 1962. This reform, proposed by the European Commission in September 2000, will fundamentally simplify the way in which the Treaty's antitrust rules are enforced throughout the European Union. Most importantly, the new Regulation abolishes the practice of notifying business agreements to the Commission, therefore reducing bureaucracy and legal costs for companies. Its adoption before the historic enlargement of the Union will strengthen vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and national authorities. It will allow the Commission and national authorities to focus their resources on the important fight against price-fixing and other agreements that are truly harmful to competition.

The proposed reform concerns the modernisation of the 40-year old procedural rules, embodied in Regulation 17 of 1962, which govern how the EU Treaty's provisions on agreements between undertakings which may restrict competition (Article 81 of the EC Treaty) and abuses of a dominant position (Article 82 of the Treaty) are enforced. The reform, which is the most comprehensive overhaul of the EU's antitrust procedures in more than 40 years, does not alter the substantive content of Articles 81 and 82 of the EC Treaty.

The new rules will come into force on the 1 May 2004, that is, at the same time as the EU takes in 10 new Member States.

(1) Summary of the reforms

The core features of the reform are:

- shifting from a system of authorisation under which all agreements have to be notified to the Commission in order to obtain antitrust approval toward a directly applicable exception system. This puts more responsibility in the hands of the companies who will need to assure themselves that their agreements do not restrict competition or, in case they do, that these restrictions qualify under Article 81(3). On the other hand it ends unnecessary bureaucracy and legal costs for companies;   
- making the provisions of Article 81(3) directly applicable, thus allowing joint enforcement of the rules governing restrictive practices by the Commission, the national competition authorities and the national courts. All competition authorities involved will closely co-operate in applying the antitrust rules.

The reform of Regulation 17 must be distinguished from the upcoming reform of the rules governing merger control. Mergers of Community dimension as defined in the applicable Merger Regulation must still be notified to the Commission prior to their implementation.

(2) Rationale for the reform

The existing system was appropriate in 1962 when there were only six Member States and there was little experience in the application of antitrust law governing agreements between undertakings. During the last forty years, however, a great number of individual decisions have been made applying the exemption criteria of Article 81(3) of the Treaty. National competition authorities and national courts are therefore well aware of the conditions under which the benefit of Article 81.3 can be granted. Individual exemptions taken by the Commission are thus no longer indispensable to ensure a uniform application of Article 81(3) of the Treaty. A system of notifications is no longer workable as the EU prepares to take in 10 new members.

(3) How will decentralised enforcement work in practice?

The Commission and the competition authorities of the Member States will put into place a network of competition authorities, called the European Competition Network (ECN), which will be a key plank of the new enforcement system. It will allow for greater co-operation between the Commission and the national competition authorities and it will provide for an allocation of cases according to the principle of the best-placed authority. As a guardian of the Treaty the Commission will have a special responsibility in the network.

The Commission will also adopt during the course of the next year a number of Notices explaining or clarifying how certain concepts must be understood with a view to providing general guidance and legal certainty for businesses.

(Q) SEC ENFORCEMENT ACTION RELATING TO BREACHES OF REGULATION FAIR DISCLOSURE

On 25 November, the SEC announced the first three proceedings taken against companies under the controversial Regulation FD (meaning Fair Disclosure). Regulation FD, adopted in 2000 under the Clinton-appointed SEC Chairman, Arthur Levitt, has been a waiting time-bomb for the financial community in its prohibition of public companies selectively disclosing any information to investment analysts (or anyone else) which was not simultaneously made public.

Regulation FD was roundly criticised by most of Wall Street who viewed the Regulation as impractical and would destroy the efficiency of the US capital markets. At the same time that Regulation FD was being debated, ASIC Chairman David Knott also made selective disclosure a big issue in Australia forcing AMP to disclose to the public what it was saying to securities analysts.

Now we have the first three "cease-and-desist" orders by the SEC against the actions of three public US companies. A SEC "cease-and-desist" order is like a plea bargain where a company does not admit its actions violated the law but agrees never to do the same action again and often has to pay a monetary penalty.

In the Raytheon Company case, the CFO of Raytheon made calls to three different investment analysts to notify them that their estimate on the earnings per share of Raytheon for the quarterly period and for the year, was too aggressive. Raytheon had previously not made public disclosure on its estimates of earnings per share. As Raytheon had not publicly commented on its earnings-per-share estimate, the SEC position was it could not notify analysts who had made EPS estimates that their estimates were too aggressive.

In Secure Computing, the CEO disclosed to an investment analyst the fact that the company had entered into an important purchase contract with a buyer, of which Secure Computing had not yet notified the public. The analyst notified other brokers within the investment bank and the stock rose over 10% in the one and half days before Secure Company made public the fact of this important purchase contract.

However, the most difficult case of a violation of Regulation FD is in Siebel Systems where the CEO had publicly disclosed that the trading conditions for the company were "tough" and "difficult". Sales and profits were down and the company's share price was declining. Three weeks later, at a Goldman Sachs Technology conference, which was not open to the public and at which certain investors were present, the same CEO changed his tune to say that conditions were "returning to normal". The CEO had reviewed internal company financial figures which supported this trend but in his comments at the seminar did not disclose such information, and only said market conditions had improved. Based on this more robust outlook, investors present bought shares of Siebel Systems which increased 20% almost immediately. The company and the CEO were found to have violated Regulation FD and were fined US$250,000. Various SEC Commissioners dissented from the Raytheon and Secure Computing proceedings because these companies and their executives were not fined, as was Siebel Systems.

Considering ASIC's move on selective disclosure in Australia, these cases point to how seriously this issue is now being taken by securities regulators worldwide. It will undoubtedly change the way corporations, investors, research analysts and the investment banking community operate.

It points to a change in the obligations of an "insider" who has material, non-public information about a company.

But the Siebel System's case is a problem - is the change of mind by a corporate MD (though based on internal non-public financial information) enough to constitute "inside" information or is it only when there is a change in the factual situation? When does a corporate executive have to tell the market that market conditions are changing?

These are vexed questions and we will have to see how aggressive ASIC will be in pursuing these issues in Australia. It will be interesting to see if regulatory developments in the US impact ASIC's thinking in the way we have seen the US Sarbanes-Oxley Act impacting the Australian Government's CLERP 9 proposals.

The author of this article is Warren Scott of Coudert Brothers. For further information please contact Warren Scott, telephone 61 2 9930 7680; email: warren.scott@sydney.coudert.com

(R) NEW REPORT SHOWS ASX TOP 100 HAVE RESPONDED TO CONCERNS ABOUT AUDITOR INDEPENDENCE WITH GREATER TRANSPARENCY AND LOWER NON-AUDIT PAYMENTS TO AUDIT FIRMS

On 22 November 2002 corporate governance research and advisory firm, Institutional Analysis, released a survey report tracking audit and non-audit fees paid by the ASX Top 100 to their auditors from 1992 to 2002.

The key findings are summarised below.

(1) The first nine years of the survey revealed a clear trend: rapid growth in non-audit fees paid while the level of audit fees paid remained relatively constant.

- From 1992 to 2001, the average audit fee paid by Top 100 companies to their audit firm increased by 9%. Over the same period, the average non-audit fee paid increased by 230%.  
- In 2001, the average fee paid by Top 100 companies to their audit firm for audit services was $1.47 million. That year the average fee paid for non-audit services was $2.99 million.   
- In 1993, non-audit fees comprised 41% of total fees paid to the audit firm by the average Top 100 company. By 2001, non-audit fees had risen to comprise 67% of total fees.

(2) In 2002 there was a significant reversal, with the average non-audit fee paid declining sharply and the average audit fee paid growing rapidly.

- The average audit fee paid grew by 27% to $1.87 million in 2002. Average non-audit fees paid slumped by 26% to $2.2 million.  
- Non-audit fees as a proportion of total payments to the audit firm by the average Top 100 company fell from 67% in 2001 to 54% in 2002.

There appears to be at least two possible explanations for the fall in the relative size of non-audit fees paid compared to audit fees paid in the ASX Top 100:

- First, a degree of self-regulation may have occurred. That is, the relative fall in non-audit fees paid by large companies may be evidence of those companies acting responsibly in the face of global concern over the independence of corporate auditors.  
- Second, the economic downturn which set in during this period may also have had an effect. Each of these factors may have played a role.

(3) 46% of ASX Top 100 companies disclosed the nature and the split of the non-audit services they received from their audit firms in their 2002 annual report, up from 30% in 2001. This is required in the United States under the recently introduced Sarbanes-Oxley Act but not a legal requirement in Australia although it was recommended in Professor Ian Ramsay's October 2001 report on the independence of Australian company auditors and this recommendation is contained in the Government's September 2002 CLERP 9 proposals.

- A possible explanation for this improvement in disclosure without any legal or regulatory drivers may be that companies have independently opted for more transparency in response to the intense global scrutiny of auditor independence.  
- The two most common categories of non-audit services disclosed in 2002 were 'Taxation Planning and Advice' and 'Due Diligence Services'.

(S) SEC PROPOSES AUDITOR INDEPENDENCE AND WORKPAPER RETENTION RULES REQUIRED UNDER SARBANES-OXLEY ACT, AGREES TO ISSUE REPORT ON ANTI-MONEY LAUNDERING RULES

In November 2002 the United States Securities and Exchange Commission approved publication of proposed rules that would require auditors to retain specific types of records. A second set of rules would require certain disclosures and reports by auditors and set conditions under which auditing firms would not be considered independent for purposes of performing audits of public company financial statements. These rules are required under the Sarbanes-Oxley Act. The Commission also approved a staff recommendation to issue a report jointly with the Department of the Treasury and the Board of Governors of the Federal Reserve System concerning the application of anti-money laundering rules to investment companies under the USA Patriot Act.

(1) The Commission voted to propose rules to implement Section 802 of the Sarbanes-Oxley Act of 2002. These proposed rules would specify the information that must be retained by auditors for a five-year period subsequent to the completion of an audit or review of a registrant's financial statements. In particular, the proposed rules would specify that auditors should retain workpapers and other documents that form the basis of the audit or review and memoranda, correspondence, communications, other documents, and records (including electronic records), which are created, sent or received in connection with the audit or review and contain conclusions, opinions, analyses, or financial data related to the audit or review. The Sarbanes-Oxley Act requires that final rules be in place by 26 January 2003. Comments on the proposal should be received by the Commission within 30 days of publication in the Federal Register.

(2) The Commission voted to propose rules to enhance the independence of accountants that audit and review financial statements and prepare attestation reports filed with the Commission. As directed by Section 208(a) of the Sarbanes-Oxley Act of 2002, the Commission is proposing rules to:

(a) revise its regulations related to the non-audit services that, if provided to an audit client, would impair an accounting firm's independence (based on the nine prohibited services listed in Sarbanes-Oxley);

(b) require that an issuer's audit committee pre-approve all audit and non-audit services provided to the issuer by the auditor of an issuer's financial statements;

(c) prohibit partners on the audit engagement team from providing audit services to the issuer for more than five consecutive years and from returning to audit services with the same issuer within five years;

(d) prohibit an accounting firm from auditing an audit client's financial statements if certain members of management of that client had been members of the accounting firm's audit engagement team within the one-year period preceding the commencement of audit procedures;

(e) require that the auditor of an issuer's financial statements report certain matters to the issuer's audit committee, including "critical" accounting policies used by the issuer; and

(f) require disclosures to investors of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer's financial statements. The disclosures, to be made in issuers' annual reports, would include fees paid by issuers for audits, tax preparation and all other fees. The proposal would require disclosure of fees for the year covered by the filing and for the previous year.  
  
In addition, under the proposed rules, an accountant would not be independent from an audit client if any partner, principal or shareholder of the accounting firm who is a member of the engagement team received compensation based directly on any service provided or sold to that client other than audit, review and attest services. The Sarbanes-Oxley Act requires that final rules be in place by 26 January 2003. Comments on the proposal should be received by the Commission within 30 days of publication in the Federal Register.

(3) The Commission approved a staff recommendation to issue jointly, with the Department of the Treasury and the Board of Governors of the Federal Reserve System, a report to Congress on applying the anti-money laundering requirements of the Bank Secrecy Act to investment companies, as required by Section 356(c) of the USA Patriot Act. The proposed report recommends regulations to apply the requirements of the Bank Secrecy Act to investment companies, including certain unregistered investment companies. The report will be published after approval by the Department of the Treasury and the Board of Governors of the Federal Reserve System.

The full text of the detailed releases concerning the proposed rules are posted on the SEC's website at **[Error! Hyperlink reference not valid.](http://www.sec.gov%20)**

(T) STRUCTURAL CHANGES LIKELY FOR MANY BOARDS, IRRC STUDY FINDS

The Investor Responsibility Research Center (IRRC) released its latest study in November 2002. According to the study a significant number of US companies face structural changes to their boards in light of proposed stock exchange listing rules that set new requirements for director independence and board committees. The study is titled Board Practices/Board Pay 2002: the Structure and Compensation of Boards of Directors at S&P 1,500 Companies. Under the New York Stock Exchange (NYSE) proposed rules, for example:

- All listed companies must have committees that deal with corporate governance matters, but only 51 per cent of NYSE companies currently have such committees.  
- All listed companies must have audit, compensation, and nominating committees and they must be fully independent. IRRC finds that 29 per cent of the audit committees, 25 per cent of the compensation committees and 48 per cent of the nominating committees at NYSE companies are not completely independent. About 20 per cent of NYSE companies do not even have nominating committees.  
- All listed companies must have a majority of independent directors on the board. Thirteen per cent of the largest NYSE companies did not have a majority of independent directors (based on IRRC's standards) as of 2002.

The study tracks trends in both board practices and board pay. Despite some spectacular corporate failures, companies generally continued to implement practices commonly associated with "good" governance, including record levels of companies with majority independent boards and an increase in the independence of audit committees. However, some disturbing features persist, such as a lack of independent directors serving on nominating committees and in positions of board leadership, a shortage of corporate governance committees, and little diversity on boards.

The study also finds that elements of director compensation continue to rise as the demands and responsibilities on corporate directors increase. Areas of significant change in director compensation practices include an increase in the value of the annual retainer and board meeting fees and an increase in the proportion of companies that grant stock options to directors on an annual basis. In addition, IRRC has identified companies that have begun to pay extraordinary compensation to audit committee members.

Highlights of some of the findings of IRRC's new study include the following:

- In all, 85 per cent of study companies had at least a majority (50 per cent of more) of independent directors serving on the board-the independence threshold proposed by the major US stock exchanges. Only 48 per cent, however, had boards that were two-thirds independent-the threshold encouraged by many institutional shareholders.  
- Both the prevalence and independence of key board committees generally reached record levels this year.  
-- 71 per cent of audit committees are comprised solely of independent directors, up from 51 per cent just three years ago.  
-- The proportion of companies with nominating committees jumped to 74 per cent from 68 per cent in the prior year. Only 50 per cent of nominating committees are fully independent, however.  
-- 41 per cent of study companies disclosed that they have a committee with corporate governance responsibilities, up just more than 10 percentage points from five years ago.  
- The recruitment of women and minorities to the boards of US companies has not changed in the last three years. Women account for 10 per cent of all directorships and minorities account for about 9 per cent. A striking finding is that women and minorities are more likely to be independent than directors overall. Eighty-six per cent of directorships held by women and 82 per cent of minority directorships are classified as independent, compared with 70 per cent generally.  
- The value of a board retainer-that is the annual fee paid in cash and/or unrestricted shares-is up nearly 4 per cent from last year, now averaging $29,350. Ninety per cent of companies pay a retainer.  
- The average board attendance fee among all companies, $1,468, has increased by 4 per cent since 2001 and 8 per cent since 2000.  
- The proportion of companies making annual option grants to directors rose a significant 10 percentage points this year, from just 58 per cent in 2001.  
- The average total remuneration of a typical non-employee director is $106,584, of which about one-third is paid in cash.  
- The practice of granting benefits to directors continues to decline.

About the study:

Board Practices/Board Pay 2002 reviews and evaluates the latest board structure and compensation practices of 1,245 US companies, and examines a total of 11,833 directors. The study is based on disclosures of governance features and board compensation amounts that were reported in proxy statements for S&P 1,500 companies that held annual meetings between Jan. 1 2002 and July 31, 2002. Each company's governance practices and compensation packages are summarized, and benchmarks are analyzed for three S&P indexes, 10 revenue bands, and 10 economic sectors.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES POLICY PROPOSAL PAPER ON ADVISERS' CONDUCT AND DISCLOSURE OBLIGATIONS

On 12 December 2002 ASIC released a policy proposal paper, Licensing: Financial product advisers - Conduct and disclosure.

The paper considers how certain conduct and disclosure obligations, under the Corporations Act, apply to the provision of financial product advice to retail clients.

It seeks comment on the guidance ASIC plans to give industry participants in regards to their conduct and disclosure obligations, including the Financial Services Guide (FSG) and Statement of Advice (SOA) disclosure obligations, as well as the suitability rule.

Comments on the policy proposal paper are sought by 21 February 2003. ASIC plans to have a final policy statement issued on these topics by the end of May, 2003.

For further information contact:

Mark Adams  
Director Regulatory Policy Branch  
ASIC  
Tel: (02) 9911 2622  
Mobile: 0402 428 025

Summary of Licensing: Financial product advisers - Conduct and disclosure

Part 7.7 of the Corporations Act requires a 'providing entity' (licensee or authorized representative) to comply with certain conduct and disclosure obligations when it provides financial product advice to retail clients. These conduct and disclosure obligations vary depending on whether the advice is general advice or personal advice.

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

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

(a) preparing and providing an FSG;

(b) complying with the suitability rule (s945A);

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

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

The policy proposal paper sets out ASIC's current thinking in relation to these obligations. In particular, it provides guidance on:

(a) the difference between personal and general advice;

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

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

(d) the suitability rule (s945A), including the extent of the obligation to make 'client inquiries' and the meaning of 'appropriate' advice; and

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

The paper sets out proposed relief from the FSG obligation in two cases:

(a) conditional relief for product issuers providing general advice;

(b) conditional relief in relation to standardised advice provided by call centre and similar staff.

The policy proposal paper sets out a proposed licence condition to clarify the record-keeping obligations of licensees.

The policy proposal paper should be read in conjunction with the various policy statements and guides ASIC has previously issued on how it administers the new licensing regime, in particular Licensing: The scope of the licensing regime: Financial product advice and dealing - An ASIC guide (November 2001, updated November 2002).

It is important to note that the policy proposal paper is based on the legislation and regulations as at its date of publication. ASIC will take into account any changes in the legislation or regulations in the finalisation of this policy.

In particular, ASIC will review its proposals, if necessary, in light of any draft regulations published in the coming months. It is recommended that readers consider any draft regulations published by the Commonwealth Treasury, which will be available from their website at <http://www.treasury.gov.au>

(B) POLICY STATEMENT 173: ON-SALE OF FINANCIAL PRODUCTS

On 3 December 2002 ASIC released Policy Statement 173: Disclosure for on-sale of securities and other financial products.

This policy addresses industry concerns about the on-sale provisions in the Corporations Act, which require prospectus disclosure (or a Product Disclosure Statement) for certain on-sales of securities and other financial products.

The on-sales provisions are sections 707(3) and (4), and sections 1012C(6) and (7) of the Corporations Act.

These provisions are designed to minimise the opportunity for product issuers to avoid preparing offer documents (such as prospectuses or Product Disclosure Statements) by first issuing the product to an intermediary who then on-sells them in the wider market.

'The new policy statement gives relief from the on-sale provisions of the law, in situations where retail investors have access to alternative disclosure that is comparable to what would normally be contained in a prospectus or Product Disclosure Statement', ASIC Executive Director, Policy and Markets Regulation, Mr Malcolm Rodgers said.

'The policy will facilitate cost-effective fundraising in wholesale markets without adversely affecting the interests of retail clients.

'There is also relief to ensure that financial products can be readily on-sold after they are issued to people, under ASIC class orders or certain statutory exemptions from the disclosure requirements', he said.

Policy Statement 173 was developed in consultation with industry participants and organisations.

The new policy will replace ASIC's interim relief announced on 7 March 2002 and 28 June 2002 (see Information Release 02/03 and Media Release 02/235 respectively).

Copies of Policy Statement 173 and related Class Order [CO 02/1180] can be obtained from ASIC's website at <http://www.asic.gov.au>

3. RECENT ASX DEVELOPMENTS

(A) ENHANCED DISCLOSURE - LISTING RULE AMENDMENTS

On 19 July ASX released its exposure draft "Enhanced Disclosure" which deals with proposed listing rule amendments to improve the operation of the continuous disclosure framework and is available at www.asx.com.au. Following the release of its response document the ASX has now released the proposed rules and a new continuous disclosure guidance note which are both available at <http://www.asx.com.au>. Amongst other things the rule changes affect companies' continuous disclosure obligations and financial reporting obligations.

(B) ASX TO FORM AUSTRALIAN CLEARING HOUSE

ASX is in the process of restructuring its clearing and settlement functions to create a single central counterparty (CCP) that will provide contract guarantee support for clearing across all ASX markets under a clearing house to be called Australian Clearing House (ACH). Under the proposed new structure:

- ACH will consolidate ASX's current licences for clearing of equities, warrants and fixed interest products (in place of the current licensee, ASX Settlement and Transfer Corporation (ASTC), and options and futures (in place of the current licensee, Options Clearing House (OCH)).   
- At the same time, the responsibility of the ASTC, which currently provides settlement services for equities, warrants and fixed interest products, will be expanded to embrace payment and delivery services across all ASX markets.

As an interim step in this restructuring, ASX implemented the following three initiatives on 2 December 2002:

- the replacement of TNS Clearing Pty Ltd (TNSC), the current CCP for CHESS approved securities, primarily equities, with OCH, thus ensuring OCH is the sole CCP for all assets traded on the ASX; in this role OCH will over time transition to the new ACH;   
- the approval and receipt of a C&S facility license variation covering both options and futures under FSR; and  
- the introduction of the OCH Derivatives Clearing rules which replace the existing OCH and ASX business rules relating to options and futures.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECLINES APPLICATION IN RELATION TO EQUITY-1 RESOURCES NL

On 11 December 2002 the Takeovers Panel advised that it had declined to commence proceedings in relation to an application by Equity-1 Resources NL (Resources) for a declaration of unacceptable circumstances and orders in relation to an announcement of a proposed takeover bid by Equity-1 Limited (Limited).

Resources asserts that the announcement of the proposed bid by Limited on 3 December was intended to disrupt a meeting of Resources and that this constitutes unacceptable circumstances. The meeting was in the process of considering a number of resolutions to approve a change to Resources' activities (including a proposed investment in MIS Orthopaedics). The meeting was subsequently adjourned to Friday 13 December 2002.

Resources sought orders that Limited not proceed with the proposed takeover offer. Alternatively, Resources sought orders that the proposed takeover offer proceed as currently announced and that Limited not prevent the adjourned annual general meeting from occurring at the designated time and place.

The Panel considered that, on the facts currently before it, the announcement of the takeover bid by Limited does not constitute frustrating action and does not prevent Resources' shareholders from making an informed decision in relation to the resolutions to be considered at Resources' adjourned meeting. The Panel therefore declined to conduct proceedings on the application before it.

However, the Panel was concerned at the adequacy of information currently provided to Resources shareholders. The Panel noted its concerns in relation to:

- the information provided by Resources in relation to its proposed investment in MIS Orthopaedics: and  
- the information provided to Resources shareholders by Limited in relation to the details of the bid, the future direction of Resources under Limited controllership and the relationship of Limited's proposed takeover bid with a proposed share placement Limited requested Resources to make to it.

The Panel has advised both Resources and Limited that it considers that there appears to be a risk that Resources shareholders may be being asked to make material decisions about the future ownership, control and direction of their company with inadequate information.

The Panel advised that, although there are a number of issues of potential concern in relation to both transactions, which may warrant future applications to the Panel, it considered it appropriate to allow the promoters of those transactions the opportunity to address those issues rather than interfere prospectively on the basis of the current application.

The President of the Panel appointed Meredith Hellicar, Andrew Lumsden and Brett Heading to consider the application.

5. RECENT CORPORATE LAW DECISIONS

(A) SHAREHOLDER GRANTED ACCESS TO COMPANY RECORDS  
(By Catherine Roberts, [Blake Dawson Waldron](http://www.bdw.com.au))

Acehill Investments Pty Ltd v Incitec Ltd [2002] SASC 344, Supreme Court of South Australia, Debelle J, 18 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2002/october/2002sasc344.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

Acehill Investments Pty Ltd ("Acehill") had serious concerns about a proposed restructure of Incitec Ltd ("Incitec"), in which it had a substantial shareholding. Acehill accordingly applied to the Supreme Court of South Australia, under section 247A of the Corporations Act 2001 (Cth) ("the Act"), for an order granting access to documents relevant to the Incitec restructure. Incitec applied, under section 1337 of the Corporations Act, for an order transferring the application to the Supreme Court of Victoria.

Debelle J dismissed Incitec's application on the grounds that although the Supreme Court of Victoria had made orders calling for shareholder meetings and had directed the delivery of the Explanatory Statement to shareholders, Acehill's application was urgent and a transfer would therefore be impractical. His Honour granted Acehill's application on the grounds that Acehill should be entitled to ascertain whether its interests were being fairly and reasonably treated under the proposed scheme. His Honour was satisfied that Acehill had genuine concerns, was acting in good faith, and that it had a proper purpose in seeking inspection.

(2) Facts

Acehill held 20.8 per cent of the shares in Incitec. Orica Investments Pty Ltd ("Orica") held a further 77 per cent of the shares. The remaining 2.2 per cent were held by other shareholders.

On 29 August 2002, Incitec announced a proposal for a major restructure of its business activities. The proposed restructure would involve separating Incitec's industrial chemicals business from its fertiliser business, with Orica acquiring Incitec's industrial chemicals business, and Incitec's fertiliser business merging with Pivot Ltd to create "Incitec Pivot". On 20 September 2002, Hansen J in the Supreme Court of Victoria made orders calling for two meetings of shareholders in Incitec and directing the delivery of an Explanatory Statement to shareholders. Incitec subsequently sent an Explanatory Statement to its members, including a report of an independent expert ("the Grant Samuel Report").

Acehill had a number of concerns about the proposed restructure. Namely, Acehill was concerned about whether it would receive a fair price for its investment in Incitec's industrial chemicals business; the potential incursion of high transaction costs; the lack of scope for a refund of a $5 million contingency fee from Orica in the event that the demerger proposal was not approved; the exclusion of the demerger co-operation deed from the Explanatory Statement; the assumptions and methodologies informing the Grant Samuel Report; and the price at which the Grant Samuel Report had valued the industrial chemicals business.

Acehill accordingly wrote to Incitec and requested access to certain books and documents relevant to the proposed restructure. Incitec refused. Acehill then applied, under section 247A of the Act, for an order authorising named persons to inspect the relevant records. Incitec applied, under section 1337 of the Corporations Act, for an order transferring the application to the Supreme Court of Victoria.

(3) Findings

Debelle J dismissed Incitec's application and granted Acehill's application.

(a) Incitec's section 1337 application

Incitec contended that Acehill's application should be transferred to the Supreme Court of Victoria on the grounds that it essentially sought to set aside Hansen J's approval of the Explanatory Statement. Incitec further argued that orders made on Acehill's application would be inconsistent with the orders made by Hansen J and that, as such, the matter should be transferred as a matter of comity and courtesy.

Debelle J noted that, as a general rule, once a court is seised of issues relating to the administration of a company, all other ancillary issues should be heard and determined by that same court. That principle is dictated by considerations of comity, courtesy and, more importantly, consistency. However, Debelle J held that there were factors which militated against transferring the application in this case. Firstly, the urgency of Acehill's application rendered a transfer impractical. Secondly, Acehill did not seek to challenge the Explanatory Statement - rather, it only sought further information. It could therefore not be said that Acehill was seeking to set aside Hansen J's approval of the Explanatory Statement and there was no real risk of inconsistent orders being made.

(b) Acehill's section 247A application

Section 247A(1) of the Act provides that on application by a member of a company, the Court may make an order authorising the applicant to inspect books of the company. The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

Incitec opposed Acehill's application on a number of grounds. Firstly, Acehill's holding company, Elders Australia Ltd ("Elders"), was a substantial dealer in fertilisers and traded with Incitec. It was asserted that Elders was seeking, through Acehill, to secure undertakings from Incitec in respect of the distribution of fertiliser products and to secure a seat on the board of Incitec Pivot. Further, Incitec asserted that the purpose of Acehill's application was to assist in securing a shareholding of 20 per cent in Incitec Pivot and for Elders to gain access to information regarding prices it paid to Incitec. Although Debelle J conceded the legitimacy of such concerns, his Honour considered them to be ill-founded in the circumstances.

Secondly, Incitec was concerned that the purpose of Acehill's application was to increase the price to be paid for the cancellation of the shares in the industrial chemicals business. However, Debelle J found that such purpose, even if held by Acehill, would not amount to an improper purpose, as Acehill was entitled to ascertain whether the price being offered was fair and reasonable.

Thirdly, Incitec opposed the application on the ground that it was inappropriate for Acehill to examine board papers. It was submitted that access should be limited to documents relating to the results of the decisions of Incitec's directors, as stated in Re Claremont Petroleum NL (No 2) [1990] 2 Qd R 310. However, Debelle J held that it was appropriate to depart from this general principle, given that the expert who prepared the Grant Samuel Report had reviewed and relied upon board papers. Further, Acehill was not seeking to inspect documents relating to a company decision. Rather, it was seeking to examine documents pertinent to the determination of value.

Debelle J concluded that Acehill, as a substantial shareholder of Incitec, should be entitled to ascertain whether its interests were being fairly and reasonably treated under the proposed scheme. Further, it should be granted access to the information which would enable it to make an informed decision when voting at the meeting called by order of the Supreme Court of Victoria. His Honour was satisfied that Acehill had genuine concerns, was acting in good faith, and that it had a proper purpose in seeking inspection. His Honour accordingly made an order authorising the inspection of certain books and documents of Incitec by Acehill's expert valuer and its solicitors. Acehill's secretary, as a senior executive of a company whose holding company traded at arms length with Incitec, was not permitted access to such records on the grounds that he may come across commercially sensitive documents and thereby give Elders a commercial advantage in its dealings with Incitec.

(B) ADMINISTRATIVE ARRANGEMENTS AVAILABLE WHERE SMALL CLAIMS ARE PAYABLE  
(By Michael Tamvakologos, [Blake Dawson Waldron](http://www.bdw.com.au))

One.Tel Ltd [2002] NSWSC 1081, Supreme Court of New South Wales, Barrett J, 15 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/november/2002nswsc1081.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

The plaintiffs in this matter were the liquidators of One.Tel Limited and ten of its subsidiaries ("the Companies"). Each company was in voluntary administration, and being wound up pursuant to Part 5.3A of the Corporations Act 2001 (Cth) ("the Act").

It was resolved that each company be wound up pursuant to Section 439C(c) of the Act, whereupon Section 446A of the Act would operate.

The plaintiffs, by way of interlocutory application, sought two orders:

(a) that it not be required to pay dividends to creditors where the dividend entitlement was less than $25 (the first application); and

(b) pursuant to section 447A(1) of the Act, that Part 5.3A of the Act operated to extend the provisions of section 446A(2) of the Act so that the liquidators did not have to comply with their notice requirements in the Corporations Regulations (the "Regulations") with respect to creditors with debts or claims of $100 or less (the second application).

(2) The facts

A number of One.Tel creditors were owed money as a result of incorrect charge reversals to their accounts or overpayment by them as customers. This was largely due to the fact that One.Tel supplied telephone services (including mobile telephone services) to a large number of customers who typically paid for these services in advance, with the result that, when the companies ceased trading, some customers had already paid for services which were never delivered.

The applications made affected 236,512 persons, all of whom had a potential claim against the companies of $100 or less.

The plaintiffs submitted that if, during the winding up of the company, two to three notices of meeting and report to creditors were sent to each creditor, at a cost of $7.65 per creditor (for photocopying, envelopes and postage) this would amount to a cost of approximately $1.8 million.

Further, if notices to submit formal proof of debt and notice of intention to declare a dividend were required to be sent pursuant to the Regulations, this would amount to a cost of $153,732.

It was argued on behalf of One.Tel that it was unduly onerous to incur such great expense considering the little advantage that would be accorded to the customers if these notices and reports were sent out.

(3) The first claim

The plaintiffs submitted that section 140(9) of the Bankruptcy Act applied in the instant case so that they need not pay dividends to creditors whose dividend entitlement was less than $25.

Section 140(9) of the Bankruptcy Act states:

"where, but for this sub-section, the amount due to a creditor in respect of a dividend would be less than $10 or ... a greater amount ... prescribed by the Regulations ... the Trustee need not pay the dividend to the creditor."

Regulation 6.21 of the Bankruptcy Regulations 1996 prescribed an amount of $25.

It was submitted for the plaintiffs that section 140(9) of the Bankruptcy Act applied in this case by virtue of section 553E of the Corporations Act which states:

"subject to this division and to section 279, in the winding up of any insolvent company the same rules are to prevail and be observed with regard to debts provable as are in force for the time being under the Bankruptcy Act 1966 ... and all persons who in any such case would be entitled to proof for and receive dividends out of the property of the company may come in under the winding up and make such claims against the company as they respectively are entitled to because of this section."

Justice Barrett held that the effect of section 553E of the Act was to bring into operation such of the Bankruptcy Rules "with regard to debts provable" as do not have obvious counterparts in Division 6 of the Act, are not contrary to it and supplement its schemes with regard to "debts provable".

The Court, in holding that section 140(9) was a provision with regards to 'debts provable', held that this provision was not just directed towards proving debts, but allowing them in the first place. That is, it gave the Trustee a discretion in a case where a debt was "proven", to augment the entitlement of the creditor to the dividend by deciding not to pay it.

The Court concluded that section 140(9) of the Bankruptcy Act applied by virtue of section 553E of the Corporations Act and could be used to enable the plaintiff to avoid paying a dividend to creditors whose dividend entitlement was less than $25.

(4) The second claim

The application made under section 447A(1) was to enable the plaintiffs to avoid complying with certain Regulations, which obliged them to send a notice of creditors meeting to every creditor of the company, notice of deadline fixed by liquidator for admission of proofs of debt, notice of intention to declare a dividend and notice of declaration of dividend.

The liquidator's aim, in seeking to be exempted from these requirements, was to avoid the costs of mailing, processing and handling in those cases where, according to the indicated rate of dividend, the amount involved was $30 or less.

The Court held that each of the companies involved in this application passed from a Part 5.3A administration into a creditors voluntary winding up by virtue of a resolution of creditors under section 439C(c).

Once applicable, section 446A was held to constitute its own regime and dispense with the normal regime operating in cases of voluntary winding up. As section 446A, a Part 5.3A provision, was the source of this winding up regime, section 447A was held to be available to modify the operation of section 446A.

In determining whether the plaintiffs should be allowed to dispense with giving the required notices as required by the Regulations, the Court examined the Regulations themselves.

The Court held that whilst the proposition that creditors with small claims were worthy of less consideration than those with more substantial claims should be treated with caution, it was satisfied that unwarranted expense, disproportionate to the benefits invoked, would be occasioned if plaintiffs were held to full compliance with all of the provisions requiring individual notification of persons with claims or debts of $100 or less.

However, the Court held that every creditor with a small claim should be given a reasonable explanation of the likely effect of winding up as it affected him or her.

This balance would be achieved by sending all small claim creditors a circular explaining the significance of section 104(9) of the Bankruptcy Act so far as it applied, stating that particular notices would not be sent to them, stating that there would be published in particular newspapers and on the Internet every notice of meeting that they would otherwise not receive, advising the recipients to monitor those newspapers, and containing a plain language explanation of the significance of the circular for persons with debts and claims of $100 or less.

Matters advertised in the newspapers would have to be prominent and give affected creditors a reasonable opportunity to decide what, if anything, they would do in response.

In closing, Justice Barrett stated that the Corporations Act does not sanction the exclusion of creditors with small claims, even where it is likely that section 140(9) of the Bankruptcy Act would be used to preclude payment of dividends to most of them. In this case, although section 447A of the Act would be used to modify the winding up provisions otherwise applicable, this was no case for simply depriving persons with small claims of all notification.

The section 447A procedure could, however, be used in an appropriate case, such as the present, to reduce costs by substituting other procedures to inform creditors such as a single circular supplanted by information disseminated in both newspapers and on the Internet.

(C) WHETHER A MEETING HAS BEEN 'HELD' UNDER THE CORPORATIONS ACT 2001  
(By Emma Bloomer, [Phillips Fox](http://www.phillipsfox.com))

ASIC v NRMA [2002] NSWSC 1135, Supreme Court of New South Wales, Windeyer J, 28 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/november/2002nswsc1135.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

In previous proceedings (No 3237 of 2002 and No 3345 of 2002), Windeyer J extended the date to 17 October 2002 by which NRMA was required to hold a general meeting requested by members to consider two resolutions. The first of these resolutions sought the removal of a particular group of directors, known as the Members First group, while the second resolution sought the removal of another group of directors, known as the Talbot group. If both of these resolutions had been passed and the members of the board remained unchanged from the date of the previous proceedings, NRMA would have been left without any directors.

The company called the general meeting to consider these resolutions on 17 October 2002, however the meeting venue was unable to hold all of the persons who were entitled to vote at the meeting. As a result, before a chairperson was appointed, the meeting was adjourned by the President of NRMA to a date to be fixed. NRMA now proposes to continue the adjourned meeting on 14 January 2003, and to hold the annual general meeting immediately before this adjourned meeting. The board of directors of NRMA had resolved (if only in principle) to include a resolution in the annual general meeting that all members of the board as at November 2002 should resign from office, with the right to seek reappointment as directors of NRMA in the future. However, as support for this proposal did not appear to be unanimous, this resolution was likely to be raised at the annual general meeting. The NRMA annual general meeting must be held in 2002, unless an extension of time is granted by ASIC. NRMA has applied to ASIC for an extension until 14 January 2003.

In addition, a further meeting was requested by NRMA members to consider the removal as directors of five persons appointed to the board of the company to fill casual vacancies arising from the resignation of directors over the preceding months. In a prior proceeding (No 5261 of 2002) Palmer J held that NRMA was obliged to call a meeting to consider this resolution, and in this proceeding Windeyer J extended the time for the holding of this meeting until 15 January 2003.

(2) The proceeding

ASIC commenced these proceedings, and claimed orders against NRMA under section 1324 of the Corporations Act 2001 (the Act). The orders sought required NRMA to continue the adjourned meeting on or before 17 December 2002, to send notices of this meeting to members by 25 November 2002, and to publish notices of this meeting in the Sydney Morning Herald and the Daily Telegraph on or before 25 November 2002. ASIC also sought orders that NRMA count all proxy votes already received and include these in any poll conducted at this meeting, and to put the two resolutions outlined above to this meeting.

Windeyer J noted that section 1324(1) of the Act provides that where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute a contravention of the Act the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

Further, section 1324(2) provides that where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required to do by the Act, the Court may, on the application of ASIC or any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing, grant an injunction on such terms as the Court thinks appropriate, requiring the first-mentioned person to do that act or thing.

Section 249D of the Act is headed 'Calling of general meetings by directors when requested by members', and subsection (5) provides that the directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company.

The question to be answered in this proceeding was whether the required meeting had been 'held' under the Act. If the meeting was found to be held, there would be no contravention of the Act, and no conduct to which section 1324(1) could apply. In contrast, if the meeting was found not to have been held, NRMA's conduct would be in contravention of the Act, for failing to hold the meeting within the time specified by the Court.

(3) The arguments

ASIC relied on the ordinary meaning of the word, and argued that a meeting was 'held' once it had commenced and concluded. NRMA submitted that a meeting may be 'held' once it had been duly commenced and lawfully adjourned, suggesting that any other interpretation would abrogate the power to adjourn a meeting, and make it a requirement to complete such meetings within the stipulated time.

(4) The decision

Windeyer J found that the ordinary meaning of the word 'held' required the completion of the meeting, and did not permit the adjournment of this meeting beyond the statutory time period, unless ordered by the Court. His Honour noted that the clear intention of section 249D of the Act was to require the proposed resolutions to be dealt with within the time prescribed, and that this might not occur if the chairperson could exercise their power of adjournment to fix some future time for consideration of the resolutions.

Windeyer J found that this interpretation of the word 'held' was supported by the decision of the High Court in Guss v Veenhuizen (1976) 136 CLR 34. This case dealt with section 136 of the former Companies Act 1961 which required the annual general meeting of every company to be held at least once each calendar year. In this case, Barwick CJ found that the word 'held' meant a meeting called and concluded within the calendar year. He noted that the company retained the power to adjourn its annual general meeting, but that this meeting must be concluded within the confines of the calendar year. Similarly, Mason and Stephen JJ found that where all that takes place within the time period prescribed was an adjournment of the meeting to a date outside this period, it was impossible to conclude that the meeting was held within the required time.

Windeyer J noted that the business of the meeting requested by the members was the consideration of the proposed resolutions, and he found that the decision in Guss supported the conclusion that the consideration of these 2 resolutions was the business of the NRMA meeting which had to be concluded within the time prescribed by section 249D of the Act. As this business was not concluded within the required time, his Honour found that NRMA had contravened the Act, and as a result the Court was empowered to make orders under section 1324.

His Honour found that there were proper reasons for not ordering that the meeting be held on or before 17 December 2002, and noted that there was no intentional conduct on the part of NRMA to place the company in contravention of the Act. However, he did point out that NRMA's decision to hold the meeting on the last possible day left no room for flexibility if the unexpected happened. Windeyer J concluded that rather than order that the meeting be held on or before a particular date, he would extend the time for the holding of the meeting up to 15 January 2003.

His Honour recognised that NRMA was required by law to give notice of the time and place of the adjourned meeting, and to deal correctly with the proxies, and he found no reason to suspect that the company would not do so. Windeyer J also found that NRMA was free to advertise notice of the adjourned meeting anywhere it wished, and that to place notices in only the Sydney Morning Herald and Daily Telegraph (as requested by ASIC) would exclude a significant number of NRMA members who reside in country areas. As a result, his Honour declined to make any of the orders sought against NRMA by ASIC.

Windeyer J noted that it was for ASIC to consider the request of NRMA for an extension of time for the annual general meeting, but stated that it was clear that such an extension would have to be granted. His Honour concluded that there were a number of meetings to be called by NRMA, and noted that the costs incurred in holding such meetings could be reduced if they were held on the same day, or on consecutive days. As Windeyer J granted an extension of time for the holding of the meeting as adjourned from 17 October 2002 to 15 January 2003, he considered that it was not appropriate to make an order under section 1324 of the Act. His Honour noted that had he not allowed NRMA to make an application for an extension of time then it would have been appropriate to make an order under this provision. As a result, although the proceedings were dismissed, his Honour made no order as to costs.

(D) WHEN CAN SPECIAL GENERAL MEETINGS BE CALLED UNDER THE CORPORATIONS ACT 2001?  
(By Arvind Dixit, [Phillips Fox](http://www.phillipsfox.com))

NRMA Limited v Scandrett [2002] NSWSC 1123, Supreme Court of New South Wales, Palmer J, 25 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/november/2002nswsc1123.htm> or <http://cclsr.law.unimelb.edu.au/judgment/>

(1) Background

The defendants, Messrs Scandrett and Snodgrass, were both members of the NRMA. In accordance with section 249D(1)(b) of the Corporations Act 2001 (Cth) ('Act') which provides that the directors of a company must hold a general meeting on the request of at least 100 members, the defendants requisitioned a meeting of NRMA to be held on 17 October 2002.

The purpose of the special general meeting was to dismiss certain directors and prevent the appointment by the board of directors of any new directors to fill casual vacancies on the board. The defendants proposed 2 resolutions to bring about these objectives. Resolution A provided that 5 directors should be removed from the board, namely Kathleen Evans, Bruce Fisher, Brian Johnston, Ken Rennie and Ross Turnbull. Resolution B provided that any directors appointed to the board during the time that the polls for Resolutions A and B were declared at the special general meeting and the time that polls for any resolutions were declared at the 2002 annual general meeting, should be removed as directors of NRMA.

Each of the 5 directors referred to in Resolution A was appointed to fill casual vacancies arising from the resignation of another director. Each director was also associated with the 'Members First' faction within the NRMA. Shortly after the requisition was served on the NRMA one of the directors, Ken Rennie, resigned.

NRMA sought declarations to the effect that it was not obliged to call and hold the meeting on the basis that: (1) neither of the 2 resolutions could validly be passed at any meeting of the company; (2) the holding of a meeting for the purposes of considering the resolutions would not be for a proper purpose within the meaning of section 249Q of the Act; and (3) the power to requisition a meeting under section 249D of the Act was exercised by Messrs Scandrett and Snodgrass for an improper purpose and was therefore invalidly exercised. NRMA also sought orders restraining the defendants from presenting any further requisitions to NRMA for the convening of meetings to consider resolutions in terms similar to the subject resolutions.

(2) Decision

(a) Validity of Resolution A

The plaintiff submitted that Resolution A cannot validly be passed by a meeting of NRMA because it seeks to remove more than 1 director. It was argued that under section 203D of the Act a director can be removed only by a resolution confined in terms to the removal of that particular director, not as a block of directors: NRMA v Bradley (2002) 42 ACSR 616.

The plaintiff argued that to treat directors in groups for the purpose of a resolution to remove is to disregard the fundamental principle which guides directors in their conduct, namely to act independently in the best interest of the company as a whole. This would suggest that if directors must act independently, they must also be judged independently, and not in a block.

Palmer J, however, stated that a director may be removed from office for any number of reasons which may have nothing to do with the director's independence or lack of it. He also cited the example of where 2 or more directors have participated in some dishonest or improvident transaction which would warrant the members removing all directors who were involved with one strike. His Honour held that members may take the view that a group of directors, although comprising different individuals, should all be removed for the same reason and that it is therefore appropriate and expedient to remove them by the same resolution.

The plaintiff then contended that parallels can be drawn between sections 203D and 201E of the Act. It was argued that since section 201E prohibits the passing of a resolution for the appointment of 2 or more directors at once, which is similar to section 118 of the former Companies Act 1961, similar principles should be applied to the dismissal of directors under section 203D of the Act.

Palmer J, however, drew a distinction between the 2 sections since they were different in nature and yielded different consequences. His Honour stated that a candidate for appointment may not be known to members but may be voted in by virtue of being blocked with a well-known candidate, which may lead to an unfair and potentially hazardous appointment. On the other hand, the performance in office of directors under threat of removal is likely to be known to members, enabling then to form a judgement as to who they will retain, and who they will remove. Therefore if there is a single resolution of dismissal for multiple directors, members may vote against the resolution in its original terms and procure a fresh resolution.

Palmer J also emphasised the fact that provisions similar to those in section 201E were not included in section 203D of the Act. His Honour stated that it would have been very easy to incorporate into section 203D provisions similar to those in section 201E and it would be presumptuous to think that the legislature had simply overlooked the obvious question whether the removal of directors should be subject to the same provisions as their appointment.

It was then noted by the plaintiff that the fact that section 203D of the Act refers only to 'a director'. The plaintiff argued the use of the singular indicates that a resolution for the removal of a director means a resolution for the removal of only 1 director. Palmer J cited the cases of Taylor v McNamara [1974] 1 NSWLR 164 and Claremont Petroleum NL v Indosuez Nominees Pty LTd (1986) 10 ACLR 520 which were contrary to the plaintiff's argument. In Taylor it was concluded that there was no reason why it should be inferred that the intention of the legislature was inconsistent with the reading of 'a director' as 'directors' and thus a resolution for the removal of all directors of a company was valid. Palmer J observed that the facts in Taylor were directly on point with the present case and nothing in the Act evinces a general legislative policy that the removal of directors should be effected by separate resolutions, as was argued by the plaintiff.

The plaintiff then contended that Resolution A could not validly be put to a meeting. This was because it could not be passed in the terms proposed, namely the removal of 5 directors, on the basis that 1 of the directors had already resigned. In addressing this argument his Honour followed the decision of Young J in Totally & Permanently Incapacitated Veterans' Association of NSW Ltd v Gadd, where it was held that if the general substance of what is in the notice of meeting is not affected by the resolution as passed, or something lesser is proposed by way of amendment, this is acceptable. On this basis Palmer J concluded that the removal of 1 of the director's names from Resolution A would be well within the substance of the resolution, and hence the resolution remained acceptable.

(b) Validity of Resolution B

Palmer J considered that if Resolution B were passed, a director appointed to fill a vacancy during the specified period would be removed from office immediately upon, and by virtue of, their appointment. This would make it impossible for such a director to exercise the right to put their case to members in accordance with sections 203D(3), (4) and (5) of the Act.  
On this basis, his Honour concluded that sections 203D(1) and (2) of the Act apply only to a resolution to remove a director who is in office at the time that the notice of intention to move the resolution is given to the company. Resolution B, however sought to remove unnamed directors, not yet appointed. Therefore his Honour held that Resolution B was not valid to be passed at a meeting of NRMA.

(c) Validity of the requisition

The plaintiff submitted that under section 249(D)1 of the Act, the right given to members of a company to requisition a general meeting must be exercised for the purpose it is given, and not for a purpose other than the passing of the resolution contained in the requisition. It was submitted that in addition to the purpose of having Resolution A passed, the defendants had other improper purposes such as harassing the company and causing trouble and expense to its directors. On this basis the plaintiff argued that the second, improper purpose, vitiated the requisition entirely.

The plaintiff also argued that the requisitions to consider Resolutions A and B should be seen as part of a campaign which is being waged for the benefit of one group of directors in order to enable that group to gain control of the board. Palmer J held, however, that such a purpose is not improper since the right to requisition a meeting for the purpose of removing directors is akin to any democratic process as exists in the governance of public companies. His Honour drew the parallel with the body politic where the will of the majority is permitted to decide the contest as often as elections may lawfully be held. In the case of a public company, his Honour stated that the will of the majority should be permitted to decide the contest as often as members can muster sufficient numbers to invoke the right to requisition a meeting under section 249D(1) of the Act for the purpose of a resolution under section 203D(1) of the Act.

It was submitted by the plaintiff that the defendants have complete disregard for the interests of the NRMA which is evinced by their intention to requisition meetings as often as they can, regardless of the heavy costs of convening them. The plaintiff pointed to the allegedly intemperate and defamatory language used in the draft statement in support of Resolutions A and B, and their belief that the defendants must have known that Resolution B was invalid, to support their contention.

His Honour, in contrast, stated that NRMA had not in fact satisfied its onus of proving that the defendants had actually intended to inflict financial expense as a tactic in their battle for control of the board. His Honour made it clear that it was not for the court to judge the merits of the substance of the defendants' claim and whether or not it was the correct view, since there was nothing in the evidence to suggest that the defendants and their supporters did not genuinely hold that view. Palmer J did not accept the argument that the defendants knew that Resolution B was invalid, as there was no evidence that the defendants had received any legal advice in drafting the resolution, and hence could not be imputed with the knowledge of legal experts.

His Honour then drew a distinction between the purpose for which a requisition is made and the motive of the requisitionist in making it. Palmer J held that if the purpose for which the requisition was made was truly to have a meeting of members convened in order to consider and pass a resolution, then it did not matter that the motive was to pursue that purpose by ill-will or self interest. His Honour then cited Swansson v R A Pratt Properties Society (1915) 20 CLR 509 which established that if a litigant institutes proceedings to invoke a remedy for which the law provides in such proceedings, then there will not be an abuse of process even if the plaintiff 'is spurred on by intense personal animosity, even malice, against the defendant', since 'it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue'.

By way of final observation, Palmer J strongly endorsed what was said by Windeyer J in NRMA v Snodgrass (2002) 42 ACSR 371 where his Honour stated that it 'seemed extraordinary that in a company limited by guarantee with about 2 million members a general meeting can be summoned by requisition of 100 members , namely 1 in every 20000 or 0.005%'. Windeyer J went on to state that 'there is provision under section 249(D)(1A) of the Act for prescription by regulation of a different number of members for the purposes of the application of section 249D(1)(b) of the Act to a particular company'. However, such a regulation was disallowed by the Senate several years ago. Despite this, Windeyer J stated that 'the time has well and truly arrived for a regulation to be made under this provision in respect of NRMA' but 'until it is the rights of members must be decided on the basis of their present rights'.

Palmer J therefore concluded that Resolution A could validly be passed by a general meeting, whilst Resolution B was invalid to the extent that it was in contravention of section 203D of the Act. NRMA was also bound to hold a general meeting in response to the requisition of the defendants for the consideration of Resolution A. In light of other proceedings that were yet to be dealt with, Palmer J stood these proceedings over to enable Windeyer J to deal with the issue of when the general meeting should be held.

(E) FIDUCIARY DUTIES OF COMPANY EMPLOYEES  
(By Matthew Goucke, [Clayton Utz](http://www.claytonutz.com))

Flanagan Sailmakers v Walker [2002] NSWSC 1125, Supreme Court of New South Wales, Acting Justice Macready, 27 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/november/2002nswsc1125.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

Mr and Mrs Flanagan owned a company known as C & KA Flanagan Sailmakers Pty Ltd ("Company") which carried on business as a sail maker, specialising in the design and supply of shade structures. The Company tendered for a job at the University of Sydney and submitted a quotation on 23 October 2000 for $105,000 to a Mr Ashwin. At this time Mr Walker (the "first defendant") and Mr Forde (the "second defendant") were both employed by the Company as the sales and marketing manager and project manager / design draughtsman respectively.

On 13 November 2000 a competitor, Shade Structures Pacific Pty Ltd, gave a budget estimate for the job of between $90,000 and $120,000 - this was later modified to a firm quotation for $120,890. On 16 November 2000 the first defendant visited Mr Ashwin and purported to secure the job on behalf of a firm known as Architectural Sails Australasia (the "third defendant") for the sum of $90,000 before making a later offer of $80,000 by telephone. On 27 November 2000 the first defendant resigned from the Company and the following day Mr Ashwin accepted the offer for $80,000 made by the third defendant.

On 29 November 2000 the first defendant arranged the purchase of a shelf company which was incorporated the next day as the third defendant. On or about 1 December the second defendant resigned from the Company and began working with the first and third defendants on the job awarded by Mr Ashwin.

(2) Claims made

The Company, as plaintiff in the proceedings, asserted claims based on a variety of causes of action, including:

- misuse of confidential information by the first and second defendants;  
- breach of their contracts of employment;  
- breach of fiduciary relationship (flowing from their employment); and   
- breaches of sections 181-183 of the Corporations Act ("Act").

The essence of these claims was that the first and second defendants had been privy to confidential information relating to the Company's tender for the job due to their position within the Company. They had then improperly and unlawfully used this information to undercut the Company and secure the job for the third defendant for their own financial benefit.

(3) Summary

The Court entered judgment for the plaintiff against the first and third defendants in the amount of $54,950 but dismissed the claims made against the second defendant. The sum awarded represented the loss of profit suffered by the plaintiff Company due to the breaches of fiduciary duty by the first defendant (and the imputed knowledge of these breaches to the third defendant) in subverting the tender process to obtain a financial benefit. The Court found the second defendant not liable because he had not breached any of his fiduciary duties nor any of the implied terms of his contract of employment.

(4) Analysis of judgment

(a) Misuse of confidential information

The plaintiff claimed that the first and second defendants had unlawfully used confidential information derived from their position within the Company, namely, three-dimensional drawings of plans of the Company's shade structure; a software program used by the Company to design the shade structure; and details of the Company's quotation of 23 October 2000 (particularly the price).

The Court held that the software program itself was not confidential information of the plaintiff as it was widely commercially available. The three-dimensional drawings might be considered confidential but they were used for marketing purposes only and in any event there was no evidence that the first or second defendants had used the drawings. The Court held that the plaintiff's tender price was crucially confidential and that the first defendant had, at all material times, been aware of this information and had unlawfully used it to undercut the Company's tender. The second defendant was not liable because he had not been aware of the price.

(b) Contractual claim

Neither the first nor the second defendants had written agreements governing their employment so the plaintiff sought to rely upon an implied term of their contracts that they were subject to a duty of good faith and fidelity as enunciated by Santow J in Colour Control Centre Pty Ltd v TY (1996) AILR 5-058 ("Colour Control"). In Colour Control, the rule from Cook v Deeks [1916] 1 AC 555 against directors or senior employees taking up a business opportunity properly belonging to the company was also cited with approval.

The Court was convinced that the first defendant had breached his implied contractual duties owed to the plaintiff by profiting from the business opportunity that arose from his position within the Company. The Court commented that the second defendant's position was more complicated and preferred to deal with it in the context of fiduciary duties.

(c) Breach of fiduciary duty

The Court again referred to Colour Control in stating that whether or not a particular employee is subject to fiduciary duties is dependent upon their position and responsibility within the company. It was relevant that neither the first nor the second defendant were ever directors of the Company. However, the plaintiff Company was a small business with few employees and this put it in a particularly vulnerable position vis a vis employee dishonesty. The first defendant had primary responsibility within the Company for marketing and obtaining sales. Similarly, the second defendant had an important and influential role as project manager.

In Colour Control, Santow J adopted the views of the Supreme Court of Canada as expressed in Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371 (which has been widely endorsed by other Australian courts) where it was said that a director or senior officer may not usurp "a maturing business opportunity which his company is actively pursuing". People in such a position were restrained from so acting even after they had resigned from the company "where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired."

The Court in this case found that both the first and second defendants owed fiduciary duties to the plaintiff Company. The Court further held that the first defendant had acted deliberately in seeking to acquire the plaintiff's business opportunity during the course of his employment with the Company. He had succeeded in doing so and consequently had breached his fiduciary duties.

The second defendant did not know of Mr Ashwin's acceptance of the third defendant's amended offer so had not attempted to usurp the company's "maturing business opportunity" for himself. The Court also found that the second defendant had been unhappy working for the plaintiff Company and that his new position with the third defendant (as a consultant) did not amount to a resignation prompted or influenced by a wish to appropriate the opportunity. Because the business opportunity had already been acquired by the first and third defendants prior to the second defendant's resignation from the Company it could not be said that his position with the plaintiff Company had led him to that opportunity. Therefore the second defendant had not breached any of his fiduciary duties nor any of the implied terms of his employment contract.

The third defendant could be liable for breach of fiduciary duty where it received the relevant property or was an accessory dishonestly procuring or assisting in a breach of fiduciary obligations. Because the third defendant had knowledge of the first defendant's breaches of fiduciary duty it was also liable to the plaintiff.

(d) Damages for breach of fiduciary duty

The Court referred to the High Court's decision in Warman International Ltd v Dwyer (1995) 182 CLR 544 where it was said that a fiduciary will normally have to account for the profits made within the scope and ambit of their duty. In the present case evidence tendered by the third defendant established that they had made $9,000 profit. The plaintiff asserted that, based on its initial tender of $105,000, it would have realised a profit of approximately $68,500. The large disparity in profit margin was explained by the fact that the plaintiff had pre-existing plant and equipment which would have saved it considerable costs borne by the third defendant.

In determining the issue of causation the Court referred to the decision in O'Halloran v R T Thomas & Family P/L (1998) 45 NSWLR 262 where an analogy was drawn with the position in respect of trustees. In such a case a strict approach is to be taken - the question to be asked is whether the loss would have happened had there been no breach (whether or not the loss was caused by or flowed from the breach was immaterial). The Court was prepared to apply the strict standard to the first defendant due to the particular vulnerability of the plaintiff Company.

The Court then turned to the likelihood of the plaintiff Company being awarded the tender ahead of its competitor. The Court found that the plaintiff Company was eager to obtain work and would have been forced to reduce its tender price by approximately $10,000. The Court also found that the plaintiff Company had underestimated the excavation costs of the project and adjusted the profit claimed accordingly, leaving a final figure for loss of profit of $54,950.

(e) Breach of the Act

Section 181 of the Act imposes obligations of good faith on directors or other officers of a company. Section 182 prohibits improper use of those positions and section 183 restricts the use of information derived from their positions. The first and second defendants were not directors and were held not to be officers because Mr Flanagan had ultimate control of the company and no evidence was led that either of them was in a position to significantly affect the corporation's "financial standing" or to affect a substantial part of the corporation's business.

(5) Conclusion

The Court was prepared to find that employees with primary responsibility for certain tasks may owe fiduciary duties to their company, even if they are not directors. If they use their position and knowledge to obtain a "maturing business opportunity" properly belonging to the company for themselves (even after resignation) they may be in breach of their fiduciary duties. In the case of particularly vulnerable companies the Court was prepared to impose a strict test of causation - would the loss have happened had there been no breach.

(F) COMPULSORY ACQUISITION - THE LATEST INSTALMENT ON "FAIR VALUE"   
(By Neil Pathak, [Freehills](http://www.freehills.com))

Energex Limited v Elkington (2002) QSC 363, Queensland Supreme Court, Mackenzie J, 8 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2002/november/2002qsc363.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This recent decision of Mackenzie J is the latest in a series of judgments involving the compulsory acquisition of shares held by minority shareholders. These decisions consider what factors can be taken into account in determining fair value for the compulsory acquisition under section 667C of the Corporations Act.

The decisions prior to this case may be divided into 2 categories. Firstly, the judgments of Santow J of the New South Wales Supreme Court in Winpar Holdings v Goldfields Kalgoorlie (2000) 18 ACLC 665 and Re Goodyear Australia Limited; Kelly-Springfield Australia v Green (2002) 167 FLR 1 which provide that "special benefits" derived by an acquirer reaching 100% of a company can be taken into account when assessing the value of a company. Secondly, decisions of Douglas J of the Queensland Supreme Court in Pauls Ltd v Dwyer (2001) 19 ACLC 959 and Warren J of the Victorian Supreme Court in Capricorn Diamonds Investments v Catto (2002) 41 ACSR 376 and Austrim Nylex v Kroll (2002) 42 ACSR 18, which have decided that special benefits must not be taken into account. This decision of Mackenzie J follows the second approach.

(2) Facts

Energex Limited held all the ordinary shares in Allgas Energy Limited and approximately 58% of the preference shares in Allgas. This meant that Energex held more than 90% of the voting power of Allgas and over 90% by value of all securities in Allgas. Having satisfied the threshold for the exercise of the general compulsory acquisition power in section 664A of the Corporations Act, Energex sought to compulsorily acquire the outstanding preference shares at a price of $2.05 per share. Objections to the compulsory acquisition from more than 10% of the preference shareholders were received. Energex applied to the Court for approval of the acquisition of the securities pursuant to section 664F.

The procedure for exercising the right to compulsorily acquire minority shareholdings includes the requirement that a person whose shares are being acquired be given a copy of an independent expert's report. In Energex's case a report was prepared by Ernst & Young Corporate Finance. The E&Y report concluded that the preference shares had a value of $1.61 to $1.79. (The valuation included some special benefits derived by Energex holding all the shares. However, after the decision of Douglas J in Pauls Ltd v Dwyer was handed down - that decision stating that special benefits should not be taken into account - E&Y amended its report to exclude these special benefits. As a result its valuation reduced to a range of $1.34 to $1.52 .)

In any case, the E&Y report concluded that the consideration of $2.05 represented fair value for the Allgas preference shares.

Following the E&Y report, a report was commissioned by certain preference shareholders from Mr Lonergan. In Mr Lonergan's opinion, the fair value of the preference shares was $13.80.

(3) Fair value under the Corporations Act

Section 667C sets out the process of determining fair value for securities in 3 steps:

(a) an assessment of the value of the company as a whole;

(b) an allocation of that value among classes of issued securities in the company. The allocation must take into account: (i) relative financial risk of the classes; (ii) voting rights of classes; and (iii) distribution rights of classes; and

(c) an allocation of the value of each class pro rata among the securities in that class. No premium is to be allowed or discount applied for particular securities in that class.

(4) Arguments and decision

The judgment involved a comparison of the E&Y report and the Lonergan report and the factors the reports took into account in coming to their respective determinations of fair value.

Mr Lonergan's report sought to include various factors which can be described as "special benefits" available to Energex as a 100% owner of Allgas. Mackenzie J decided that given the language of section 667C these factors should not be taken into account and approved the acquisition of securities held by the objecting shareholders. In doing so, he followed the decisions of Douglas J in Pauls and Warren J in Capricorn Diamonds and Austrim Nylex.   
Reference should be made of certain matters which Mr Lonergan sought to take into account in a determination of fair value.

(a) Premium for forcible taking

Mr Lonergan sought to allocate $0.50 in his value as a premium for forcible taking. Even Santow J had not accepted that a premium for forcible taking should be included in the valuation. Mackenzie J saw no reason to depart from the authorities on this point and rejected the argument that an allowance be made for a premium for forcible taking.

(b) Taxation advantage

A taxation benefit (valued by Mr Lonergan at $11.81 per share) arose from the State of Queensland being the owner of all shares in Energex. Once Energex acquired all the preference shares in Allgas, Allgas would be subject to income tax under the Queensland state equivalent tax regime and would no longer be subject to Federal tax under the Income Tax Assessment Act. Effectively, the payment of income tax previously made to the Federal Commissioner of Taxation would now be payable to the Queensland State Revenue Office. The ultimate shareholder of Allgas, the State of Queensland, would receive a benefit, in the form of tax receipts in future years, it currently does not hold. A benefit of this nature would not be available to any non-government entity acquiring Allgas.

In considering this factor, Mackenzie J pointed out that any benefit from redirecting a payment by the company from the Federal government to the State government would accrue not to Allgas but to the ultimate beneficial shareholder of Energex. Allgas would have to pay the tax to another entity irrespective of whether it is ultimately wholly owned by the State of Queensland or not. In this respect, nothing is added to the value of Allgas as a whole by this factor. Therefore, it was in principle incorrect to include a component for special taxation advantages in the value of the company as a whole.

(c) Administrative savings

The E&Y report originally included a sum in the valuation of Allgas to reflect an advantage available by reason of administrative savings as a result of becoming a wholly owned subsidiary. Later on, after the decision in Pauls Ltd v Dwyer, E&Y amended its report to exclude reference to administrative savings. The Lonergan report sought to include this factor.

The judgment of Mackenzie J spends some time discussing the authorities in relation to this matter. Mackenzie J made reference to comments by Santow J and other judges which supported the inclusion of synergies or benefits in the "value of the company as a whole". This could be considered as a reference to generic benefits arising where an entity was or became wholly owned irrespective of the identity of the acquirer. However, MacKenzie J made clear that "what have been called synergies or benefits peculiar to a 'particular' acquiring entity that may be achieved because that party may be able to effect economies by reason of sole ownership do not form part of the value of the company as a whole for the purposes of section 667C".

While accepting that section 667C does not specifically state that possible synergies are not to be included in the assessment of the value of the company as a whole, Mackenzie J ultimately decided that "given the historical setting in which Part 6A [of the Corporations Act] was conceived, it is my conclusion that it is not the legislative intent, in a case where it is necessary to invoke the compulsory acquisition provisions, that an entrenched minority shareholder is to benefit from the addition of a sum representing synergies (which could not be achieved but for the forced but successful resort to the compulsory acquisition procedure)".

(d) Previous attempts to acquire the preference shares

One other factor which Mr Lonergan sought to include in his determination of fair value was the fact that Energex had offered to acquire the preference shares in 1998 and 1999 at $10 and in excess of $11 respectively. Section 667C(2) requires that the consideration paid for acquisitions of securities in the last 6 months be taken into account when determining fair value. Clearly, these offers were not within the 6 month period, and, as MacKenzie J noted, the previous offers were made prior to the introduction of the general compulsory acquisition procedure. In these circumstances, Mackenzie J rejected the argument that the offers made on the market in an attempt to acquire the outstanding preference shares should be an indicator of the level of "fair value" for the purposes of section 667C.

(5) Conclusion

The decision confirms the views of the Queensland Supreme Court and the Victoria Supreme Court that the determination of fair value should not include an allocation for any special benefits or special value obtained by a shareholder acquiring 100% of the company. This is contrary to the approach of Santow J in the New South Wales Supreme Court.

As Levy points out in "Takeovers Law & Strategy" (2nd Edition, 2002) at page 200, the inclusion of special benefits in a determination of fair value will remain uncertain "until there is a higher court decision or further law reform. Until then, it is likely there will be a difference in approach depending on the jurisdiction where the case is heard."

(G) APPLICATION TO TERMINATE A WINDING-UP: FACTORS TO BE CONSIDERED  
(By Rebecca Grapsas, [Mallesons Stephen Jaques](http://www.mallesons.com))

El-Fahkri, in the matter of Elfah Pty Ltd (in liq) [2002] FCA 1469, Federal Court of Australia, Finkelstein J, 19 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/november/2002fca1469.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Elfah Pty Ltd ("Elfah") was incorporated in 1990 and its shares held by three brothers, Akram, Daniel and Moses El-Fahkri ("Plaintiffs"). Elfah held substantial assets and owed money to two secured creditors. A default judgment was obtained against Elfah and Elfah was wound up in insolvency after it failed to pay the judgment debt. Had the liquidation run its course and the creditors and liquidator received payment, an estimated surplus to the Plaintiffs of $6 million could have resulted. The Plaintiffs applied to the court as contributories for an order terminating the winding-up pursuant to section 482 of the Corporations Act 2001 (Cth) ("Corporations Act").

(2) Terminating a winding-up

Section 482(1) of the Corporations Act provides that the court may, on application, make an order staying or terminating the winding-up of a company.

In deciding whether or not to exercise his discretion and make the order sought by the plaintiffs, Finkelstein J considered the following factors (In re Calgary and Edmonton Land Co Ltd (in liq) [1975] 1 WLR 355 per Megarry J):

(a) the interests of creditors of Elfah, in particular, whether or not the creditors objected to a termination of the winding-up and whether or not the creditors would be paid in full;

(b) whether or not the members of Elfah consented or failed to object to the giving up of their rights to the surplus assets of Elfah on completion of the liquidation; and

(c) the position of the liquidator and his statutory right to receive his costs, charges and expenses.

Justice Finkelstein also considered whether granting the order would be conducive or detrimental to commercial morality and the interests of the public at large (Re Telescriptor Syndicate Ltd [1903] 2 Ch 174, 180; Chan v Austgrove Enterprises Pty Ltd [1993] 12 ACSR 427).

Justice Finkelstein noted that in England, an applicant seeking termination of a winding-up must "make out a case that carries conviction" (In re Calgary and Edmonton Land Co Ltd (in liq) [1975] 1 WLR 355, 358-9). He stated that the "position in Australia is not so strict" in that the court "does not have to find special reasons for a stay or termination" (Alexander v Cambridge Credit Corporation Ltd [1985] 2 NSWLR 685; Aetna Properties Pty Ltd v G A Listing and Maintenance Pty Ltd (1994) 13 ACSR 422). However, he held that "there must be some valid reason why it is appropriate to make the order rather than let the liquidation take its normal course."

(3) Order to terminate winding-up

Justice Finkelstein granted the application of the Plaintiffs and made an order terminating the winding-up in accordance with section 482(1) of the Corporations Act. He considered that in doing so, there would be no prejudice to the public interest, the creditors of the company or the members (who were the applicants in this case). The financial position of the members would be adversely affected if the liquidation were to proceed, as the members would lose the benefit associated with holding valuable capital assets. In order to protect the position of the liquidator, Finkelstein J ordered that the Plaintiffs undertake to instruct their solicitors to apply trust monies to pay the liquidator's costs and expenses.

(H) APPLICATION FOR EXTENSION OF MAREVA-TYPE ASSET PRESERVATION ORDER  
(By Rebecca Grapsas, [Mallesons Stephen Jaques](http://www.mallesons.com))

Consolidated Constructions Pty Ltd v Bellenville Pty Ltd [2002] FCA 1513, Federal Court of Australia, Carr J, 4 December 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/december/2002fca1513.htm> or <http://cclsr.law.unimelb.edu.au/judgments>

(1) Background

Bellenville Pty Ltd ("Bellenville") engaged Consolidated Constructions Pty Ltd ("Consolidated Constructions") to carry out building works on the David Jones site in Perth. Prior to entering into the contract, Consolidated Constructions obtained a report from an incorporated project manager which included inaccurate information about the quantity, type and location of asbestos at the site. In a separate proceeding, Consolidated Constructions claimed damages of $5.15 million against Bellenville for misleading and deceptive conduct in relation to the asbestos information and Bellenville counterclaimed for liquidated damages from Consolidated Constructions as a result of delay in the building works.

Bellenville was a special purpose joint venture vehicle owned by members of the Babcock and Brown group and the Buxton group. The owners of Bellenville sold the David Jones site and intended to distribute the profits of Bellenville amongst themselves as dividends, with the result that there would be no assets left in Bellenville to satisfy a judgment against it. Consolidated Constructions applied for an extension to an interim Mareva-type asset preservation order to prevent the distribution of the assets of Bellenville which would frustrate any remedy obtained by Consolidated Constructions against Bellenville.

(2) Intention or effect of the conduct

Justice Carr considered that the court has jurisdiction and power to grant a Mareva-type asset preservation order where it is shown that the relevant conduct was intended to frustrate, or would have the effect of rendering ineffective, a successful claim by a plaintiff (Riley McKay Pty Ltd v McKay [1982] 1 NSWLR 264, 276). In so holding, he rejected Bellenville's argument that an order should not be made unless the party seeking to dispose of assets positively intends to abuse the judicial process by preventing recovery (National Australia Bank Ltd v Bond Brewing Holdings Ltd (1990) 169 CLR 271, 277 per Mason CJ, Brennan and Deane JJ and Cardile v LED Builders Pty Ltd (1999) 198 CLR 394 cited in support of rejecting this argument).

(3) Relevance of the ordinary course of business

In deciding whether or not to exercise his discretion and make the asset preservation order, Carr J took into account the fact that Bellenville would have engaged in the conduct of distributing its assets at the conclusion of the project in the ordinary course of its business, irrespective of a claim by Consolidated Constructions. In particular, he considered that the ordinary course of business was relevant when assessing the degree to which the making of an asset preservation order would interfere with the carrying on of business. However, Carr J did not take into account the fact that Consolidated Constructions was aware that the distribution would be made as there was a significant change in the commercial relationship between the parties after the David Jones site was sold before completion of the building works.

(4) Serious question to be tried

Justice Carr considered the contents of the affidavits made pursuant to the claim by Consolidated Constructions against Bellenville, particularly the representations and evidence relating to asbestos, and decided that there was a serious question to be tried. He also took into account the possibility that the claim by Consolidated Constructions may not succeed.

(5) Proffered guarantees

Justice Carr was invited to consider the relevance of the fact that related parties of Bellenville had offered to guarantee payment to Consolidated Constructions of any judgment obtained against Bellenville in return for a discharge of the interim Mareva-type asset preservation order. It was submitted by Bellenville that this evidenced an intention not to frustrate the judicial process and therefore a Mareva-type asset preservation order should not be made. Justice Carr rejected this argument on the basis that the guarantees were largely irrelevant, as it was sufficient if the effect of the conduct were to frustrate a remedy granted by the court. However, he acknowledged that he should take into account the proffered guarantees as a factor to be considered in the exercise of his discretion whether or not to make the order.

(6) Undertaking as to damages

In deciding whether or not to exercise his discretion and make the Mareva-type asset preservation order, Carr J also considered the adequacy of the undertaking as to damages filed by Consolidated Constructions in the event that Bellenville was successful in its counterclaim for liquidated damages. In particular, he noted Bellenville's argument that there was no evidence of the financial backing of Consolidated Constructions in this respect.

(7) Extension granted to Mareva-type asset preservation order

After considering all of the above factors, Carr J exercised his discretion and ordered that Bellenville be restrained from transferring, alienating or otherwise dealing with or disposing of or directing the payment of, or causing or permitting to be transferred, alienated or otherwise dealt with or disposed of or directed, the payment of $3 million (adjusted downwards from the original $5 million) of the unencumbered amount of the proceeds of sale of the David Jones site.

(I) VALIDATION OF APPOINTMENT OF ADMINISTRATORS AND LIQUIDATORS  
(By Carine Cruse, [Clayton Utz](http://www.claytonutz.com))

Re Wood Parsons Pty Ltd (in liq) [2002] NSWSC 1058, New South Wales Supreme Court, Austin J, 8 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/november/2002nswsc1058.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

This decision considers the availability of remedies under the Corporations Act to cure deficiencies in the appointment of voluntary administrators, who subsequently become liquidators, of a company.

(1) Facts

A recital of the facts occupies most of the judgment. Austin J noted that stating the facts was a difficult matter as many issues had arisen between the directors and shareholders of the company only glimpses of which were revealed in evidence. The matter proceeded on affidavit evidence and was argued over a period of 5 days during which the Court tried to piece together a picture of the affairs of the company, its history and its financial position. The Court found that the evidence was unsatisfactory in certain respects and certain matters could not be resolved as the Court had not heard any oral evidence.

Wood Parsons Pty Ltd was formed in 1969 to be the holding company for a 75% interest in Guide Rails Pty Ltd. The ASIC records of the company reflected at all relevant times that the directors were Mr Herd and Mr Haddock who were appointed directors in 1999. The ASIC records did not accord with the Company's annual return as far as the members of the company was concerned. The identities of the shareholders and directors of the company were in dispute at trial.

In 2000 a conflict arose between Mr Herd, Mr Haddock and the shareholders. A shareholders' meeting was purportedly held on 15 August 2000 in the Bahamas at which one of the members was allegedly present by telephone. At that meeting two new directors were appointed and Mr Herd and Mr Haddock were removed from office. Additional directors were later appointed. At the same meeting the shareholders resolved that assets of the company be sold to meet outstanding liabilities and avoid liquidation. The shareholding in Guide Rails Pty Ltd was sold for $2 to two companies who agreed to pay the outstanding liabilities of the company to a related third party.

Mr Herd and Mr Haddock were informed of the outcome of the meeting by letter some days later. While they did not accept the termination of their appointments, they later formally resigned on 7 December 2000. A directors' meeting was held on 3 November 2000 where a quorum was present and the decisions made at the 15 August meeting and other intervening directors' meetings were ratified.

The purported transfer of shares in Guide Rails Pty Ltd was subsequently questioned on the basis of voidable transactions under section 588FE. The transfer of the charges in favour of the former directors and intercompany loans were also questioned. The disposal of the assets of the company led to the appointment of voluntary administrators on 7 December 2000 by the two directors who were purportedly appointed at the meeting of 15 August 2000. The administrators reviewed the ASIC records of the company which showed the former directors only. On assurances from one of the new directors that the ASIC records had not been properly updated and the fact that Mr Herd and Mr Haddock had resigned on 7 December 2000 before their appointment occurred, the administrators formed the opinion that their appointment as administrators was valid.

The statutory creditors' meetings were called in December 2000 and January 2001 respectively. Prior to the final meeting the administrators issued a report to the creditors noting that "disputes have arisen following a shareholders meeting purportedly held in the Bahamas in August 2000 relating to the appointment and removal of directors, the control and stewardship of the company and the subsequent disposal of company assets". The report concluded that it would be in the best interests of the company for the company to be wound up, so that liquidators could investigate dealings with the company's assets and businesses, and decide upon the prospects for recovery. On 11 January the creditors resolved to wind up the company and the administrators then ostensibly became the liquidators of the company by virtue of the operation of section 446A(4) of the Corporations Act.

On 17 January 2001 Mr Herd asserted in a letter to third party solicitors that the meetings between 15 August and 7 December 2000 did not take place. The validity of the shareholders' meeting on 15 August 2000 was questioned on the basis of inadequate notice and lack of quorum. The relevant member was apparently not present by telephone which led to a lack of quorum for the purposes of a meeting at which any business of the company could be conducted. The member later confirmed his absence in an affidavit in the proceedings. Mr Herd's letter reached the liquidators on 14 June 2002.

The liquidators sought relief to remove any doubt as to their past and present status. Guide Rails obtained leave to appear at the hearing and made submissions for the removal of the liquidators.

(2) Findings

The plaintiffs sought orders under section 447A and section 1322(4) of the Corporations Act, to cure their appointments and to validate their conduct retrospectively from 7 December 2000 when they were purportedly appointed voluntary administrators. The application raised questions as to the Court's jurisdiction to make such orders, and as to the discretionary grounds for doing so. In the alternative, the plaintiffs sought declaratory relief pursuant to section 201M of the Act.

Austin J relied on Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270 where the High Court emphasised the broad scope of section 447A on its literal construction and made observations as to the role of that section as an integral part of the legislative scheme in Part 5.3A. While the High Court did not have to decide whether either section 447A or section 1322(4) could be used to cure a deficiency in the appointment of voluntary administrators, Austin J had noted in an earlier decision (Deputy Commissioner of Taxation v Portinex Pty Ltd (2000) 34 ACSR 391) that the High Court showed a willingness to use section 447A in cases where the parties had assumed the validity of a deed of company arrangement and had acted accordingly.

In the present case the plaintiffs assumed the validity of their appointment as voluntary administrators and the validity of the transition of their roles from voluntary administrators to voluntary liquidators, but not everyone affected by the administration and liquidation process had done so. Austin J reiterated his findings in the Portinex case:

"Notwithstanding these considerations, my view is that the Australasian Memory case establishes the proposition that section 447A is available to cure such matters as a lack of quorum of properly appointed directors at the meeting where a resolution is purportedly passed to appoint the voluntary administrators...".

While Austin J found that section 447A was available as a source of jurisdiction to make a curative order, he doubted that section 447A could be utilised to make an order which was to operate retrospectively to 7 December 2000. He relied on section 1322(4) which was "more clearly available to permit an order nunc pro tunc." Section 1322(4) authorises the Court to make an order declaring that any act, matter or thing purporting to have been done in relation to the company is not invalid by reason of any contravention of a provision of the Corporations Act. The resolution of 7 December 2000 to appoint the plaintiffs as voluntary administrators was such an act. The invalidity arose through failure to give proper notice of the shareholders' meeting of 15 August 2000 as required by the corporations legislation and the constitution of the company, and the absence of the quorum required by the constitution of the company.

Austin J held that section 1322(4) was available in cases where section 447A was also available. There was nothing to limit the Court's general power, where it had jurisdiction to make an order, to make that order nunc pro tunc.

Whereas section 1322(4) is to be read subject to section 1322(6), Austin J opined that, although no particular considerations were articulated in section 447A, basically the same considerations (in section 1322(6)) arose under that section.

An important consideration for the Court was the fact that the company had been in external administration since December 2000 and in liquidation for over 18 months. If an order were not made nunc pro tunc, this would affect the timing of the relation back date. This could prejudice the interests of the company's creditors in that it would no longer be possible to investigate whether certain transactions in 2000 were liable to be avoided as preferences or on other grounds.

His Honour also made reference to the fact that decisions made at the meeting of 15 August 2000, which was said to be lacking a quorum, were ratified at the meeting on 3 November where there a quorum was present, although inadequate notice was alleged with regard to this meeting.

With regard to the interests of the company his Honour found that the company was insolvent as from the time of the plaintiffs' report to creditors and should have been wound up.

Austin J satisfied himself pursuant to section 1322(6)(a) that it was just and equitable that an order be made and pursuant to section 1322(6)(c) that no substantial injustice had been or was likely to be caused to other persons who would be affected by the orders. He held that:

"In light of the assumption upon which the external administration proceeded, it seems to me just and equitable, as regards the other parties to the transactions, that orders should be made restoring the position that was assumed to exist."

His Honour also held that as far as the interests of the members were concerned there would have been no difference in the outcome had the deficiencies of notice and quorum not occurred.

As an aside, Austin J said that the plaintiffs did not conduct adequate investigations surrounding their purported appointment. However, this factor was substantially outweighed by the other considerations and so did not persuade him to deny the relief that had been sought.

In summary, Austin J decided that the court had jurisdiction to make an order, nunc pro tunc, which had the effect of curing or validating the external administration of the company as from 7 December 2000, when the resolution to appoint the plaintiffs as voluntary administrators was purportedly passed. His Honour determined that the source of the jurisdiction was "section 1322(4) and may also be section 447A of the Corporations Act."

He found it unnecessary to deal with the application for declaratory relief under section 201M and noted, obiter, that he was not persuaded that the section would apply in the circumstances.

(J) LEAVE TO COMMENCE PROCEEDINGS AGAINST A COMPANY IN LIQUIDATION  
(By Maria Pawelek, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Lean v Tumut River Orchard Management Ltd [2002] FCA 1419, Federal Court of Australia, Carr J, 20 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/november/2002fca1419.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

In these proceedings the applicant, a certified practising accountant and a partner in a firm of business and insolvency consultants, made an application on behalf of approximately 100 investors for leave pursuant to section 500(2) of the Corporations Act 2001 ("Act") to commence proceedings against Tumut River Orchard Management Ltd (the "Company") which had gone into liquidation on 28 April 1999.

The respondent opposed the application on a number of grounds, including, that the applicant had failed to show there was a serious question to be tried, the Company's resources should not be depleted in litigation and the appropriate compensation was in the form of damages and not the declaratory relief claimed in the proposed statement of claim.

The Court considered if, on the balance of convenience, leave should be granted and, if so, on what conditions.

(1) Background

The Company carried on and managed orchards for the purpose of investment schemes on land it owned in NSW and Queensland. The investor growers had entered into contracts, including a farming agreement where the Company undertook to cultivate and harvest the fruit trees ("Farming Agreement") and licence deeds where the Company granted a licence to the group members to occupy a farming allotment. Some group members also took up an offer of a loan ("Loan"). The rights of the Company under the Loan were assigned to a finance company HP Mercantile Pty Ltd ("HPM").

On 28 April 1999, the creditors passed a special resolution under section 491 of the Act that the Company be voluntarily wound up and the Company went into liquidation. Subsequently, HPM commenced proceedings in the local court of New South Wales to recover certain harvesting and marketing costs and outstanding loans from the growers.

The applicant proposed to commence an action against the Company seeking declarations that, as a result of misleading and deceptive (and unconscionable) conduct and breaches of the Farming Agreement by the Company, the growers were not personally liable for the harvesting and marketing costs, the Loans were non-recourse loans (only repayable out of proceeds of sale from the orchards), the growers had not breached the Farming Agreement and the growers are entitled to an equitable or statutory set off against the Company and its assignee HPM.

As a result of the voluntary winding up, by virtue of section 500(2) of the Act, the applicant could not commence an action against the Company without leave of the Court.

(2) Issues

(a) Should leave be granted?

Section 500(2) of the Act states that after the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be continued with or commenced against the company except by leave of the Court. The Court considered whether the applicant had established that there was a serious or substantial question to be tried and whether the applicant had satisfied the onus of showing that it was more appropriate for the claims to proceed by action rather than by proof of debt. Overall, the Court considered where the balance of convenience lies in granting the leave in the particular circumstances of the case.

(b) What conditions should be placed on granting leave?

Section 500(2) goes on to say that leave to commence an action against a company in liquidation should be granted subject to such terms as the Court imposes. After considering the factual circumstances of the case the Court made the decision to impose a number of conditions on the granting of leave to commence the action against the Company.

(3) Decision

In reaching his decision, Justice Carr referred to the judgment of Lee J in Executive Director of the Department of Conservation and Land Management and Ringfab Environmental Structures Pty Ltd (Federal Court of Australia, unreported, 6 November 1997) which, he said, most usefully summarised the court's approach when deciding an application of this type.

Justice Carr concluded there was sufficient material in the evidence before the court to raise a serious question to be tried that the growers had suffered loss or damage by incurring liabilities under the various agreements. In rejecting the respondent's submission that the liabilities had not been identified, his Honour contrasted this type of application with an application to strike out a pleading or for an order for further and better particulars.

His Honour held the sample local court claims attached to the second of the applicant's solicitors' affidavits showed, sufficiently for the purpose of the application, that HPM was suing to recover as assignee of debts arising under one of the Farming Agreements. His Honour held the applicant was not required, for an application of this kind, to provide evidence of what was happening in respect of the local court claims or to prove all elements of the proposed claims.

Justice Carr also held the application was not the place in which to resolve points of construction, but rather, it was a matter for the trial judge in the proposed action. His Honour said it was sufficient for him at this stage to have formed the view (as he had) that a serious question had arisen. In his Honour's view, the applicant had shown that the proposed claims in respect of the alleged misleading or deceptive and (perhaps to a lesser extent) unconscionable conduct on the respondent's part had a solid foundation and gave rise to a serious dispute which his Honour found was much the same as saying that there was a serious question to be tried.

Justice Carr held it was a matter for the trial judge hearing the proposed application to determine the appropriate compensation for losses arising from the alleged misleading or unconscionable conduct or breach of contract, however, he saw no reason why the applicant should be confined to a remedy in damages.

On this point, his Honour said the width and extent of the remedies available under section 87 of the Trade Practices Act have not finally been determined and it was clearly arguable the applicant may be able to persuade a court to grant declaratory relief if it could, in the action, establish misleading or unconscionable conduct by the Company. His Honour also noted that relief under section 87 of the Trade Practices Act could be obtained if it appears to the court that a party is likely to suffer loss or damage by the relevant conduct.

His Honour concluded that the declaratory orders, and orders varying what would otherwise be the applicant's contractual obligations, constituted relief which the applicant would not be able to obtain otherwise than by a successful application to the court. His Honour saw this as a significant factor in favour of granting leave. Justice Carr also considered both the complexity of the proceedings and the likelihood of an appeal against the rejection of a proof of debt by the liquidator (if the growers were confined to such relief) as factors weighing in favour of granting leave.

While his Honour noted the possibility of similar actions being commenced by the balance of some 2,600 growers, he said (to the extent they were not among the proposed group members) these persons would have to apply for leave to proceed and the situation could be reviewed if and when such applications were made.

In his decision, Justice Carr noted that the factors weighing against the granting of leave were the fact that the respondent was not insured for the damages sought by the growers and that any legal costs to be incurred would not be borne by an insurer. In respect of the first comment he noted a claim for damages was only of secondary interest to the applicant. His Honour chose to deal with the second point by making the grant of leave subject to certain conditions (see below).

Justice Carr concluded that subject to the imposition of certain conditions, the applicant had demonstrated that the balance of convenience lies with granting leave.

When formulating the conditions, his Honour was concerned to keep to a minimum, any diminution of the assets of the Company and any delay in and prejudice for, the orderly winding up of the Company. His Honour concluded that leave should be confined to the commencement of proceedings in all claims other than the breach of contract claims to the point at which the issues of liability and relief other than damages had been decided. His Honour also gave liberty to apply if the Judge responsible for those proceedings considered such split as inappropriate. In relation to the breach of contract claims, his Honour held that leave should be confined to the institution of proceedings by the filing of the application and the statement of claim.

In deciding if the applicant should be responsible for the respondent's costs of discovery in the action, his Honour concluded the liquidators would be obliged to some extent to incur the cost of inspecting the documents when deciding whether to admit any proofs of debt submitted by the growers. Consequently, Justice Carr held it would be equitable for the applicant to undertake to pay one half of any costs which the liquidator may incur in complying with their discovery obligations, such costs to be agreed (or taxed if not agreed) and paid at such time as the trial Judge deemed appropriate. His Honour was of the view that such an undertaking would have the result of focusing the applicant's discovery demands and thus limit discovery costs.

(4) Comment

The judgment outlines the elements considered by the Courts when deciding if it is appropriate to grant leave under section 500(2) of the Act and the conditions on which such leave should be granted. The judgment also establishes that applicants do not need to prove the entire case, or all elements of the action, that they intend to commence and only need establish that there is a serious question to be tried. His Honour's findings on the range of remedies available pursuant to section 87 of the Trade Practices Act should also be noted.

(K) EQUITABLE AND STATUTORY LIENS - PRIORITY OF PAYMENT IN RESPECT OF ADMINISTRATORS' AND LIQUIDATORS' FEES   
(By Jay Buckley, [Corrs Chambers Westgarth](http://www.corrs.com.au))

ASIC v John McKenney Consulting Pty Ltd [2002] VSC 52, Supreme Court of Victoria, Warren J, 29 November 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2002/november/2002vsc527.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Principle

Where an administrator and subsequently a liquidator has been appointed to a group of companies and the assets have been pooled, any shortfall between the amount realised by the administrator during the period of its appointment and the amount of remuneration owed to it cannot be recovered as a priority payment from the pooled funds of the company realised by the liquidator. This shortfall is 'deferred expense' under section 556(2) of the Corporations Act 2001 (Cth) ("Act") and is paid in accordance with the ranking of payments set out in section 556(1) of the Act.

(2) Background

This case concerned the liquidation and administration of certain companies in the Lifestyle Group. The group comprised 54 companies. A liquidator had been appointed to several of these companies and administrators were subsequently appointed over a further 11 companies in the group. ASIC commenced proceedings seeking to wind up the 11 companies in administration.

The court made an order for the liquidation of the 11 companies in administration, under section 601EE of the Act on the grounds that a managed investment scheme was not registered as required under the Act. The court placed the entire group under the liquidators' control.

The court made consequential orders to the effect that in the liquidation the assets of the group were to be pooled. The remuneration and costs of the administrators and ASIC were to be paid as a matter of priority and in accordance with sections 449E, 443A and 556 of the Corporations Law (as it then was).

The liquidator failed to comprehend that the orders resulted in a pooling order, and held separate creditors' meetings rather than a combined creditors' meeting.

The liquidator brought an application under section 1322(4) of the Act to validate the irregularity caused by ignorance of the pooling order, specifically the failure to obtain approval for the matters performed in the winding up from the combined creditors of the Lifestyle Group. The liquidator claimed that there were insufficient funds to pay the administrators' remuneration. The administrators asserted priority and claimed that the liquidator should pay any shortfall. ASIC wanted to ensure that its costs were paid.

(3) Issues

The central issues were:

(a) the effect of any equitable or statutory liens in relation to the issue of remuneration and costs for liquidators and administrators; and

(b) factors affecting the exercise of the court's discretion to validate procedural irregularities under section 1322.

Counsel for the liquidators argument was based on the fact that the administrators equitable lien (allowing priority payment) applied only to the assets realised by the administrators in the course of their administration.

Counsel for the administrators argued that the existence of an informal arrangement between the liquidator, the administrators and ASIC meant that they would be paid their remuneration and not have to wait until the winding up which may not conclude until 2010. In respect of liens and remuneration, the administrators argued that if there were insufficient funds, in order to do equity between the parties, any shortfall should be made up by the liquidator from his own funds as the administrators were entitled, either under the statutory lien or section 556, to be paid as money was recovered in the winding up.

(4) Decision

Justice Warren described the equitable lien using an extract from the decision of the Full Federal Court in Shirlaw v Taylor (1993) 31 FCR 222, which involved the interpretation of section 441 (now section 556) in assessing the relative priority of a provisional liquidator and a liquidator. There, the court held:

"When provisional liquidation is followed by a winding up, the equitable lien remains as much of a secured debt as it does when there is no ensuing winding up." (p 232).

The Court went on to confirm that this lien entitled the provisional liquidator to priority payment only where the amounts were realised during the course of the provisional liquidation. The entitlement to recover from amounts realised during the ensuing winding up would be 'deferred costs' and paid in accordance with the operation of the then section 441.

The liquidator's equitable lien was extended to administrators in Commonwealth Bank of Australia v Butterrel (1994) 35 NSWLR 64.

Her Honour referred to the collective operation of sections 443F(1), 443D, 443E(1) and section 449E(1) of the Act, which grant to the administrator a statutory lien on the company's property. She also referred to the decision of Austin J in Weston v Carling Constructions Pty Ltd (in prov liq) (2000) 35 ACSR 100 ("Carling Constructions").

In Carling Constructions Austin J confirmed the existence of an equitable lien entitling administrators to immediately recover their remuneration out of the assets of the company realised in the course of the administration. However, he held that the statutory lien attached only to 'any additional assets recovered by a subsequently appointed liquidator'.

Austin J determined that fees and remuneration, as opposed to disbursements and liabilities, were encompassed by section 556(2) which defined the term "deferred expenses", and that such expenses rank below the various expenses relating to the liquidation. Warren J satisfied herself that the statutory lien applies to property of the company which comes under the control of the administrator, and where there are insufficient funds realised to cover the administrators' remuneration, it will become a 'deferred' expense under section 556 realised in the course of the administration.

Therefore her Honour concluded that the administrators had an immediate lien over assets realised during their administration, with the shortfall in their remuneration subject to the priority of debts enumerated in section 556. The administrators' statutory lien obviously applied only to the assets in the pool realised from the specific companies in the group over which they presided. The equitable lien of the liquidator attaching to the realisation of the assets in the winding up, took precedence over the administrators' statutory lien in accordance with the equity, in that it would be unconscionable for the administrators to benefit (ahead of the liquidators) from the fruits of the liquidator's labour.

As far as ASIC's position was concerned, her Honour held that "it can be in no better position than the administrators in that the liquidator's lien has priority over those costs".

As to the issue of the discretion under section 1322, her Honour noted that the discretion to rectify irregularities was qualified by a "condition that it does not cause substantial injustice". While her Honour was of the view that the innocent impropriety on the part of the liquidator justified an order under section 1322, the order was made "on condition that the liquidator provide detailed information showing that his costs and rates were reasonable and no higher in conducting separate liquidations". In other words, her Honour took a view that it was implicit in the section that material breaches of the Act that resulted in the substantial altering of parties' positions should not attract orders that could be viewed as sanctioning a liquidator's negligence.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

E Walsh, 'Judging the Takeovers Panel' (2002) 20 Company and Securities Law Journal 435

This article represents a comprehensive examination of the effectiveness of the Takeovers Panel, its enabling legislation and its decisions. Since March 2000 the Takeovers Panel has become the primary dispute resolution body in takeover matters. This represents a dramatic improvement on the previous regime where takeover disputes could be taken to the courts. As such the new Takeovers Panel has been hailed a great success. This article embraces the new Takeovers Panel and its success. However, the author's purpose is to demonstrate that the Panel's enabling legislation and more recent decisions could be the subject of further improvement.

A Endeshaw, 'The Regulation of Online Financial Services in Hong Kong' (2002) 20 Company and Securities Law Journal 455

This article examines the new regulatory measures for online financial services being put into place in Hong Kong. It first describes the type of problems that an online regulatory framework needs to address before analytically constructing the emerging framework for online securities and investments, banking and insurance. The article concludes that the emerging regulatory framework in Hong Kong is still in an inchoate state. It points to the abundance and repetitive nature of the existing guidelines for online securities and investments while ebanking and online insurance still lack appropriate measures. Finally, it calls for an integration of the regulation of online financial services and the end of the split between three authorities.

S Milne and F Carr, 'Collateral Benefits - Do the CLERP Amendments Resolve the Dilemmas Faced by Bidders?' (2002) 20 Company and Securities Law Journal 477

The principle of equal sharing of takeover benefits underlies the legislative provisions of the Corporations Act applying to collateral benefits provided by bidders. The legislature, courts and Takeovers Panel have long struggled to distinguish between legitimate commercial transactions under a separate relationship and the giving of unequal benefits to shareholders in connection with a bid. The authors submit that the current provisions of the Corporations Act in this area still need further work in the interests of certainty and fairness. The article focuses on two areas of difficulty and suggests a possible way forward to resolve them.

Note, 'Convergence of Australian Accounting Standards Board Accounting Standards with International Accounting Standards Board Standards' (2002) 20 Company and Securities Law Journal 486

J Cassidy, 'Sexually Transmitted Debts: The Scope of Defences to Directors' Liability for Insolvent Trading' (2002) 20 Company and Securities Law Journal 372

The recent demise of prominent Australian corporations, such as GIO Australia Holdings Ltd, One.Tel Ltd, HIH Insurance Ltd and Ansett Australia Ltd, have highlighted the relevance of, inter alia, the Australian insolvent trading provisions embodied in the Corporations Act 2001 (Cth) (formerly Corporations Law). What may not be appreciated, however, is that insolvent trading is not only concerned with large public companies. Many of the insolvent trading cases that come before the courts involve small proprietary companies. Moreover, in many cases these are small "family" companies where there may only be one active director. This gives rise to a difficult issue as to the appropriateness of imposing liability for insolvent trading on a spouse who is, factually, merely a dormant director. This article explores the issue of spousal liability for insolvent trading, particularly focusing on the scope of the current defences to insolvent trading under s 588H.

P Darvas, 'Section 249D and the "Activist" Shareholder: Court Jester or Conscience of the Corporation?' (2002) 20 Company and Securities Law Journal 390

This article focuses on the extent of allowable activist shareholder participation in the large publicly listed corporation in the light of the controversy raised by the application of s 249D. This provision was utilised by 0.02% of North Ltd shareholders to compel the directors to convene an annual general meeting of members, to consider, inter alia, their environmental concerns about the proposed second uranium mine at Jabiluka National Park. "Activist shareholder", for the purpose of this article, means any shareholder whose concerns focus on wider socio-political issues. This issue is examined in two stages: first, by using a theoretical approach to set out the possible visions of the acceptable level of activity of a shareholder and second, to connect the theory to alternative proposals for reform of the current legislative provision in s 249D of the Corporations Act. This article concludes that there clearly is a role for shareholders in requisitioning the directors to call meetings of the company. However, in the publicly listed company, the legitimacy of such a role for smaller socio-politically motivated shareholders is extremely limited in the light of corporate law theory. This is because the traditional legal model does not allow for the "insiders" to bring such socio-political issues to the attention of the board of directors.

Note, 'Members' Right to Inspect Books - Two Recent Cases' (2002) 20 Company and Securities Law Journal 409

Note, 'Public Company Accounting and Investor Protection in the United States: Implications for Australian Corporate Governance from the Sarbanes-Oxley Act' (2002) 20 Company and Securities Law Journal 413

Note, 'The Mandatory Bid Rule - Where are We and Can it be Made to Work?' (2002) 20 Company and Securities Law Journal 424

L Bebchuck, J Coates and G Subramanian, 'The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy' (2002) Stanford Law Review 887

F Lipman, 'Incentive Stock Options and the Alternative Minimum Tax: The Worst of Times' (2002) 39 Harvard Journal on Legislation 337

C Half, 'Funding Growth: Leasing and Small and Medium Enterprise Financing in Russia' (2002) 43 Harvard International Law Journal 469

P Burbidge, 'Cross-Border Insolvency Within the European Union: Dawn of a New Era' (2002) European Law Review 589

G Egert, 'Legal Capacity of Incorporated Associations and the Associations Incorporations Act 1981 (Qld) (2001) 8 James Cook University Law Review 39

D McIlroy, 'A Relational and Economic Analysis of Banking Regulation Under the Financial Services and Markets Act 2000' (2002) 11 Nottingham Law Journal 36

B Berne, 'The Regulatory Environment of Corporate Asia is Changing' (2002) Vol 40 No 9, Law Society Journal (October) 54

K Cull, 'Ethics and Law as an Influence on Business' (2002) Vol 40 No 9, Law Society Journal (October) 50

X Wei, 'Asset Management Company and Debit-Equity Swap Practice in China' (2002) 17 Journal of International Banking Law 295

M Heidinger, 'Auditor Liability in Recent Austrian Case Law' (2002) 17 Journal of International Banking Law 301

R Litten and B Hoffman, 'Market Price Manipulation and Forward Contracts Under Germany's Fourth Act on the Promotion of Financial Markets' (2002) 17 Journal of International Banking Law 305

E Chambliss and D Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) 30 Hofstra Law Review 691

L Breed, 'Regulating our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad' (2002) 42 Virginia Journal of International Law 1005

E Westfield, 'Globalization, Governance and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century' (2002) 42 Virginia Journal of International Law 1075

K Lebrun, 'Making a Private Equity/Venture Capital Investment in Japan: Implementing Techniques Commonly Used in US Transactions' (2002) 23 University of Pennsylvania Journal of International Economic Law 213

Note, 'The Purloined Personality: Consumer Profiling in Financial Services' (2002) 39 San Diego Law Review 943

International Company and Commercial Law Review, Vol 13 No 10, October 2002. Articles include:

- Limited Liability Companies Under the New Brazilian Civil Code  
- A Panorama of International Insolvency Law: Part 1  
- Sweden - A Future Paradise for Holding Companies and Private Equity Funds?  
- Rules on the Incorporation of Securities Companies With Foreign Participation in China

A Biryukov, 'Bankruptcy and Legislative Reform in Ukraine' (2001) 27 Review of Central and East European Law 581

M Steinberg, 'The SEC and the Securities Industry Respond to September 11' (2002) 36 The International Lawyer 131

G Lander, 'SEC Rules for Cross-Border Tender Offers, Exchange Offers and Business Combinations' (2002) 36 The International Lawyer 237

J Kiggundu, 'Modern Company Law for the New Millennium: The Botswana Model' (2002) 4 International and Comparative Corporate Law Journal 101

K Ilmonen, 'Structural Implications of Upgrading the Investment Services Directive' (2002) 4 International and Comparative Corporate Law Journal 133

A Zahid and A McGee, 'Prospective Disclosure and the Role of the Securities Commissions in Ontario and Bangladesh: A Comparative Study' (2002) 4 International and Comparative Corporate Law Journal 163

N Clausen and K Sorensen, 'Disclosure of Major Shareholdings: A Comparative Analysis of Regulation in Europe' (2002) 4 International and Comparative Corporate Law Journal 201

A Trichardt, 'Market Stabilisation and the Green Shoe Option: Some Comments from Australia' (2002) 4 International and Comparative Corporate Law Journal 249

A Sykes, 'Overcoming Poor Value Executive Remuneration: Resolving the Manifest Conflicts of Interests' (2002) 10 Corporate Governance: An International Review 256

K Ahmed and M Roush, 'The Effect of Board Changes on Write-Downs of Non-Current Assets: Evidence from New Zealand' (2002) 10 Corporate Governance: An International Review 278

A Al-Twaijry, J Brierley and D Gwilliam, 'An Examination of the Role of Audit Committees in the Saudi Arabian Corporate Sector (2002) 10 Corporate Governance: An International Review 288

K Vanderwarren, 'Financial Accountability in Charitable Organisations: Mandating an Audit Committee Function' (2002) 77 Chicago-Kent Law Review 963

F Razzano, 'To Cooperate With the Securities Exchange Commission or Not to Cooperate, That is the Question' (2002) 30 Securities Regulation Law Journal 241

S Sinai, 'A Challenge to the Validity of Rule 10b5-1' (2002) 30 Securities Regulation Law Journal 261

R Barron, 'When an Owner of a Restricted Warrant Can Tack the Holding Period of the Warrant to the Holding Period of the Underlying Common Stock' (2002) 30 Securities Regulation Law Journal 340

The Journal of Corporation Law, Vol 27 No 3, Spring 2002. Articles include:

- The Fiduciary Foundation of Corporate Law  
- Regulating Corporate Governance Through the Market: Comparing the Approaches of the United States, Canada and the United Kingdom  
- The Enduring Illegitimacy of the Poison Pill  
- Hidden Social Costs of Open Market Share Repurchases  
- Periodic Financial Reporting - A Relic of the Past?

C Bisping, 'The Classification of Floating Charges in International Private Law' (2002) The Juridical Review 195

H Saviprasad, 'Pre-incorporation Contracts: A Comparative Analysis of Indian and English Laws' (2002) 44 Journal of the Indian Law Institute 117

T Brinkman, 'Minority Protection Under Section 459 of the Companies Act 1985' (2002) 13 European Business Law Review 55

M Siems, 'Shareholders, Stakeholders and the "Ordoliberalism"' (2002) 13 European Business Law Review 147

S Goo and H Ito, 'Corporate Governance Review in Hong Kong - Implications from SCCLR Report Phase 1' (2002) Vol 119 No 4 Comparative Law Review

V Goldwasser and T Ciro, 'Standards of Behaviour in Commercial Contracting' (2002) 30 Australian Business Law Review 369

O Kuriyama, 'Securities Regulation in the US' (2002) No 285 The Doshisha Law Review 98

Y Ito, 'Repurchase and Resale by a Corporation of It's Own Shares' (2002) No 285 The Doshisha Law Review 74

T Kawasaki, 'Corporate System Fault: A New Model of Corporate Criminal Liability' (2002) No 284 The Doshisha Law Review 59

Y Kawaguchi, 'Purchase of It's Own Stock and Regulation of Insider Trading' (2002) No 285 The Doshisha Law Review 53

A Morita, 'Corporate Governance in the Electric Utility Industry' (2002) No 285 The Doshisha Law Review 32

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7. RESEARCH FELLOW - CENTRE FOR CORPORATE LAW

The Centre for Corporate Law and Securities Regulation and the Centre for Employment and Labour Relations Law have received major Australian Research Council funding to support a project on the interconnection between corporate governance and employment systems. This is a multi-disciplinary project, requiring some understanding of legal regulatory techniques and the ability to undertake survey work and case study research. The duration of the project is 5 years.

The Positions: The two Centres seek to appoint two or more Research Fellows to conduct research and carry out data analysis across the broad research agenda of these funded projects.

The Persons: Will have appropriate qualifications in corporate law, labour law or in related disciplines. A higher degree and/or equivalent research training and experience is required.

The Benefits: Salary will depend on qualifications and experience and will be in the following ranges:

$38,430 - $52,153 (Research Fellow Grade 1, Level A)  
$54,900 - $65,193 (Research Fellow Grade 2, Level B)  
Plus employer superannuation contributions of 9 per cent, salary packaging options, staff training and development opportunities.

Employment Type: These are fixed term, fractional (up to 0.8) research only positions for three years with the possibility of renewal for a further two years.

Contact: http://www.hr.unimelb.edu.au/r/ for a position description, or for further information contact Ms Elena Goodey, tel +61 3 8344 8924, fax +61 3 9349 4623, email e.goodey@unimelb.edu.au or visit our Centres' websites (<http://www.law.unimelb.edu.au/celrl>) or (<http://cclsr.law.unimelb.edu.au>) for more information on the Centres and their activities.

More detailed inquiries on the nature of the research project and required research skills may be directed to Professor Richard Mitchell (+61 3 8344 7960) and Professor Ian Ramsay (+61 3 8344 6172).

Applications To: Ms Jessie Macintyre, GMO, Melbourne Law School, The University of Melbourne, Victoria 3010; fax + 61 3 8344 9900 or email hr-applications@unimelb.edu.au as soon as possible. Include curriculum vitae and the names (with phone and facsimile numbers and email addresses) of three referees in your application.

8. CONTRIBUTIONS

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