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| **Corporate Law Bulletin**  **Bulletin No. 77, January 2004**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au), Director, Centre for Corporate Law and Securities Regulation  Published by [LAWLEX](http://www.lawlex.com.au" \t "default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au" \t "_new), the [Australian Stock Exchange](http://www.asx.com.au" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au" \t "_new), [Clayton Utz](http://www.claytonutz.com" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au" \t "_new), [Freehills](http://www.freehills.com" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com" \t "_new), [Phillips Fox](http://www.phillipsfox.com" \t "_new).  **Editor’s note** This is an additional issue of the Corporate Law Bulletin. The recent judgments section of the Bulletin will return in the February issue.  ***Use the arrows to navigate easily across the bulletin***= back to Brief Contents = back to top of current section |
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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Centre for Corporate Law Conference – Corporate Governance - 13 February 2004**  The University of Melbourne’s Centre for Corporate Law and Securities Regulation is hosting a one-day conference featuring two of the United States’ leading commentators on corporate governance.  The governance-related failures of many high-profile companies – including Enron in the US and HIH and One.Tel in Australia – have seen corporate governance assume an unprecedented importance. An initial focus on auditor independence has been followed by legislative, stock exchange and investor action on executive remuneration, board composition and financial disclosure.  This conference is an opportunity for professional advisers, regulators, directors, auditors and academics to hear, and speak to, leading corporate governance advisers commentators and scholars from the US, the UK and Australia.  Further details are available from the Centre’s Administrator on 03 8344 5281 or from the [Centre’s website](http://cclsr.law.unimelb.edu.au/news/).  **1.2 ASA releases poor performer list**  On 21 January 2004, the Australian Shareholders' Association (ASA) released its seventh annual list of 'poor performers'. The list contains 19 companies that the ASA has highlighted for special attention during 2004. The companies have been selected using Shareholder Rate of Return (SROR) figures provided by The Australian newspaper in a special issue titled 'Shareholder Scorecard'.  The SROR calculation is a composite of the movement in share price, dividend and imputation tax credits. It takes account of changes in capital and is defined as the annualised total return to shareholders from maintaining their investment in a stock over a period.  Compared with their ASX sectors up to 30 June 2003, companies on the 'poor performer' list have substantially under-performed over three years. In all cases, the SROR has been negative over a three-year period, and the one-year SROR has not justified the exclusion of a company from the list.  Mr Wilson, CEO of ASA stated, 'The ASA uses this list to focus its company monitoring resources where they will best benefit shareholders. The Association's monitoring activities cover most major companies as well as the companies appearing on the poor performer list. Following on from monitoring activities in 2003, the ASA will again be pursuing questions about performance and corporate governance. Where we are not satisfied with the answers, we will be raising those issues publicly.'  **ASA Poor Performer List**   |  |  |  | | --- | --- | --- | |  | **Three year return to 30 June 2003** | | | **Company** | **Company return %** | **Sector return %** | | Adsteam Marine | -9.3 | 22.5 | | AMP\* | -31.2 | -16.7 | | Aristocrat Leisure | -35.8 | 6.5 | | Brambles\* | -24.9 | 22.5 | | CSL | -27.7 | -15.6 | | Energy Developments | -43.4 | 7.1 | | ERG\* | -72.9 | -62.6 | | Foster’s Group | - 0.3 | 6.5 | | Gribbles | -22.0 | 1.9 | | Harvey Norman | -10.6 | 1.4 | | Hutchison Telecommunications | -56.6 | -11.6 | | Lend Lease\* | -24.8 | 9.1 | | Mayne Group\* | -4.0 | 1.9 | | Metal Storm | -12.1 | 23.3 | | Novus\* | -12.7 | 7.6 | | PMP\* | -24.0 | -12.1 | | Sons of GWALIA | -21.2 | 7.4 | | Southcorp | -11.5 | 6.5 | | Village Roadshow\* | -16.8 | -12.1 |   \* indicates member of earlier list(s)  **1.3 Parliamentary Report recommends improvements to rural/remote banking services**  On 15 January 2004, the Parliamentary Joint Committee on Corporations and Financial Services, published its report ‘Money Matters in the Bush’, on the level of banking and financial services available to people living in rural, regional and remote Australia and its Supplementary Report on ATM fees.  The major recommendations of the report call for:  1. improved customer access to trained bank officers with local knowledge, to overcome the breakdown in the customer/bank relationship; 2. banks to provide more effective education and training programs in the use of new technology, such as internet and telephone banking, especially to ensure older and indigenous Australians have the skills, confidence and motivation to use these technologies; 3. a review of the Rural Transaction Centre Program to enhance its success; 4. financial institutions to make greater use of Australia Post’s Giropost; 5. the introduction of industry standards for electronic banking in remote Australia; 6. the protection against unreasonable differential rural foreign ATM fees in areas where there is only a foreign ATM; 7. the Branch Closure Protocol toincorporate comprehensive community consultation, a community impact statement, six months notice and cost free transfer of accounts into its provisions; 8. improved portability of accounts between financial institutions, especially in the situation of branch closures; 9. measures to be taken to remove unnecessary regulatory impediments that prevent smaller approved deposit taking institutions from expanding into rural areas; 10. a comprehensive program to improve the financial literacy of indigenous Australians in remote areas of Australia; 11. improved consumer protection measures regarding bank account administration for isolated people; 12. the refinement of APRA’s Points of Presence Database and measures taken to ensure proper analysis; and 13. the adaptation to Australia of overseas measures to encourage banks to be more involved as invigorators of the economic life of communities in rural, regional and remote Australia.  The report is available on the [Committee’s website](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm" \t "_new). 1.4 Andrew S Fastow, former Enron Chief Financial Officer, pleads guilty, settles civil fraud charges and agrees to cooperate with ongoing investigation On 14 January 2004 the United States Securities and Exchange Commission settled civil fraud charges filed against Andrew S Fastow, Enron's former chief financial officer. The complaint, filed on October 2, 2002 in the US District Court in Houston, alleged that Fastow defrauded Enron's shareholders and enriched himself and others by, among other things, entering into undisclosed side deals, manufacturing earnings for Enron through sham transactions, and inflating the value of Enron's investments.  Without admitting or denying the allegations in the Commission's complaint, Fastow has agreed to be enjoined permanently from violating the antifraud, periodic reporting, books and records, and internal control provisions of the federal securities laws, and to be barred permanently from acting as an officer or director of a public company. The Commission settled its action in coordination with the Justice Department's Enron Task Force, which entered into a guilty plea with Fastow on related criminal charges. In resolving the parallel civil and criminal proceedings, Fastow has agreed to serve a ten-year sentence, to disgorge more than $23 million and to cooperate with the government's continuing investigation.  As alleged in the Commission's complaint, Fastow participated in a series of fraudulent transactions. Three of the transactions — RADR, Chewco, and Southampton — were part of an alleged scheme to hide Fastow's interest in and control of certain entities in order to avoid consolidating those entities in Enron's financial statements. This was done, according to the complaint, for self-enrichment and to mislead analysts, rating agencies, and others about Enron's true financial condition.  Two of the transactions — the Nigerian barges and Cuiaba — are alleged to have been sham sales best described as secret asset-parking arrangements. The Nigerian barges involve Enron's purported sale of an interest in certain Nigerian barges to Merrill Lynch & Co., Inc. ("Merrill"). Fastow is alleged to have personally promised that Merrill would be taken out of its so-called investment and later arranged for an entity he controlled, LJM2 Co-Investment, L.P. ("LJM2"), to buy the financial institution's interest at a pre-arranged rate of return on a pre-arranged time table. In Cuiaba, Enron entered into a transaction with another off-balance-sheet entity controlled by Fastow, LJM Cayman, L.P. ("LJM1"), to sell an interest in a severely troubled power plant in Cuiaba, Brazil, in order to avoid consolidation of project debt and recognize earnings. In connection with this transaction, Fastow allegedly entered into an unwritten side agreement with Enron requiring Enron to buy back the interest it just sold to Fastow at a guaranteed profit.  In the last transaction, Enron and LJM2 created a complex financial structure — Raptor I — that allowed Enron to hedge against potential declines in certain of its mark-to-market investments. LJM2's $30 million investment — representing the purported 3% outside equity required to be at risk in order for Enron to avoid consolidating the Raptor vehicle in its financial statements — however, was not at risk. Fastow allegedly entered into an undisclosed side deal in which Enron agreed that, prior to conducting any hedging activity with Raptor I, Enron would return LJM2's investment ($30 million) plus a guaranteed return ($11 million). As a result, Raptor I should have been consolidated on Enron's financial statements.  To conceal the side deal, Fastow and others allegedly devised a scheme to manufacture a $41 million payment to LJM2. Enron and the Raptor vehicle entered into a "put," a transaction in which Enron essentially bet that its own stock price would decline. Enron purchased that "put" option from the Raptor vehicle for $41 million. The $41 million was then transferred from Raptor I to LJM2. The complaint alleged that there was no true business purpose for the "put" other than to generate funds to pay LJM2 under the undisclosed side deal.  The complaint also alleged that in September 2000, Fastow and others used Raptor I to effectuate a fraudulent hedging transaction and thus avoid a decrease in the value of Enron's investment in the stock of a public company called Avici Systems Inc. Specifically, Fastow and others back-dated documents to make it appear that Enron locked in the value of its investment in Avici in early August 2000, when Avici's stock was trading at its all time high price.  The Commission's Complaint in this matter can be accessed at [http://www.sec.gov/litigation/complaints/comp17762.htm](http://www.sec.gov/litigation/complaints/comp17762.htm" \t "_new) 1.5 SEC proposes new investment company governance requirements, new investment adviser codes of ethics requirements, and new confirmation and point of sale disclosure requirements On 14 January 2004 the United States Securities and Exchange Commission voted to propose three regulatory initiatives designed to better protect the 95 million investors in mutual funds. These initiatives represent the next in a series of securities law reforms pursued by the Commission to address problems identified with the management and sale of mutual funds.  **(a) Investment company governance**  Mutual fund boards of directors play an important role in protecting fund investors. They have overall responsibility for the fund, oversee the activities of the fund adviser, and negotiate the terms of the advisory contract, including the amount of the advisory fees and other fund expenses.  The Commission voted to propose amendments to its rules to enhance fund boards' independence and effectiveness and to improve their ability to protect the interests of the funds and fund shareholders they serve. The rule amendments are designed to strengthen the hand of independent directors when dealing with fund management.           **Independent composition of the board.** Independent directors would be required to constitute at least 75 percent of the fund's board. This requirement is designed to strengthen the presence of independent directors and improve their ability to negotiate lower advisory fees and other important matters on behalf of the fund.            **Independent chairman.** The board would be required to appoint a chairman who is an independent director. The board's chairman typically controls the board's agenda and can have a strong influence on the board's deliberations.          **Annual self-assessment.** The board would be required to assess its own effectiveness at least once a year. Its assessment would have to include consideration of the board's committee structure and the number of funds on whose boards the directors serve.            **Separate meetings of independent directors.** The independent directors would be required to meet in separate sessions at least once a quarter. This requirement could provide independent directors the opportunity for candid discussions about management's performance, and could help improve collegiality.            **Independent director staff.** The fund would be required to authorize the independent directors to hire their own staff. This requirement is designed to help independent directors deal with matters on which they need outside assistance.  Comments on the proposed rule amendments should be received by the Commission within 45 days of publication in the Federal Register.  **(b) Codes of ethics for investment advisers**  The Commission voted to propose new rule 204A 1 and related rule amendments under the Investment Advisers Act of 1940. New rule 204A 1 would require registered investment advisers to adopt and enforce codes of ethics applicable to their supervised persons.  Investment advisers are fiduciaries that owe their clients a duty of undivided loyalty. The Commission's recent enforcement proceedings suggest that some advisory personnel may have forgotten or ignored this duty. The new rule is designed to prevent fraud by reinforcing the fiduciary principles that must govern the conduct of advisory firms and their personnel. An adviser's code of ethics would have to include certain minimum provisions.           **Standards of business conduct.** The code would be required to establish standards of conduct that are expected of the adviser's supervised persons and that reflect the adviser's fiduciary duties. Supervised persons would have to acknowledge, in writing, receipt of a copy of the code of ethics.          **Compliance with federal securities laws.** An adviser's code of ethics would have to require the adviser's supervised persons to comply with applicable federal securities laws.            **Safeguard nonpublic information.** The code would have to contain provisions reasonably designed to prevent disclosure of material nonpublic information about the adviser's securities recommendations and clients' securities holdings and transactions to persons without a "need to know."          **Personal securities reporting.** Advisers' codes of ethics would have to require certain supervised persons ("access persons") to report their personal securities holdings and transactions, including transactions in mutual funds advised by the adviser or an affiliate. Currently, only mutual fund advisers must have a code of ethics requiring their personnel to report their personal securities transactions.            **Pre-approval of certain transactions.** The code of ethics would have to require access persons to pre-clear any personal investments in initial public offerings and limited (private) offerings.             **Reporting of code violations.** The code of ethics would have to require supervised persons to report, promptly, any violations of the adviser's code of ethics to the firm's compliance officer or to another designated person.  Comments on the proposed rule and related amendments should be received by the Commission within 45 days of publication in the Federal Register. (c) Confirmation requirements and point of sale disclosure requirements for transactions in certain mutual funds and other securities, and other confirmation requirement amendments, and amendments to the registration form for mutual funds The Commission voted to propose two new rules and rule amendments that are designed to enhance the information that broker-dealers provide to their customers in connection with transactions in certain types of securities. The two new rules would require broker-dealers to provide their customers with targeted information, at the point of sale and in transaction confirmations, regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares, unit investment trust (UIT) interests (including insurance company separate accounts that offer variable annuity contracts and variable life insurance policies), and municipal fund securities used for education savings (commonly called 529 plans).  The rules would require disclosure at two key times - first at the point of sale, and second at the completion of a transaction in the transaction confirmation. (i) Proposed Rule 15c2-3 - point of sale requirements Because confirmation disclosure does not provide information to investors prior to transactions in securities - i.e., at the time they make investment decisions – the commission is proposing new rule 15c2-3 to require brokers, dealers and municipal securities dealers to provide point of sale disclosure to customers prior to effecting transactions in mutual fund shares, UIT interests, and 529 plan shares.  The rule would require the broker, dealer or municipal securities dealer to inform its customer about the distribution-related costs that the customer would be expected to incur in connection with the transaction. This would include separate disclosure (either by reference to the value of the purchase, or, if no amount was specified, by reference to a model investment of $10,000) about:           the amount of sales loads that would be incurred at the time of purchase, and the amount of that load that would be paid to the broker-dealer;           estimated asset-based sales charges and asset-based service fees paid out of fund assets in the year following the purchase if net asset value remained unchanged; and           the maximum amount of any deferred sales load that would be associated with the purchase if those shares are sold within one year, along with a statement about how many years a deferred sales load may be in effect.  In addition, the rule would require disclosure of whether the broker, dealer or municipal securities dealer receives revenue sharing or portfolio brokerage commissions from the fund complex, as well as whether it pays differential compensation in connection with transactions in the covered security, if the covered security is either a class B share or a proprietary security.  **(ii) Customers' right to terminate orders made prior to disclosure**  Under the rule, an order made prior to the required point of sale disclosure would be treated as an indication of interest.  **(iii) Manner of disclosure**  The rule would generally require a broker, dealer or municipal securities dealer to give or send the information to the customer in writing using a new standardized form, Schedule 15D. This would be supplemented by oral disclosure if the point of sale occurs at an in-person meeting. If the point of sale occurs through means of an oral communication other than at an in-person meeting, however, then the information would only be disclosed to the customer orally.  **(iv) Recordkeeping**  Brokers, dealers or municipal securities dealers, at the time they disclose information required by the rule, would have to make records of communications sufficient to demonstrate compliance.  **(v) Exceptions**  The rule would contain a limited exception for transactions resulting from orders that a customer placed via US mail, messenger delivery or a similar third-party delivery service. It also would contain an exception for certain brokers that did not communicate with the customer, except to accept an order, if they reasonably believe another broker provided point of sale disclosure. The rule also would contain other targeted exceptions. (vi) Proposed Rule 15c2-2 - confirmation requirement Proposed rule 15c2-2 would require more quantitative disclosure of the information included in the point of sale document.  **(vii) Disclosures for purchases**  Proposed rule 15c2-2 would require specific disclosures in purchase transactions that build on the point of sale requirements. These requirements would include:           Cost and remuneration disclosure - Disclosure of the amount of any sales load that the customer has incurred (front end load) or will incur (back end load) at the time of purchase, expressed in dollars and as a percentage of the net amount invested, and disclosure of any dealer concession that the broker, dealer or municipal securities dealer earns in connection with the transaction, expressed in dollars and as a percentage of the net amount invested.           Revenue sharing and portfolio brokerage disclosure - Disclosure of quantified information about revenue sharing arrangements and portfolio brokerage (i.e., effecting transactions for an issuer's own portfolio). In particular, the rule would require disclosure of (a) revenue sharing payments from persons within the fund complex, and (b) commissions, including riskless principal compensation, associated with portfolio securities transactions on behalf of the issuer of the security, or other securities within the fund complex. This disclosure would be quantified based on the pro rata estimates of the amount of income received by the broker from the fund complex as compared to the assets of the funds. This ratio would then be applied to the assets invested by the particular investor. Disclosure would also be required of any specific revenue sharing arrangement that would be applicable to the transaction.          Differential compensation disclosure - Disclosure of whether a broker, dealer or municipal securities dealer pays its salespersons more compensation if they sell securities that carry a deferred sales load, or if they sell "proprietary" securities (that is, securities issued by an affiliate of the broker, dealer or municipal securities dealer).  **(viii) Periodic disclosure alternative**  The rule would permit brokers, dealers and municipal securities dealers to disclose the required information periodically -- rather than transaction-by-transaction -- in certain limited circumstances involving transactions in a "covered securities plan" or in no-load open-end money market funds, after an initial confirmation has been sent that meets the requirements of the rule.  **(ix) Comparison range disclosure**  The rule would provide a mechanism to give investors additional context for evaluating the significance of certain information. This context would come from comparison ranges for sales compensation, revenue sharing, and portfolio brokerage commissions, so that investors can see where their particular costs and payments fall in comparison to the median and ranges in the marketplace. The Commission would need to propose additional rules to determine how to obtain and disseminate comparison range information.  **(x) General disclosure requirements**  For all transactions (sales as well as purchases), the rule would require disclosure of:           the date of the transaction,            the issuer and class of the security,            the net asset value of the shares or units and, if different, their public offering price,            the number of shares purchased or sold by the customer,            the total dollar amount paid or received in the transaction,            the net amount of the investment bought or sold in the transaction,          any commission, markup or other remuneration the broker, dealer or municipal securities dealer will receive from the customer in connection with the transaction, and           when applicable, that a broker, dealer or municipal securities dealer is not a member of the Securities Investor Protection Corporation (SIPC), or that the broker, dealer or municipal securities dealer clearing or carrying the customer account is not a member of SIPC. (d) Proposed amendments to the Commission's general confirmation requirements and Form N-1A The Commission also voted to propose conforming amendments to its general confirmation rule, as well as amendments to that rule to provide investors with additional information about call features of debt securities and preferred stock. Finally, the Commission voted to propose amendments to Form N-1A, the registration form for mutual funds, to improve disclosure of sales loads and revenue sharing. (e) Special Request for comments from investors Finally, these initiatives are intended to give investors "news they can use." In addition to including a special section in the proposal soliciting comments from investors, the Commission intends to reach out to the investor community through a variety of methods, including investor focus groups. This process is intended to design requirements - including standardized disclosure forms - that average investors will find useful and informative.  Comments on these proposals should be received by the Commission within 60 days of publication in the Federal Register.  **1.6 OECD Invites Comment on Draft Revision of its Corporate Governance Principle**  On 12 January 2004, the OECD invited public comment on a draft of the revision of its Principles of Corporate Governance that were adopted by OECD governments in 1999. This followed a request from OECD governments for reinforcement of the Principles in response to recent corporate scandals.    Since they were adopted in 1999, the OECD Principles have been a reference for corporate governance initiatives around the world. The Financial Stability Forum named them as one of the Twelve Key Standards for Sound Financial Systems, and they underpin the corporate governance component of the World Bank/IMF Reports on Standards and Codes (ROSC).  The OECD Principles are the result of a consensus between participating governments on minimum requirements for best practice. Although they are non-binding, they provide a reference for national legislation and regulation, as well as guidance for stock exchanges, investors, corporations and other parties.  The draft text now made public for comment is the result of consultations over the past year with governments and representatives of business, professional groups, labour and civil society in both OECD and non-OECD countries. The draft, issued under the responsibility of the OECD Secretariat, represents work in progress.  Subsequent versions will take into account comments received during this consultation as well as additional comments by members of the OECD Steering Group on Corporate Governance.  The OECD Principles already cover many of the issues that have been at the centre of recent corporate scandals. They include recommendations on high quality standards of accounting and audit, the independence of board members and the need for boards to act in the interest of the company and the shareholders.  The new draft text, in addition, sets more demanding standards in a number of areas. It specifies that investors should have both the right to nominate company directors and a more forceful role in electing them. It states that shareholders should be able to express their views about compensation policy for board members and executives and submit questions to auditors. It calls on institutional investors to disclose their overall voting policies and how they manage material conflicts of interest that may affect the way they exercise key ownership functions, such as voting.  The text also identifies the need for effective protection of creditor rights and an efficient system for dealing with corporate insolvency. It calls on rating agencies, brokers and other providers of information that could influence investor decisions to disclose conflicts of interest and how they are being managed. It also calls on boards to be more rigorous in disclosing related party transactions and to protect so-called "whistle blowers" by allowing them confidential access to a contact at board level.  It is anticipated that a final revised version of the Principles will be submitted to OECD governments for approval at the annual meeting of the OECD Council at Ministerial Level on 13-14 May 2004.  The draft Principles are on the [OECD website](http://www.oecd.org/" \t "_new).  **1.7 Treasury releases position paper on compensation in the services sector**  On 24 December 2003, the Parliamentary Secretary to the Australian Treasurer, the Hon Ross Cameron MP released the Government’s position paper on compensation for loss in the financial services sector.  It should be noted that the area covered by this paper is limited to losses incurred in connection with the provision of financial services. It is not about losses suffered as a result of changes in the value of financial products through, for example, market fluctuations or loss of insurance cover caused by the insolvency of the issuer.  The paper is the second in the Government’s review of this area. The first was an issues and options paper in response to which Treasury received 29 submissions, indicating a wide range of views.  The position put in the paper envisages professional indemnity insurance (or a substitute), with the possibility of exemption for some APRA-regulated entities. It was framed in the light of current difficulties in the professional indemnity insurance market.  As well as putting a position, the paper seeks the views of the public on a number of more specific issues.  The consultation period starts 24 December 2003 and will finish on 31 January 2004. The Government welcomes input from stakeholders and the community in developing policy in this area. The government’s final position will only be finalised after this consultation process has concluded.  In the light of the consultation period required to determine acceptable compensation arrangements, it is envisaged that the transitional arrangements relating to section 912B of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) will be extended for a further 12 months, to 11 March 2005. That is, they will operate from one year after the full commencement of the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) on 11 March 2004.  The paper is available on the [Treasury website](http://www.treasury.gov.au/" \t "_new) under "Publications." 1.8 FSA finalises rules on past performance in advertising Standardised data must be included in advertisements referring to past performance, under new rules published on 22 December 2003 by the United Kingdom Financial Services Authority. The rules, which will come into force on 1 June 2004, will prevent firms 'cherry-picking' data to present their past performance in a flattering light.  Under the new rules:           Where past performance information is used in advertisements, it must be accompanied by standardised data, set out in a table, showing discrete annual returns for the previous five years. These figures must be expressed as a percentage and will give consumers a better understanding of the volatility of the investment and how it has performed over a period of time.           Where less than five years performance is available, then a firm should give information for as many 12-month periods as possible, updated to the previous quarter. Firms should indicate (using dashes or an explanation) where there is no information available for the 'missing years.'           Where data is available for less than one twelve month period, past performance information may not be included. This is because a period of less than a year will not give a 'clear, fair and not misleading' impression of longer term performance. However, this information will still be available to intermediaries and professionals because only advertisements aimed at retail investors are covered by the FSA's advertising rules.  The standardisation measures form part of an overall package aimed at cleaning up the way in which past performance information is used in advertising. Other elements of the package include:           improving the balance in advertisements by reducing the emphasis on past performance;          strengthening the warning so that it appears in the main body of the advertisement, not buried in the small print; and           preventing firms from making a link between past performance and the future.  Final rules and guidance are published in [Policy Statement 183 Standardising Past Performance: feedback on CP183](http://www.fsa.gov.uk/pubs/policy/ps183/index.html" \t "_new) and come into force on 1 June 2004. 1.9 SEC Releases Guidance Regarding MD&A On 19 December 2003 the United States Securities and Exchange Commissions issued an interpretive release providing guidance regarding Management's Discussion & Analysis of Financial Condition and Results of Operations, commonly called MD&A, included in reporting companies disclosure documents.  The guidance reminds companies of existing disclosure requirements and provides additional guidance, designed to elicit more informative and transparent MD&A that satisfies the principal objectives of MD&A: (1) to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management; (2) to enhance the overall financial disclosure and provide the context within which financial information should be analysed; and (3) to provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.  Specifically, the guidance emphasizes that MD&A should not be merely a recitation of financial statements in narrative form or an otherwise uninformative series of technical responses to MD&A requirements, neither of which provides the important management perspective called for by MD&A.  Instead, the release encourages top-level management involvement in the drafting of MD&A, and provides guidance regarding:           the overall presentation and focus of MD&A (including through executive-level overviews, a focus on the most important information and a reduction of duplicative information);            emphasis on analysis of financial information;            known material trends and uncertainties;            key performance indicators, including non-financial indicators;          liquidity and capital resources; and           critical accounting estimates.  The release does not create new legal requirements, nor does it modify existing legal requirements.  A copy of the release can be found on the Commission's Web site at [http://www.sec.gov/rules/interp/33-8350.htm](http://www.sec.gov/rules/interp/33-8350.htm" \t "_new) under "Regulatory Actions / Interpretive Releases."  **1.10 2003 US Proxy Season Roundup** SocialFunds.com, a website focusing on corporate social responsibility, has reported on the 2003 US proxy season in an article dated 17 December 2003. A record number of resolutions, more than 1,080, were filed. Some resolutions received very high votes. For example, a resolution calling for annual elections of directors filed at 38 companies averaged 62.7 percent of the vote, according to the Investor Responsibility Research Center, an independent corporate governance and social responsibility research firm. The resolution received  92.89 percent vote at Avon, according to the Interfaith Center on Corporate Responsibility ([ICCR](http://www.iccr.org/" \t "_new)), an association of 275 faith-based institutional investors who collectively manage over $110 billion in assets.   ICCR uses the [Principles of Global Corporate Responsibility--Bench Marks for Measuring Business Success](http://www.bench-marks.org/" \t "_new) to work with corporate boards and management to develop human rights codes and business principles. For example, an ICCR dialogue group inspired Ford to adopt a human rights code and a set of business principles focused on corporate social responsibility, labour rights, and environmental issues such as climate change.   The full article is available at [www.socialfunds.com](http://www.socialfunds.com/" \t "_new) under "News". 1.11 SEC approves NYSE governance structure changes; proposes mutual fund disclosure rules; solicits comment on fund transaction cost issues On 17 December 2003 the United States Securities and Exchange Commission voted to approve changes to the governance structure of the New York Stock Exchange; to publish for comment a rule proposal that would amend mutual fund disclosure requirements regarding breakpoint discounts and front end loads; and to publish a concept release to solicit public comment on mutual fund transaction cost issues. (a) New York Stock Exchange corporate governance proposal On 7 November 2003, the New York Stock Exchange filed a proposal with the Commission to amend and restate its Constitution to implement a series of governance changes (SR-NYSE-2003-34). The proposal was published for public comment in the Federal Register on 13 November 2003. The Commission voted to approve the proposal.  The NYSE will make a number of revisions to its governance structure, including, most significantly, the following changes:           Independent Board of Directors. The Board of Directors will be reduced from 24-27 members to between 6-12 members, plus the Chairman of the Board and CEO (if different than the Chairman). Board members (except the CEO) will be required to be independent of management, the members, and issuers.           Constituent Board of Executives. The Board of Executives will be created as an advisory board, consisting of the Chairman and the CEO (if different than the Chairman), and at least 20 but no more than 25 members who will serve for one-year terms. The members of the Board of Executives will include representatives of the Exchange's various stakeholders, including member firms, institutional investors, and listed companies.             Autonomous Regulatory Office. The position of Chief Regulatory Officer will be created to oversee the NYSE's regulatory function. The Board will appoint the Chief Regulatory Officer, who will report directly to the Regulatory Oversight & Regulatory Budget Committee. That independent Board committee will exercise control over the NYSE's regulatory plan, budget and staffing, and recommend the compensation of senior regulatory employees.          Independent Key Board Committees. Four Standing Committees, consisting only of independent directors, will be created to oversee certain critical functions. These are the Nominating & Governance Committee, the Human Resources & Compensation Committee, the Audit Committee, and the Regulatory Oversight & Regulatory Budget Committee. (b) Enhanced disclosure of mutual fund breakpoint discounts The Commission decided to propose amendments that would require a mutual fund to provide enhanced disclosure regarding breakpoint discounts on front-end sales loads. This enhanced disclosure would assist investors in understanding the breakpoint opportunities available to them.  Some mutual funds with a front-end sales load provide discounts for larger investments. The investment levels required to obtain a reduced sales load are commonly referred to as "breakpoints." In determining whether an investor meets a "breakpoint," funds often allow the investor to use a "right of accumulation" to aggregate shares purchased at different times, in different funds within a fund family, and by family members of the investor.  An examination sweep of broker-dealers initiated by the Commission, NASD, and the New York Stock Exchange late last year revealed that in 32% of the transactions that appeared to be eligible for a reduced sales charge, investors did not receive the full reduction to which they were entitled. The most frequent causes for not providing a breakpoint discount involved problems with rights of accumulation, including not linking an investor's ownership of different funds in the same mutual fund family, shares owned by the investor in different accounts, or shares owned by persons related to the investor. Following the joint examination sweep, NASD formed a Joint NASD/Industry Task Force on Breakpoints, which issued its recommendations in July of this year.  As a result of the examination sweep and the Task Force report, the Commission is aggressively attacking industry failures to deliver breakpoint discounts through both enforcement investigations and regulatory initiatives. The proposals would require enhanced disclosure by mutual funds regarding breakpoints, as recommended by the Task Force. The proposals would:           require a mutual fund to provide a brief description in its prospectus of arrangements that result in sales load breakpoints, including a summary of eligibility requirements, with more detailed information permitted to be in the statement of additional information (SAI);            require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints;            require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary; and           require a mutual fund to state in its prospectus whether it makes available on its website information regarding its breakpoints.  Comments on the proposed rule amendments should be sent to the Commission within 45 days of their publication in the Federal Register.  Investors can learn more about reduced front-end sales loads by going to [http://www.sec.gov/answers/breakpt.htm](http://www.sec.gov/answers/breakpt.htm" \t "_new) and [http://www.nasdr.com/alert\_breakpoint.htm](http://www.nasdr.com/alert_breakpoint.htm" \t "_new). Investors can access fund expense calculators at [http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm](http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm" \t "_new) and [http://www.nasdr.com/fundcalc/expense\_analyzers.asp](http://www.nasdr.com/fundcalc/expense_analyzers.asp" \t "_new).  The examination sweep report "Joint SEC/NASD/NYSE Report of Examinations of Broker Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds" is available at [http://www.sec.gov/news/studies/breakpointrep.htm](http://www.sec.gov/news/studies/breakpointrep.htm" \t "_new). A copy of the Joint NASD/Industry Task Force on Breakpoints report can be found at [http://www.nasdr.com/breakpoints\_report.asp](http://www.nasdr.com/breakpoints_report.asp" \t "_new). (c) Request for comments on ways to improve mutual fund transaction cost disclosure The Commission decided to issue a concept release on mutual fund transaction costs. The release will seek public comment on whether mutual funds should be required to quantify and disclose to investors the amount of transaction costs they incur; include transaction costs in their expense ratios and fee tables; provide other measures or additional disclosure that would indicate the level of a fund's transaction costs; or some combination of the above. In addition, the release will seek comment on whether mutual funds should be required to record transaction costs or the portion of those costs that represent soft dollar benefits as an expense in their financial statements. The release also will ask for comment on the adequacy of existing requirements for board review of transaction costs.  Comments in response to the concept release should be sent to the Commission within 60 days of its publication in the Federal Register. 1.12 EU Takeover Directive adopted On 16 December 2003, the European Parliament adopted its draft opinion on the European Commission's proposal for a Takeover Directive, backing the compromise text that the Council had informally adopted in November.   The Takeover Directive aims to provide a framework of common principles for cross-border takeover bids, create a level playing field for shareholders and establish disclosure obligations throughout the EU. Several proposals had been discussed over a 14-year period. In 2001, the European Parliament had rejected the last proposal in a historic vote (273:273 votes).   The Competitiveness Council had on 27 November 2003 agreed on a compromise text, which considerably waters down the Commission's initial proposal by adopting an optional approach to the two contested parts of the proposed directive: shareholder participation on defensive measures and neutralising these measures after a takeover. However, there is room for a further development in the Directive, as the Commission is required to review it after five years.   The Parliament voted by 321 votes in favour, 219 against with 9 abstentions to approve the new takeover directive but with a number of strategic amendments that make key provisions of the legislation optional. Opposition came from members who felt the clauses on information and consultation of workers were inadequate.  A key point of the new directive is that minority shareholders will be better protected. The Commission's text already proposed forcing any company launching a takeover bid to offer to buy all the target company's shares at an "equitable price", defined as "the highest price paid for the same securities by the offeror" over a period of 6-12 months prior to the bid. Under the Council compromise now endorsed by Parliament, the definition of an equitable price becomes more generous to minority shareholders. If, after the bid is made public and before it closes for acceptance, the bidder buys any shares at above his offer price, he will have to increase his offer price to at least match the highest price he has paid.   The other main amendments adopted concern the use of defensive measures, restrictions on votes and multiple voting rights, and especially the introduction of optional arrangements.   Under the Commission's text, boards of companies which are the target of a hostile takeover bid must consult their shareholders before taking any defensive measures, such as share issues, to frustrate the bid. However, as part of the compromise, Parliament voted to allow any Member State to "opt out" (i.e. notto require firms to apply the provisions on defensive measures) although individual companies in such a Member State would be able to "opt in", i.e. to choose to observe the rule of not taking defensive measures without shareholder approval. In yet another twist, however, a company can be exempted from this rule if it has "opted in" but has subsequently become the target of a hostile bid by a firm that does not itself observe the rule.   "Multiple voting rights" create another form of "defensive position". In certain firms, particularly in Scandinavian countries, some shares carry more voting rights than others, enabling their holders to block takeover bids that might be acceptable to the majority of shareholders. There is no "level playing field" throughout the EU as long as these special rights exist in some countries, yet they were omitted from the Commission proposal, which only says, more generally, that restrictions on voting rights will not apply during votes on defensive measures. Therefore, in line with the compromise reached in Council, Parliament voted to ensure that multiple voting rights will be treated in the same way as restrictions on voting rights. However, opt-outs for Member States, as well as opt-ins for companies, will be available as in the case of defensive measures. Another amendment states that where such rights are being removed, "equitable compensation*"* must be provided for any loss the holders incur. The precise terms of this compensation are to be decided by each Member State.   It should be noted that the new directive does not cover the "golden shares" held in major companies by many EU governments and sometimes used to block takeover bids. These are to be the subject of a separate directive.  **1.13 Macroeconomics and Governance - New Research Report**  The Australian Treasury published in December 2003 a research report titled "Macroeconomics and Governance". In recent years there has been a resurgence of interest in the impact of institutions on economic growth and development. Governance, both at the economy-wide and firm-specific level, has emerged as one of the central aspects of institutional structure and design.  The report argues that the quality of governance matters to macroeconomic performance because it provides a key foundation for the equitable and efficient allocation of resources, including capital. Better governance tends to be associated with deeper economic and financial development, with the causation running from better governance to higher income rather than the other way round. Better governance also reduces the risk of macroeconomic instability, by containing the types of shocks to which an economy is exposed and by making it easier for private and official decision-makers to deal with negative shocks when they occur. This matters for all economies, be they developing, emerging, transition, or industrialised.  The report sets out some definitions of governance, at both the economy-wide and firm-specific level, and explores what is meant by "good governance" . It sets out some indicators of governance for selected Asia-Pacific economies. It explores some of the ways that governance can matter for macroeconomic growth, development and stability.  The report is available on the [Treasury website](http://www.treasury.gov.au" \t "_new) under "What's new".  **1.14 Canadian Committee calls for single securities regulator built on joint federal provincial model**  In December 2003 the Committee to Review the Structure of Securities Regulation in Canada published its report calling for the creation of a single regulator built on a joint federal-provincial model. The Committee's report, titled "It's Time", is a response to a high level of frustration among market participants with the inadequate enforcement, undue complexity, excessive cost and weak international profile of Canada's current regulatory system of 13 provincial and territorial regulators.  “There was a time when Canada was well served by a provincially-based system of securities regulation, but those days are gone,” said Michael Phelps, Committee Chair. “It is time for Canada to have a single regulator administering a single code nationwide. With less than 3% of the global capital market and a population roughly equal to the state of California, Canada can no longer afford to be the world's only major industrialized country without a national regulator. It is argued in the report that the recommendation are about staying competitive with the rest of the world. It is about implementing the system that best protects investors, that best provides access to capital for companies, and that best enables capital markets to contribute effectively to Canada's long-term economic growth.”  **(a) The recommended model**  The recommended model ensures strong participation by the provinces. The Canadian Securities Commission (CSC) would consist of nine full-time, regionally representative Commissioners appointed by the Minister of Finance. Nominees would be proposed by a 13-person Nominating Committee with 10 members designated by the provinces. A Securities Policy Ministerial Committee consisting of the provincial ministers responsible for securities regulation and the Minister of Finance would provide a framework for provincial input to securities policy and the system's administration.  The Commission would administer a comprehensive code of capital markets regulation to be enacted by the Federal Government. This legislation should take into account the Uniform Securities Legislation Project that has been undertaken by the Canadian Securities Administrators and other provincial legislative reform proposals.  The Committee's single regulator proposal would significantly strengthen enforcement, facilitate better policy innovation and development, and enhance Canada's brand of securities regulation internationally. Moreover, it would establish clear lines of accountability, ensure responsiveness to regional needs, provide for uniform investor protection across Canada and facilitate the reallocation of substantial funds towards better enforcement and other pressing regulatory issues.  **(b) A call for change**  It was made abundantly clear to the Committee in 92 written submissions and through nine days of public consultations with issuers, investors and other market participants across the country that there is a new and unprecedented demand for change. Canadians want and need a simpler, more efficient regulatory system geared to the distinctive characteristics of the Canadian economy, including a significant component of emerging companies.  The Committee gave serious consideration to the proposed passport system throughout its deliberations. The passport represents an incremental improvement over the status quo, but as a number of market participants pointed out, it falls far short of the kind of system Canada needs to be successful.  “The Committee believes there are no meaningful impediments, constitutional or otherwise, to the prompt implementation of its recommended model,” said Mr. Phelps. The Committee urges capital market participants to continue speaking out on this issue. That is the only way to ensure reform. Likewise, the Committee urges the federal and provincial governments to work together to promptly implement the Committee's recommended model.  **(c) About the Committee**  Established by former Minister of Finance John Manley in March 2003, the mandate of the Committee was to undertake an independent objective review of the current securities regulatory framework and identify an appropriate model for securities regulation in Canada.  The Committee's recommendation is based on extensive input from market participants, independent research studies, and the Committee members' collective experience and judgment. Many of the independent research studies conducted for the committee represent the first independent examination of this complex and important subject. Copies of the Committee's report, independent research papers, submissions from market participants and related documents are available on the Committee's website at [www.wise-averties.ca](http://www.wise-averties.ca/" \t "_new).  **1.15 Managed Investments: An Industry Report - Centre for Corporate Law Research Report**  In December 2003, the Centre for Corporate Law and Securities Regulation at The University of Melbourne released its research report, “Managed Investments: An Industry Report”.  The research report is divided into three parts:           Part 1: Structure and operation of the Australian managed investments industry;          Part 2: The Australian regulatory regime in the context of international principles; and          Part 3: Observations and conclusions.  Part 1 of the report sets out the size and scope of the managed investments industry in Australia, measured by both data from the Australian Securities and Investments Commission (‘ASIC’), the Australian Bureau of Statistics (‘ABS’), the Australian Stock Exchange (‘ASX’), Axiss Australia and ASSIRT. The practical operation of the industry is assessed through an analysis of surveys completed by and interviews conducted with industry participants.  Part 2 of the report examines the operation of the Australian legislation, including the associated licensing regime, in light of international principles for the governance of collective investment schemes.  Part 3 contains concluding observations on the adequacy of the governance structures under Australian law.  The managed investments industry is regulated primarily by chapter 5C of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). This chapter was introduced into the law by the [Managed Investments Act 1998 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5794" \t "default) (‘*MIA*’), which commenced operation on 1 July 1998.  The MIA marked a radical shift in the policy of regulating collective investment schemes. Under the pre-MIA approach, schemes were operated by a management company and monitored by an external independent trustee. The trustee was under a statutory covenant to protect the interests of investors. The MIA abandoned this two-party system, principally on the basis that it created uncertainty as to which party was ultimately accountable to scheme investors. The MIA installed a regime under which there is a single responsible entity (‘RE’). The legislative intention behind the ‘single responsible entity’ was to have one entity accountable to scheme investors.  In brief, the regulatory regime installed by the MIA includes the following features:           All schemes which offer interests in themselves must be registered with ASIC (unless they fall within one of a limited number of exceptions).          All registered schemes must be operated by a licensed public company (the ‘single responsible entity’), which is subject to statutory duties of care and diligence and to act in the best interests of investors.          Each scheme must have a constitution, a compliance plan (which must deal adequately with conflict of interest scenarios and be audited by an independent auditor) and an external compliance committee (or, alternatively, a board at least half of which must be external directors), who must monitor the RE’s compliance with the law.  The principle focus of the report is an examination of the managed investments industry in Australia and the means by which it is regulated. The report examines in particular:           the different size and types of schemes in Australia;           the extent to which the Australian regulatory regime conforms with international principles for the regulation of collective schemes;          the legislative intention and practical operation of compliance committees;          the internalisation and centralisation of the compliance function;           the degree to which scheme operators or responsible entities outsource their activities and responsibilities; and          whether the governance and regulatory approach of the MIA represents an improvement to the pre-MIA regime.  Copies of the report are available on the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new) website.  **1.16 UK corporate governance bill introduced into Parliament**  In December 2003 the Companies (Audit, Investigations and Community Enterprise) Bill was introduced into the House of Lords. The Bill focuses on the reliability of financial reporting and the independence of auditors by:           Requiring directors to state that they have not withheld any relevant information from their auditors;          Requiring companies to publish details of non-audit services provided by their auditors;          Imposing independent auditing standards, monitoring and disciplinary procedures on the professional accountancy bodies;          Strengthening the role of the Financial Reporting Review Panel (FRRP) in enforcing good accounting and reporting, by giving it new powers to require documents and broadening its scope;          Allowing the Inland Revenue to pass information about suspect accounts to the FRRP.  The Bill will also increase powers to investigate companies by:           Giving investigators a new power to get relevant information from anyone and widening their document-gathering powers;           Providing statutory immunity from breach of confidence claims for individuals volunteering information in specified circumstances;          Giving investigators the power to require entry to, and remain on, premises without obtaining a warrant. This will make it easier to require documents and other information and to see the business in operation, but is not a search and seize power, which will still require a court warrant.          Allowing a refusal to provide information to be treated as a contempt of court. This is a more flexible procedure than using criminal proceedings, with a better prospect of getting the desired information.  In addition the Bill will create community interest companies (CICs), a new type of company for social enterprises, or businesses that use their profits for the benefit of the local community or the wider public.  CICs will offer the certainty and flexibility of the standard company form, but with a new feature - a legal "lock" to ensure that assets and profits will be used for the community interest, not private gain.  CICs will face fewer legal restrictions than charities and will not get charity- style tax breaks. They will be commercial enterprises, competing with other businesses, but for a social aim. CICs will also be:           Easy to set up, but subject to an objective and transparent eligibility test;          Able to issue shares to raise investment, but the dividends paid on those shares would be capped, to protect the "asset lock";          Required to produce annual reports (which will be made publicly available) on how they have pursued their social or community objectives and how they have worked with their stakeholders;           Allowed to transfer assets to other suitable organisations, such as other CICs or charities.  The Bill and Explanatory Notes are available on the [Department of Trade and Industry website](http://www.dti.gov.uk/" \t "_new).  **1.17 UK Government consultation on director and auditor liability**  Options for an overhaul of directors' and auditors' liability were unveiled in December 2003 by Patricia Hewitt, UK Secretary of State for Trade & Industry.  The consultation document "Director & Auditor Liability" seeks responses on a wide range of options designed to maintain an effective and competitive audit market alongside a diverse, talented and willing pool of potential company directors.  This consultation looks only at civil liability. It does not seek to protect against criminal misconduct such as fraud.  Options on directors' liability include:           Maintaining the status quo;          Implementing the Company Law Review recommendations, for example by allowing a company to pay a director's legal costs upfront; and          Looking at more radical proposals, such as allowing companies to limit the liability of directors against claims for negligence.  The consultation document also looks at issues such as the availability of directors' liability insurance, the position of non-executive directors and case management by the courts.  The key auditor-related issue in the consultation document is whether auditors should be allowed to contract with their clients to limit their liability. Options identified include:           Allowing audit firms to limit their liability with a client, subject only to the general law on contracts;          Allowing audit firms to limit their liability, with a cap set at a multiple of the audit fee;           Allowing audit firms to limit their liability, with a cap set at a multiple of total fees paid to the auditor - including any non audit services provided;          Allowing audit firms to limit their liability, set as a multiple of the auditor's turnover; and          Allowing audit firms to limit their liability at a fixed rate (for example, one rate for the Big Four firms and lower rates for the next tier of firms etc.)  The consultation also seeks views on the need for disclosure obligations and / or shareholder ratification, in the event that audit firms are allowed to contract to limit liability.  The consultation does not propose the UK adopting a proportionate liability system. This option has been examined several times in the last 15 years, most recently by the Company Law Review, and dismissed each time.  Responses to the consultation are requested by 12 March 2004.  The consultation document can be found at [www.dti.gov.uk](http://www.dti.gov.uk/condocs.htm" \t "_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC acts on conflicts of interest in public companies**  On 8 January 2004, the Australian Securities and Investments Commission (ASIC) announced the interim results of its program of reviewing company documents sent to shareholders. The program aims to improve disclosure generally between public company boards and their shareholders.  Since 1 July 2003, ASIC has required amendments to be made to 32 related party documents and obtained further disclosure to shareholders in another 14 instances.  The following are examples of where ASIC has taken action:           In IT&e Limited, ASIC required further information to be provided to shareholders about a resolution seeking approval to give a financial benefit to NextSet Software Inc and Parwood Pty Ltd, being companies that would become related parties of IT&e in the future. In particular, further information was obtained in relation to the details of the proposed acquisition of NextSet's business and the nature of the benefit being given to Parwood.           In Nova Heath Limited, ASIC required an undertaking from the company that directors involved in underwriting a rights issue would not increase their voting power by more than the takeovers threshold (20%).           In Consolidated Broken Hill Limited (CBH), ASIC required the company to supply shareholders with an independent expert's report in relation to a proposal to issue shares over the takeovers threshold. In addition, following discussions with ASIC, CBH sent to its shareholders information requesting they make no decision on the proposal until they had considered the supplementary information.          In Fexco Investments Australia Ltd's bid for Prudential Investment Company of Australia Ltd, ASIC had previously given relief for a joint takeover bid by a bidding vehicle on the basis that the joint bidders would be required to accept a better rival bid if they did not match that bid. The expert's report in the target statement concluded that the bid was not fair, but was reasonable as a rival bid was extremely unlikely given the shareholding of the joint bidders. ASIC required the expert's report to be amended to make it clear that the terms of the relief increased the likelihood of a rival bid. In that case a rival bid was made and the joint bidders increased their bid price from 35c to 57c per share.           In beTRUSTed Australia Pty Limited's takeover for SecureNet Limited, ASIC required SecureNet to lodge a supplementary target's statement containing additional disclosure in relation to forward looking statements and reasons for entering into the lock-up agreement with beTRUSTed.           In Tranzact Financial Services Limited (Tranzact), ASIC required Tranzact to supply shareholders with an independent expert's report in relation to an approval for a proposed acquisition by Tranzact's major shareholder. Further, Tranzact agreed to postpone the meeting until the shareholders had reasonable opportunities to consider the supplementary information.  ASIC also found that related party documents commonly fail to place a value on options being issued to directors and other related parties (see ASIC media releases [03-202](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-202+Valuing+options+for+directors+and+executives+?openDocument" \t "_new) and [03-232](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-232+ASIC+acts+on+conflicts+of+interest?openDocument" \t "_new))  **2.2 ASIC policy approach to the regulation of managed discretionary account services**  On 6 January 2004, the Australian Securities and Investments Commission (ASIC) announced it has finalised its policy approach to the regulation of managed discretionary account services (MDA services).   Under the final policy, operators of MDA services (MDA operators) are exempted from the managed investments provisions in Chapter 5C of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) and the product disclosure provisions in Part 7.9 of the Act. To have the benefit of this relief, MDA operators must comply with the licensing and conduct provisions in Parts 7.6 and 7.7 of the Act and some additional conduct requirements designed to promote consumer protection.   The final policy was adopted after public consultation, and takes the same approach as foreshadowed in ASIC's consultation. A formal policy statement setting out ASIC's policy on MDA operators in some detail will be issued by early February 2004 (together with accompanying class orders).   'ASIC's final policy in regulating MDA services treats MDA operators as the provider of a financial service rather than as an issuer of a financial product. This approach will remove regulatory overlap without reducing the consumer protection outcomes intended by the Act. We have also provided flexibility for those transitioning to the relief under the policy, so that most existing MDA operators can continue operating MDA services with minimal changes to their current practices until 10 December 2004', ASIC Executive Director, Policy and Markets Regulation, Mr Malcolm Rodgers, said  'We have announced our final policy in advance of the issue of the policy statement to give MDA operators as much notice as possible of our policy approach, including our transitional arrangements', he said.  The new policy comes into effect on 11 March 2004. ASIC will provide transitional relief to give existing MDA operators time to comply with the requirements of the relief. Generally, existing operators will have some time to comply fully with the new policy.  **Background**  MDA services are discretionary trading arrangements undertaken by dealers where:  (a) the client gives to the dealer (MDA operator) their money or money's worth or access to money or money's worth (client contributions); (b) the MDA operator agrees to carry out trading in financial products using client contributions without prior reference to the client for each transaction; and (c) the MDA operator also agrees to manage the client's investments as a discrete portfolio belonging to that client. Generally, ASIC considers these arrangements to be both managed investment schemes and a facility for making a financial investment. Therefore, the offer of MDA services to retail clients would generally involve the offer of financial products and financial services (such as offering of and trading in financial products, operating a managed investment scheme that must be registered and giving personal advice).  **2.3 ASIC focuses on defective debenture prospectuses**  On 6 January 2004, the Australian Securities and Investments Commission (ASIC) released information on its surveillances relating to debenture prospectuses.  From 1 July 2003 to date, ASIC has taken action on 14 debenture prospectuses with the issue of 5 final stop orders, 11 interim stop orders and the extension of the exposure period on one prospectus. The action was taken to protect investors from making a decision based on inadequate information in prospectuses seeking to raise a total of more than $1 billion.  Six of the interim orders have been revoked following the lodgement of replacement or supplementary prospectuses that addressed ASIC concerns. One company lodged a replacement prospectus during the extended exposure period to address ASIC's concerns, prior to the issue of an interim stop order.  The significant defects identified in debenture prospectuses included:           Failure to comply with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) requirement for a debenture trust deed and trustee. Five fund raisers did not establish a debenture trust deed or appoint a trustee despite offering debt instruments that fell within the definition of a 'debenture' under the Act. The debenture trust deed and trustee provisions are important protection mechanisms for investors as they allow retail investors interests to be aggregated under a trustee who has a duty to act in if there is a breach of the debenture trust deed.           Lack of disclosure of bad and doubtful debts provisions and experience. Two fund raisers failed to disclose information on bad and doubtful debts incurred in relation to its lending activity. Another company provided incorrect information on its loans in arrears. Information on bad and doubtful debts is important in assessing the risk faced by and prospects of a debenture issuer.           Inadequate disclosure on lending policies, loan approval process and borrowing limitations. Several fund-raisers did not make adequate disclosure on their lending policies, loan approval process and borrowing limitations. Investors need such information to assess the prospects of a debenture issuer. Where lenders are on-lending to higher risk borrowers or to borrowers with poor financial track records or on security of more speculative assets, investors will have difficulty making an accurate call on the risk/reward returns in the offer.           Inadequate financial information. One fund raiser did not disclose current financial information on the performance and profitability of the company. Another fund raiser had wrongly classified a large investment in a mortgage managed investment scheme as debt receivables owing to the company. A third issuer raised funds for the purposes of on-lending to related companies who would in turn on-lend to third parties for property development purposes, but did not include information about the financial position of the related companies and their capacity to repay the loans. Investors need current and accurate financial information in order to make an informed investment decision.           Inadequate disclosure regarding the use of funds to be raised, especially where the issue was not subject to a minimum subscription condition. One fund-raiser issuing debentures for the purpose of extinguishing existing debt and carrying out capital projects did not disclose the impact upon its operations and its capacity to satisfy obligations in respect of the debentures if the issue was not fully subscribed.           Incorrectly describing the debentures. Under the Act, an issuer is only allowed to describe a debenture as a mortgage debenture or a debenture if the instruments are adequately secured against land or tangible property, respectively. All other debentures must be referred to as unsecured notes or unsecured deposit notes. Several issuers incorrectly referred to unsecured notes as debentures. This can be misleading and deceptive as it leads investors to believe the instruments are more secure than they actually are.  ASIC has previously issued an investor alert 'Fixed Interest products – higher returns mean higher risk' ([MR 03-158](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/03-158+Investor+alert%3A+fixed+interest+products+higher+returns+mean+higher+risks?openDocument" \t "_new)).  **2.4 ASIC issues licensing relief for certain wholesale foreign financial services providers**  On 23 December 2003, the Australian Securities and Investments Commission (ASIC) announced class orders relieving some wholesale foreign financial services providers from the requirement to hold an Australian financial services (AFS) licence.  The class orders recognise the overseas regulation of:           the Financial Services Authority of the United Kingdom [CO 03/1099];           the Securities and Exchange Commission of the United States [CO 03/1100];           the Federal Reserve Board and the Office of the Comptroller of Currency of the United States [CO 03/1101];           the Monetary Authority of Singapore [CO 03/1102]; and          the Securities and Futures Exchange of Hong Kong [CO 03/1103].  In each case the relief applies to specified financial services provided to wholesale clients in Australia. These class orders have been made in response to industry submissions under ASIC Policy Statement 176: *Licensing: Discretionary Powers – wholesale foreign financial services providers* made on behalf of foreign financial services providers (FFSPs).   FFSPs can rely on these class orders to provide financial services to wholesale clients in Australia if, as far as possible, they comply with the regulatory requirements that would apply to these services in their home jurisdiction.  FFSPs must consider the individual circumstances of their operation to determine whether they are carrying on a business in Australia. If they are carrying on a business in Australia, they must be registered under Part 5B.2 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). For FFSPs that are not carrying on business in Australia and are therefore not registered foreign companies under Part 5B.2, the relief provided in these Class Orders overlaps with CO 03/824 and those FFSPs may rely upon either exemption from licensing.   A copy of PS 176 and the class orders can be obtained from ASIC's Infoline by calling 1300 300 630 or emailing [infoline@asic.gov.au](mailto:infoline@asic.gov.au) or from the ASIC website at [www.asic.gov.au](http://www.asic.gov.au/" \t "_new)  **2.5 ASIC provides further relief for joint product disclosure statements**  On 23 December 2003, the Australian Securities and Investments Commission (ASIC) published a class order which permits two or more product issuers to prepare a joint Product Disclosure Statements (PDSs), [CO 03/1092].   ASIC expects that product issuers that together offer two or more complementary products together will be the main users of the relief. The relief will allow retail clients to consider those products together as part of one overall purchasing decision, for example, two different types of insurance sold together.  The conditions in the class order require clients to be informed:           that the PDS covers two or more separate financial products;           of the identity of the issuer of each financial product it covers;           that each issuer takes full responsibility for the whole PDS;           which external dispute resolution schemes are able to deal with complaints relating to the products covered by the PDS; and           how they may exercise their cooling off rights (if any).  A copy of [CO 03/1092] can be obtained from the ASIC's Infoline by calling 1300 300 630 or from the ASIC website at [www.asic.gov.au/co](http://www.asic.gov.au/co" \t "_new)  **2.6 ASIC provides temporary relief during period of consultation**  On 23 December 2003, the Australian Securities and Investments Commission (ASIC) published six class orders providing temporary relief to specific kinds of service providers from the financial services licensing regime.   The class orders apply only in limited circumstances, and generally allow the current arrangements for these service providers to continue while the Federal Government or ASIC consults with industry, consumers and other interested parties about how the Financial Services Reform (FSR) regime applies to them.   'ASIC is granting temporary relief so that affected parties do not have to obtain an AFS licence while the details of whether and how the regime will apply to them in the future are decided. For example, ASIC understands that not all aspects of actuarial advice were fully considered when the exemption from licensing was provided for certain professional services under regulation 7.1.29', ASIC's Executive Director of Policy and Markets Regulation, Mr Malcolm Rodgers said.   The temporary relief covers the following kinds of services:           credit ratings given by credit rating agencies (relief until 1 July 2005);           the operation of law society professional indemnity schemes, fidelity funds, statutory deposit accounts and public purpose funds (relief until 1 July 2005);           certain actuarial services provided by actuaries (relief until 1 July 2005); and           the operation of securitisation vehicles (relief until 30 September 2004).  Temporary relief has also been given from the requirement under s1012IA of the Act to give a Product Disclosure Statement (PDS) about certain underlying investments of superannuation funds until 31 December 2004.  Copies of the Class Orders can be obtained from the ASIC's Infoline by calling 1300 300 630 or from the ASIC website at [www.asic.gov.au/co](http://www.asic.gov.au/co" \t "_new)  **2.7 ASIC releases 2003 Codes monitoring report**  On 22 December 2003, the Australian Securities and Investments Commission (ASIC) released its annual monitoring report on compliance with the Banking, Credit Union and Building Society Codes. The report covers the period from April 2002 to March 2003.  This is the last time that ASIC will report on the Code of Banking Practice, as from next year, an independent body will undertake monitoring responsibilities.   This Code was substantially amended, with effect from 1 April 2003, following an extensive independent review. The terms of the revised Code of Banking Practice provide for the establishment of an independent committee, responsible for monitoring and ensuring compliance with the Code in the future.   **(a) Findings** The report shows an increase in disputes reported under the Code of Banking Practice of 18 per cent (which translates to an increase of 11 per cent per million transactions). Of these, 40.2 per cent were resolved internally in favour of the customer and a further 24.3 per cent by mutual agreement.   Disputes about fees and charges were the most common cause of consumer dispute. This is in contrast to the two previous monitoring reports, which showed that EFT (PIN based) transactions were the most common cause of disputes reported under that code.   The number of disputes recorded under the Credit Union Code and Building Society Code fell this year. Credit union disputes fell by 19 per cent, following an increase in the previous reporting period. The total number of disputes recorded under the Building Society Code also fell significantly, by 46 per cent. However, this does not provide a complete picture of building society activity, as only 8 of the 14 building societies operating in Australia currently subscribe to that code.   The most common cause of dispute recorded under the Credit Union and Building Society codes related to EFT (PIN based) transactions.   **(b) Background – EFT Code**  In previous years, ASIC has reported on compliance with the EFT Code as well as the other payments systems codes. However, this year, EFT Code figures are not reported on because of the major amendments to that code, but will be covered again in the next report.   The EFT Code was significantly amended from 1 April 2002. The revised code extends coverage from ATM and EFTPOS transactions to all forms of electronic banking, including telephone, internet and PIN based credit card transactions. As a result, this year's EFT returns are not easily comparable to previous year's results, and new systems are being developed to properly capture the expanded range of information under the Code. Data will again be provided next year. |
| **3. Recent ASX Developments** |
| **3.1 ASX releases 2003 Market Highlights**  On 5 January 2004, the Australian Stock Exchange released a selection of market highlights for 2003.  **(a) Indices and performance**  After reaching the low point of 2800 in February, the S&P/ASX 200 had climbed to almost 3300 (3299.8) by the end of December.  The Australian market was recognised on a global level by the inclusion of S&P/ASX 50 into the S&P Global 1200 and ASX reaching eighth position in the Morgan Stanley Capital International (MSCI) index in May and September (index weighting of 2.1%).  Locally, the Investment Sector Performance Report from Towers Perrin found that Listed Investments continue to outperform residential investment property on an after-tax basis - [http://www.asx.com.au/shareholder/pdf/Towersreport.pdf](http://www.asx.com.au/shareholder/pdf/Towersreport.pdf" \t "_new)  **(b) ASX wins ‘Exchange of the Year’ award**  AsiaRisk Magazine awarded the prestigious ‘Derivatives Exchange of the Year’ for 2003 to ASX. The publication said that ASX “has continued to make strong inroads in its plans to strengthen its derivatives capabilities”. AsiaRisk cited the developments in futures such as electricity, agricultural and property trust contracts as the major factors behind ASX’s success.  AsiaRisk covers financial risk management and the derivatives markets in the Asia-Pacific region.  **(c) Equities**  2003 saw a number of new trading records:           October – Highest month in terms of value of trading, $56 billion, and the second highest month in terms of Average Daily Trades and the Total Trades. The previous record was September 2003, when $54 billion was traded.          29 August – Second busiest trading day on the exchange with more than 102,000 trades. This fell just short of the record set on 30 June 2000, when more than 103,000 trades were executed.          The second half of 2003 saw strong interest from the retail segment. The last time ASX saw this level of retail activity was during the height of the technology boom in early-2000. This time, however, investment is not focused just on one sector and investors appear to exercise greater sophistication in their strategy, such as employing diversification or using exchange traded options to manage their risk and enhance their portfolios.  **(d) Options**  A number of new records were also established in the options market.           28 August – Interest sparked by National Australia Bank’s purchase of AMP shares resulted in 28 August 2003 setting a record for single-day trading in options. A total of 151,121 option contracts were traded; at 1,000 shares per contract this represented the equivalent of 151 million shares.          Volume was up 1.3% on 2002 at more than 67,000 contracts per day.           There were nearly 71,000 average daily contracts traded in October, compared with 49,000 in October 2001 and 38,000 in October 2000.          ASX attributes this growth to enthusiastic retail participation (excluding market maker trading, retail investors account for 68% of the market), growing retail investor sophistication and the use of index options (the fastest growing Options contract was index options over S&P/ASX 200 Index volume, up 74 percent over the volume for 2002). Index options allow investors to take a view on broad market direction rather than an individual stock.          Top 10 option stocks were: TLS, NCP, BHP, CBA, AMP, NAB, RIO, ANZ, XJO (ASX200 Index options), WBC.  **(e) Listed Managed Investments (LMIs)**  The LMI sector continues to grow strongly, providing more than 115 product offerings and enabling a total market capitalisation of more than $75 billion. Highlights for 2003 included:           A record 24 new product offerings, predominantly comprising investment companies and property trusts who chose to list on ASX;          Market capitalisation grew from $65 billion to more than $76 billion, an increase of 16.9 per cent over the year;          Number of trades increased by 25% over the year;          Absolute return funds made their debut on ASX.  **(f) Interest Rate Securities**  More than $4 billion was issued in 2003, bringing the ASX Interest Rate Market’s (IRM) market capitalisation to more than $18 billion. Market capitalisation was originally $7 billion when the separate IRM was first established on ASX’s Seats trading system in 1999.  One of the highest profile listings for the year was the ANZ Bank's $1 billion hybrid issue, along with smaller but still significant transactions by companies such as Transurban Group, Alinta Gas, Graincorp , Patrick Corporation, Leighton Holdings and Brickworks Limited.  Another development is the addition of over $130 million investment-grade rated credit-linked notes by HY-FI Securities limited. This transaction was arranged by ABN AMRO Australia and followed $60 million of Deutsche Bank-arranged Nexus Bonds issued in December 2002. The deal confirmed the growing prominence of structured debt transactions on the retail landscape. Credit-Linked Notes and other forms of collateralised debt obligations could be a strong sector within IRM in 2004. This traditionally 'wholesale' product is expected to grow in popularity as investors further improve their understanding of risk and risk management as well as continuing to seek higher yielding investments.  **(g) Warrants**  There was a record 1,396 warrant series available for trading on ASX at the end of December 2003. During the year, instalment turnover reached a record of $214 million in October, an increase of just under 40% compared with the same month a year ago.  Warrants continue to grow in popularity, advanced by the introduction of a number of new warrant types. These include Self Funding Instalments, warrants over Gold and a recently introduced new trading-style warrant known as a Knock-Out.           Self-Funding Instalments were offered for the first time during 2003, offering many of the benefits of the traditional instalment. The main variation is the treatment of dividends. Holders are entitled to dividends (including franking credits), however the cash component of a dividend will be used to reduce the loan amount, rather than being paid in cash to the holder. This type of warrant is more suited to an investor with a longer-term investment view.          ASX traded its first gold warrant during the year. The first was the Perth Mint Gold Warrant (ZAUWMA), structured as a non-leveraged synthetic gold product. Each warrant is equivalent to the Australian dollar price of 1/100 oz of gold. Following this innovation, Deutsche Bank AG offered the first leveraged gold warrant in Australia. These warrants offer a leveraged exposure to the Australian dollar price of gold.          European style Knock-Out Warrants were introduced to Australia in November 2003, by Deutsche Bank AG. Since launch, knock-out warrants have achieved considerable turnover on ASX, accounting for more than 11% of all warrant turnover value. They are suited to investors who track the price of their investments on an intra-day basis and can be an extremely rewarding short-term investment for the active trader.  **(h) New Listings**           As at 31 December 2003, there were 124 new listings on ASX for 2003. Of these listings, 96 occurred since 1 July 2003.          Over $6 billion AUD was raised between 1 January 2003 and 24 December 2003 via floats.           Some of the largest initial capital raisings (listings) included:  o        Promina Group ($1.9 billion) o        Australian Leisure & Hospitality Group Limited ($881m) o        ALE Property Group ($212m) o        Multiplex Group ($900m) o        Repco Corporation ($405m) o        Macquarie DDR Trust ($548m) and o        Virgin Blue ($673m)           Large subsequent capital raisings included;  o        ANZ ($3.6 billion); o        Lihir Gold ($217 million); o        Centro Properties Group ($215 million); o        CSL ($438 million); and o        Australand Property Group ($225 million).           Total amount of new capital raised in 2003 was approximately $30 Billion.  **(i) Futures**           Grain futures began trading on ASX on 20 May. Open interest continues to show good growth and is now over 8,000 contracts, which represents 160,000 tonnes of grain.          ASX Futures also launched three wool futures contracts on 8 September. The contracts reflect the specifications traded on the Chinese export market. China is now the largest exporter of wool but until now this market had lacked effective risk management products. 3.2 Other developments at ASX **(a) Business rules regarding short selling**  ASX Business Rules 2.11.3 and 2.11.3A have been amended to allow Trading Participants to advise the Exchange of their net short sale position by 9.00 am on the next trading day. Refer Participant Circular number 686/03 dated 31 December 2003.  **(b) Agreement with Rene Rivkin**  ASX has reached an agreement with Rene Rivkin concerning the conduct which resulted in Mr Rivkin being charged with contravening s1002G(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (prohibited conduct by person in possession of inside information) and a conviction subsequently being entered against him with respect to that charge. Under the agreement Mr Rivkin agreed to surrender his recognition as an affiliate of ASX and pay an amount of $25,000 in consideration for ASX taking no further action in respect of the conviction and its investigation of the conduct. The agreement is attached to circular 2003/674 dated 22 December 2003.  **(c) New ASX rules for FSR – compliance work shops**  In October of 2003, ASX published a Key Issues Paper on the new business framework for trading, clearing & settlement on ASX markets. This paper outlined the main policy issues surrounding the proposed new business framework.  In preparation for the new licence implementation, effective 11 March 2004, ASX is offering compliance workshops to participating organisations to help them better understand the changes introduced as a result of the new business framework.  The workshops will be relevant to ASX Participating Organisations, ASX RIOTs, ASXF Participants, ASXF Locals, OCH Participants and ASTC Non-Broker Participants. (d) ASX emergency trading policy ASX has recently reviewed its policy and procedures relating to Emergency Trading facilities offered by ASX. In any outage scenario ASX has the over-riding aim to ensure that as many participants can continue to trade as possible. Participant circular 683/03 issued on 29 December 2003 presents the current policy of ASX with regard to Emergency Trading facilities.  Essentially the policy clarifies that while ASX maintains limited emergency trading facilities in each state, these are to be considered as a non-guaranteed service of last resort only. All participants are strongly advised to develop and maintain their own business continuity plan. Participants should not expect general trading to be halted where it is evident that an outage experienced by a participant could have been avoided with appropriate contingency measures. |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Novus Petroleum Limited: Panel accepts undetakings**  On 20 January 2004, the Takeovers Panel concluded the proceeding held as a result of the application (the Application) made by Novus Petroleum Limited (NVS) on 6 January 2004 following acceptance by the Panel of undertakings to the Panel provided by Medco Energi (Australia) Pty Ltd (Medco), which has made an off-market cash takeover bid for shares in NVS (the Bid).  As noted in Panel Media Release TP 04/01, the Application alleged that unacceptable circumstances had arisen from Medco not disclosing in its bidder’s statement its capacity or arrangements to refinance debt owed by Novus which would become repayable on a change of control, from Medco not announcing whether it would declare the Bid free from the current condition relating to the level of make whole payments which may arise on that change of control (the Fee Condition) in light of the apparent likelihood that the Fee Condition would be triggered and from the inclusion of a brief summary of the report concerning Novus prepared for PT Medco Energi International Tbk (Medco's holding company) (MEI) by Madani Securities, a summary of which (the Summary Madani Report), in Indonesian, accompanied MEI's circular to its shareholders concerning a resolution to be voted on at a general meeting of MEI relating to the approval of the Bid.  Medco has undertaken:           in relation to the Summary Madani Report, to issue a supplementary bidder's statement, no later than 23 January 2004:  o        offering to provide a hard copy of the short form of the Summary Madani Report in English translation to each NVS shareholder who requests it; and  o        including appropriate cautions (which must also accompany each copy of the Summary Madani Report provided) about the origin and nature of the report, which the Panel will settle with Medco; and           in relation to the refinancing of such of NVS’ debt as must be repaid (together with interest, make whole payments etc), to issue a supplementary bidder's statement concerning that debt promptly after it is provided with details of the amounts which must be paid and the terms of payment, including:  o        any details of its new financing arrangements which would be material to a continuing shareholder in NVS, including indications of interest rates, term, security and penal clauses on repayment; and  o        if the terms of the refinancing are such that the net effect on NVS of the make whole payment and the refinancing is materially less than the 11 cents/share mentioned in Medco’s announcement of 24 December 2003, that fact.  The timing of this supplementary bidder’s statement will depend on when NVS provides the necessary information, and the Panel accepts Medco’s estimate that it may not be issued until the end of January.  The Panel has indicated to NVS that its target's statement should disclose sufficient details of all its debt which may become payable on a change of control and the timing and other terms of payment. The Panel considers this information to be material to shareholders in deciding whether to accept the Bid and that it would be unreasonable to require Medco to arrange the funding of repayment of such debt on the basis of their assumptions about their terms where those terms are not completely standardised.  In light of the information available to the market and the Panel to date, the Panel considered that the fact that Medco has not announced a decision whether it will declare the Bid free from the Fee Condition has not yet given rise to unacceptable circumstances and is unlikely to do so. It notes that, offers having been dispatched by Medco, there are no special circumstances (like those considered by the Panel in *BreakFree 04* and *BreakFree 04R*) which suggest a reason to disturb the statutory timetable for announcement of decisions concerning conditions set out in sections 630 and 650F of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (which requires that to be done at least seven days before the end of the bid period).  **4.2 Citigold Corporation Limted bid for Great Mines Limited: Panel accepts undertakings**  On 9 January 2004, the Panel concluded the proceeding (the Proceeding) arising from the application (the Application) made by the Australian Securities and Investments Commission (ASIC) on 10 December 2003 alleging unacceptable circumstances in relation to the off market scrip takeover bid of Citigold Corporation Limited (CTO) for all of the issued ordinary shares in Great Mines Limited (GML) (Bid). The Proceeding concluded following acceptance by the Panel of undertakings provided by CTO.  ASIC alleged that unacceptable circumstances arose from deficiencies in CTO's bidder's statement, specifically:           GML shareholders and directors had not received enough information to enable them to assess the merits of the CTO Bid; and          the bidder's statement contained misinformation because it contained valuations of CTO and GML which it alleged did not comply with relevant standards and had been prepared for another purpose, namely to assist CTO shareholders to decide whether to approve the Bid at a general meeting; and           the bidder's statement contained references to ASIC's "acceptance" of a valuation and to an endorsement by a mining engineer, without their consent.  The Panel has decided, under section 201A of the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) to accept the following undertakings in writing from CTO:           CTO will send all shareholders in GML a letter, in a form approved by the Panel, advising shareholders that:  o        they should disregard the experts reports supplied by CTO in it bidder's statement of 22 October 2003 and its supplementary bidder's statement of 3 December 2003 (TWA Reports) and instead rely on the independent experts report provided by GML in its supplementary target statement of 17 December 2003 (REC Report);  o        if they have accepted the offer under the Bid, they will have until a specified date to withdraw their acceptance (such date to be 21 days from the date of dispatch of the letter); and  o        the time for acceptances of the offer will remain open until the time to withdraw acceptances has expired.           CTO will give effect to the statements made in the letter to GML shareholders, specifically with respect to withdrawal of acceptances and the time for acceptance of the offers under the Bid.  On 9 January 2004, CTO sent a letter to GML shareholders pursuant to these undertakings which provides GML shareholders until 30 January 2004 to accept the Bid if they have not done so already or to withdraw their acceptance.  In accordance with the Panel’s recommendation, the letter indicated that GML shareholders should disregard the TWA Reports as they were prepared for the benefit of CTO shareholders to assist them in their decision whether to approve the Bid under the related party transaction provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and not to assist GML shareholders in their decision of whether to accept the Bid. It indicated that GML shareholders should instead rely on the REC Report which was specifically prepared to advise GML shareholders whether they should accept the Bid.  The Panel has not made any findings with respect to the concerns of ASIC because GML has provided its shareholders with the REC Report and CTO has advised GML shareholders to rely on the REC Report rather than the TWA Reports. ASIC submitted that the TWA Reports were deficient in material respects. If GML had not provided the REC Report, the Panel would have made further investigations. Had the Panel found that the issues raised by ASIC were in fact well-founded, it may have made an order that CTO issue a replacement Bidder's Statement and/or an order that all acceptances be cancelled.  The Panel notes that this matter demonstrates that people involved in takeovers should be careful when using in takeover documents other reports or documents which were prepared for some other purpose. In some circumstances, it may be appropriate to disclose in takeover documents the existence of those other reports or documents and to summarise their content or reproduce them. Where this is done, however, the issuer of the takeover document should make abundantly and unambiguously clear the purpose for which the other report or document was prepared and any consequential limitations on the use of the other report or document, or the summary of it, by the addressees of the takeover document.  The Panel also notes that where a bidder includes an expert's report in its bidder's statement this may increase the onus on the target to provide its shareholders with a report to ensure that they are appropriately informed.  The Proceeding also concerned the obtaining of all appropriate consents of experts to the inclusion in takeover documents of statements quoting, or said to be based on, statements by those experts. The Panel considers that not only should these consents be obtained, but also that it is imperative that the issuers of those takeover documents comply with the requirements of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) concerning the publication in those documents of the existence and currency of those consents.  **4.3 Breakfree 04 – Review Panel confirms Initial Panel Decision**  On 22 December 2003 the Panel advised that the BreakFree 04Review Panel (Review Panel) confirmed and extended the decision of the BreakFree 04 Panel (Initial Panel) in relation to the affairs of BreakFree Limited (BreakFree), as set out in the Panel's Media Release 106/2003.  **(a ) First Instance Decision**  The proceedings concerned an announcement by BreakFree on 12 September 2003 (the BreakFree Announcement) about a survey of its shareholders' intentions whether to accept a scrip bid which S8 Limited (S8) had announced that it would make for all of the shares in BreakFree and the response of S8 to the BreakFree Announcement, culminating in S8's announcement on 8 October 2003 that it would drop its announced scrip bid for BreakFree.  The BreakFree Announcement stated that certain shareholders in BreakFree (whom it did not name) intended not to accept the bid, and how many shares in BreakFree they held. That number was enough that the 50.1% minimum acceptance condition in the bid could not be satisfied without their acceptances. The statement did not appear to have been made on behalf of those shareholders.  On 8 October 2003 S8 announced that it had dropped the scrip bid and that instead it would make a cash bid for all of the shares in BreakFree. That bid was made. BreakFree applied to the Initial Panel to declare that unacceptable circumstances in relation to the affairs of BreakFree had resulted from S8's conduct.  The Initial Panel found that unacceptable circumstances in relation to the affairs of BreakFree arose from S8's extended delay in responding to the BreakFree Announcement, because in the absence of any further announcement by S8, the market was entitled to infer that the S8 would proceed with its scrip bid despite the BreakFree Announcement. The facts supporting this inference included S8's failure to disclose to ASIC, the market or the Panel that it was preparing a cash alternative to its scrip bid and features of the BreakFree Announcement which meant that it was not a satisfactory basis for a decision by S8 that its scrip bid could not succeed.  While the Initial Panel made a declaration that unacceptable circumstances had resulted from S8's delay in announcing the change in the structure of its bid, it pointed out that the BreakFree Announcement could not be relied upon (because the people to whose intentions it related took no responsibility for the statement) and that the announcement was an important ingredient of the situation which the Panel characterized as unacceptable. The Initial Panel made no orders to remedy the circumstances, citing the impracticability and limited benefit of requiring S8 to proceed with its scrip bid, after the cash bid had been made.  **(b) Decision on Review**  S8 applied for review of the decision at first instance, submitting that the declaration should not have been made concerning its conduct, because S8 had been entitled to rely on the BreakFree Announcement and BreakFree was principally to blame for any adverse effects on the market in BreakFree shares, because it had been irresponsible to make the BreakFree Announcement. It also submitted that the declaration should not have been made at all, since the Initial Panel had determined to make no orders to remedy unacceptable circumstances.  The Review Panel confirmed the Initial Panel's decision, with one variation. It considered that the set of circumstances which resulted from the BreakFree Announcement and S8's delayed response to the BreakFree Announcement was unsatisfactory and tended to prevent the acquisition of shares in either company taking place in an efficient, competitive and informed market, to a degree which was unacceptable. It rejected S8's submission that S8 had been entitled to act as it did in reliance on the BreakFree Announcement, for the reasons mentioned by the Initial Panel in the announcement of its decision.  However, the Review Panel wishes to make it clear that the declaration concerns the set of circumstances which existed because of the BreakFree Announcement and S8's delayed response to that announcement, and not the conduct of the parties itself. That is, the declaration is not that the conduct of either S8 or BreakFree was unacceptable, but that the set of circumstances to which the conduct of both of them contributed was unacceptable. It has amended the declaration to clarify this.  The Review Panel rejected S8's submission that a Panel should not make a declaration of unacceptable circumstances unless the declaration is the foundation for orders designed to remove or remedy the circumstances. A declaration can be made to draw attention to the sorts of situations which parties should avoid creating in future, because of their propensity to affect adversely participants in the market. |
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