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| **Brief Contents** |
| |  |  |  | | --- | --- | --- | | [**1. Recent Corporate Law and Corporate Governance Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#h1)  [**2. Recent ASIC Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#h2)  [**3. Recent ASX Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#h3)  [**4. Recent Takeovers Panel Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#h4)  [**5. Recent Corporate Law Decisions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#h5)  [**6. Contributions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#6) |  | [**7. Subscription**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#7)  [**8. Change of email address**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#8)  [**9. Website version**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#9)  [**10. Copyright**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#10)  [**11. Disclaimer**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#11) | |
| **Detailed Contents** |
| **[1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm" \l "1)**  [1.1 Centre for Corporate Law website - research resources](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#011) [1.2 Review of Australia/ New Zealand memorandum of understanding on business law](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#012) [1.3 European Commission proposes improvements to the European market for investment funds](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#013) [1.4 European Commission report shows potential economic benefits of further integration in new Member States and retail financial services](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#014) [1.5 Canada's securities regulators harmonize exempt market rules](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#015) [1.6 CESR consults on the historical financial information which must be included in a prospectus](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#016) [1.7 European Commission launches league table on Member States implementation of securities directives](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#017) [1.8 SEC votes to adopt major Securities Act Rule reform](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#018) [1.9 CESR completes its final advice on dissemination of financial information and other implementing measures of the Transparency Directive](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#019) [1.10 CEBS opens consultation on recognition of external credit assessment institutions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0110) [1.11 IFAC strengthens its code of ethics](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0111) [1.12 APRA releases draft "fit and proper" standards and guidance notes](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0112) [1.13 Research on business ethics](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0113) [1.14 FSA launches debate on the impact of hedge funds in the UK](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0114) [1.15 Australian M&A activity up 58% in 2005](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0115) [1.16 Study finds cost of being public rose 33 percent for small and mid-sized US companies in 2005](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0116) [1.17 ABA task force supports attorney-client privilege as first line of defence against corporate corruption](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0117)  [1.18 SEC staff report on off-balance sheet arrangements, special purpose entities and related issues](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0118) [1.19 European Commission opens sector inquiries into retail banking and business insurance](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0119) [1.20 International survey of corporate responsibility reporting](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0120) [1.21 Compliance with the ASX Corporate Governance Council's Recommendation 7.2 in 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0121) [1.22 2004 Centre for Corporate Law Annual Report](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0122)  **[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm" \l "2)**  [2.1 ASIC issues latest report on relief applications from financial service providers](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#021) [2.2 ASIC seeks industry comment on policy for disclosure in reconstructions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#022) [2.3 ACCC and ASIC issue further consultation draft of the joint debt collection guideline](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#023) [2.4 Insurance conflict management](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#024) [2.5 ASIC reports on Stock Exchange of Newcastle](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#025) [2.6 ASIC further extends interim relief for actuaries](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#026) [2.7 ASIC takes action against 478 company officers following public complaints](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#027)  **[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm" \l "3)**  [3.1 ASIC releases annual ASX assessment](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#031) [3.2 ASX review of supervision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#032)  **[4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm" \l "4)**  [4.1 Austral Coal Ltd 02(R) - Declaration of unacceptable circumstances and final orders](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#041) [4.2 Right issues - Panel seeks public comment](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#042)  **[5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm" \l "5)**  [5.1 Charges over book debts - Only a floating charge?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#051) [5.2 Commercial contract not void for incompleteness and uncertainty](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#052) [5.3 Prioritising the Commonwealth - protecting advances to employees of insolvent companies](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#053) [5.4 Resolving inconsistencies between the Corporations Act and state legislation](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#054) [5.5 Is a debt extinguished by the deregistration of the creditor?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#055) [5.6 Sentencing for insider trading - impact of similar information being available in the marketplace](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#056) [5.7 Sham transactions lead to winding up](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#057) [5.8 Acting in aid of foreign courts in a cross-border insolvency](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#058) [5.9 When a court will exercise its powers under the Corporations Act to summon a person for examination about a corporation's examinable affairs](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#059) [5.10 Remuneration of liquidators](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0510) [5.11 Non-negotiable cheques: What is a banker's duty?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0511) [5.12 Misleading and deceptive conduct](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0512) [5.13 Successful application not to lodge financial reports with ASIC](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2095%20%28July%202005%29.htm#0513) |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Centre for Corporate Law website - research resources**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has a wealth of resources on its website dealing with corporate law, corporate governance and securities regulation.   These resources include links to:   * Asian-Pacific corporate law and securities regulation sites (links are provided, on a country by country basis, to sites such as stock exchanges, securities commissions, corporate law legislation and corporate law judgments for each of these countries); * world securities commissions (links to approximately 60 securities commissions); * world stock exchanges (links to approximately 110 stock exchanges); * corporate governance (links to a range of organisations which are involved in corporate governance issues); * corporate social responsibility; * professional and interest bodies; and * financial news.   The Centre for Corporate Law website also provides free access to corporate law judgments of the High Court, Federal Court and the State Supreme Courts as well as decisions of the Takeovers Panel.  There are over 3,000 judgments on the website. An advanced search engine allows convenient searching for key words in all judgments. In addition, it is possible to search for judgments loaded onto the website within specified periods of time (eg in the last day, last week, last two weeks or last month).  Also on the website are research papers dealing with corporate law issues. Recent publications on this part of the Centre for Corporate Law website include:   * Employee Share Ownership Schemes in Australia: A Survey of Key Issues and Themes * Shareholder Meetings: Key Issues and Developments * The Role and Responsibilities of Directors on Board Sub-Committees * Insolvent Trading: An Empirical Study   The address of the Centre for Corporate Law website is: [http://cclsr.law.unimelb.edu.au/](http://cclsr.law.unimelb.edu.au/" \t "_new)  **1.2 Review of Australia/ New Zealand memorandum of understanding on business law**  On 25 July 2005, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, released the terms of reference for a proposed review of Australia and New Zealand’s Memorandum of Understanding (MOU) on Coordination of Business Law.  The review will consider whether the framework set up by the MOU needs to be modified to reflect changes over the past five years to enhance future business law coordination. The review will also involve an assessment of the work program arising from the MOU.  The MOU and the terms of reference for the review are available at: [http://www.treasury.gov.au](http://www.treasury.gov.au" \t "_new)  **1.3 European Commission proposes improvements to the European market for investment funds**  On 14 July 2005, the European Commission published a Green Paper on the enhancement of the EU framework for investment funds. The Paper invites consideration and comment on a range of proposals aimed at boosting the efficiency of the single market for investment funds.  The Green Paper reviews the functioning of the legislative framework for investment funds provided for by the UCITS Directive, which seeks to enable a fund authorised in one Member State to be sold across the EU while assuring a high level of investor protection.  The Green Paper is available at: [http://europa.eu.int/comm/internal\_market/securities/ucits/index\_en.htm](http://europa.eu.int/comm/internal_market/securities/ucits/index_en.htm" \t "_new)  **1.4 European Commission report shows potential economic benefits of further integration in new Member States and retail financial services**  On 8 July 2005, the European Commission published the Financial Integration Monitor (FIM) 2005, the second annual report on the state of integration in EU financial markets. Whereas the FIM 2004 described the headline trends which have affected financial markets in the original 15 Member States (EU15) in recent years, this year’s report aims to go into greater depth in specific areas which are at the forefront of political debate: the entry into the EU of ten new Member States just over a year ago and the rate of integration of EU retail financial markets. Along with the Green Paper on Financial Services Policy, the FIM report provides input to the ongoing policy debate.  This year’s report looks into retail markets in greater detail and concludes that retail integration has been very much limited to cross-border establishment for accessing local markets. However, new distribution channels, in particular online facilities, are making consumers gradually less dependent on traditional channels of local establishment and may eventually facilitate the integration of retail financial markets. So far, only in a few retail areas such as savings accounts and UCITS is some direct cross-border activity taking place.  Partly because of the less advanced level of financial development, direct and indirect cross-border retail activity has been thriving in most of the new Member States. This is reflected in the very high level of foreign, mainly EU15, ownership in the new Member States' financial institutions. Foreign ownership on average amounts to 70% of total banking assets in the new Member States, compared to an average of 24% in the EU15.  The potential for further growth of these markets is high. The important links that already are in place between the new Member States and the rest of the EU facilitate their integration while, at the same time, raising new challenges in terms of financial stability and consistency of supervision.  The report is available at: [http://europa.eu.int/comm/internal\_market/finances/cross-sector/index\_en.htm](http://europa.eu.int/comm/internal_market/finances/cross-sector/index_en.htm" \t "_new)  **1.5 Canada’s securities regulators harmonize exempt market rules**  On 8 July 2005, the Canadian Securities Administrators (CSA) published a new rule that will harmonize and consolidate prospectus and registration exemptions across Canada, resulting in more efficient access to the capital markets.  Provided all necessary approvals are obtained, National Instrument 45-106 Prospectus and Registration Exemptions (NI 45-106) will come into effect on September 14, 2005 and will replace all significant existing exemptions found in securities legislation across Canada. In addition to harmonizing existing exemptions, NI 45-106 is more straight-forward and user-friendly.  NI 45-106 and its accompanying forms and companion policy can be found on websites of Canadian securities regulators. (eg [http://www.osc.gov.on.ca](http://www.osc.gov.on.ca" \t "_new))  The CSA, the council of the securities regulators of Canada’s provinces and territories, co-ordinates and harmonizes regulation for the Canadian capital markets.  **1.6 CESR consults on the historical financial information which must be included in a prospectus**  On 6 July 2005, the Committee of European Securities Regulators (CESR) published a consultation paper which sets out recommendations for a possible amendment of the Commission’s Regulation on Prospectus (Ref. CESR/05-428) regarding historical financial information which must be included in a prospectus.  The Prospectus Regulation, which came into effect on 1 July 2005, contains requirements relating to historical financial information. For example, Annex I to the Regulation contains a schedule of disclosure requirements in relation to shares. This requires the inclusion in a prospectus of "audited historical information covering the last three financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year" (Item 20.1). Similar requirements are set out in other Annexes adapted to the different types of securities.  Normally, the historical financial information of the issuer reflects the business of the issuer as a whole throughout the required period, including significant acquisitions or disposals. However, there are certain circumstances that arise, mainly in relation to public offers or admission to trading of shares, in which the issuer has not prepared its historical financial information as a single business during the whole of the period for which the historical financial information is required under the Regulation (these types of issuers are therefore considered to have a "complex financial history").  Examples of issuers with a "complex financial history" are:   * the issuer is a newly incorporated holding company inserted over an established business; * the issuer seeking admission to trading or making an offer consists of companies that were under common control or ownership but which never formed a legal group; * the issuer has made a significant acquisition (representing more than 25% of the group) during the three year historical record or subsequent to the last audited consolidated financial information on the issuer, including specific reference to cases where the acquired target has different accounting policies; * the issuer has disposed of a significant part of its business since the last audited accounts; * the issuer has changed its accounting reference date during the three year period.   From the work that CESR carried out, it emerged that some CESR members required in their current practices historical financial information not only of the legal entity which issues or proposes to issue securities (which would be the issuer for the purpose of the Regulation), but also in relation to the companies or businesses the issuer has acquired during the period for which historical financial information is required on the issuer. There is some uncertainty about the extent to which the provisions of the Prospectus Regulation relating to historical financial information will enable authorities to continue with their current practice.  The consultation paper is available on the CESR’s [website](http://www.cesr-eu.org" \t "_new).  **1.7 European Commission launches league table on Member States implementation of securities directives**  On 6 July 2005, the European Commission published a league table on Member States success in meeting deadlines for writing into national law a series of securities Directives that were adopted as part of the Financial Services Action Plan (FSAP) launched in 1999. The league table shows that 20 Member States did not fully implement the prospectus Directive (2003/71/EC) before the deadline of 1 July 2005, which could disrupt the smooth introduction of the "single passport for issuers", intended to make securities available to investors either through a public offer procedure or by admitting their shares to trading. Also, it shows that 16 Member States did not yet fully implement the market abuse Directive (2003/6/EC) and its implementing measures for which the deadline was 12 October 2004.  At this stage, the league table covers the Market Abuse Directive (2003/6/EC) and its three technical implementing Directives (2003/124/EC, 2003/125/EC and 2004/72/EC) and the Prospectus Directive (2003/71/EC). In future, it will also cover the Market in Financial Instruments Directive (MiFID, 2004/39/EC) and the Transparency Directive (2004/109/EC) as well as their implementing measures.  **1.8 SEC votes to adopt major Securities Act Rule reform**  On 29 June 2005 the US Securities and Exchange Commission (SEC) voted to adopt changes to the registration, communications, and offering processes under the Securities Act of 1933.  **(a) Categories of issuers**  In many cases, the amount of flexibility granted to issuers under the reforms is contingent on the characteristics of the issuer, including the type of issuer, the issuer's reporting history, and the issuer's equity market capitalization or amount of previously registered non-convertible securities, other than common equity.  The rules divide issuers into four categories:   * Issuer is a new class of issuer that is current and timely in its Exchange Act reports for at least one year and has either US$700 million of worldwide public common equity float or has issued US$1 billion of non-convertible securities, other than common equity, in registered offerings for cash, in the preceding three years. * A seasoned issuer is a primary shelf eligible issuer. * An unseasoned issuer is an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but is not a primary shelf eligible issuer. * A non-reporting issuer is an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act.   The most significant revisions to the Commission's communications rules and registration processes apply to well-known seasoned issuers.  **(b) Liberalizing communications around the time of registered offerings**  The rules update and liberalize permitted offering activity and communications to allow more information to reach investors by revising the "gun-jumping" provisions under the Securities Act. The cumulative effects of these rules are:   * Well-known seasoned issuers are permitted to engage at any time in oral and written communications, including use at any time of a new type of written communication called a "free writing prospectus," subject to enumerated conditions (including, in some cases, filing with the Commission). * All reporting issuers are, at any time, permitted to continue to publish regularly released factual business information and forward-looking information. * Non-reporting issuers are, at any time, permitted to continue to publish factual business information that is regularly released and intended for use by persons other than in their capacity as investors or potential investors. * Communications by issuers more than 30 days before filing a registration statement will be permitted so long as they do not reference a security offering that is the subject of a registration statement. * All issuers and other offering participants will be permitted to use a free writing prospectus after the filing of the registration statement, subject to enumerated conditions (including, in some cases, filing with the Commission). Offering participants, other than the issuer, will be liable for a free writing prospectus only if they use, refer to, or participate in the planning and use of the free writing prospectus by another offering participant who uses it. Issuers will have liability for any issuer information contained in any other offering participant's free writing prospectus as well as any free writing prospectus they prepare, use, or refer to. * The exclusions from the definition of prospectus are expanded to allow a broader category of routine communications regarding issuers, offerings, and procedural matters, such as communications about the schedule for an offering or about account-opening procedures. * The exemptions for research reports are expanded.   A number of these new rules include conditions of eligibility. Most of the rules, for example, are not be available to blank check companies, penny stock issuers, or shell companies.  The rules address the treatment under the Securities Act of electronic communications, including electronic road shows and information located on or hyperlinked to an issuer's website. The rules define written communication as any communication that is written, printed, a radio or television broadcast, or a graphic communication. The definition of graphic communication and, thus, electronic road show excludes communications that are carried live and in real-time to a live audience, regardless of the means of transmission. Electronic road shows for initial public offerings of common equity or convertible equity securities will have to make a bona fide electronic road show readily available to an unrestricted audience to avoid filing the electronic road show with the Commission. No other road shows will be subject to filing.  **(c) Liability timing issues**  The Commission addressed the liability provisions under the Securities Act. In this regard, the Commission:   * Reaffirmed the interpretation and adopted an interpretive rule that, for purposes of disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, when assessing whether a statement to an investor prior to or at the time of sale by a seller includes or represents a material misstatement or omits to state a material fact necessary to make the statement in light of the circumstances under which it was made, not misleading, information conveyed to the investor only after the time of the contract of sale should not be taken into account. * Approved changes to the Securities Act procedures for shelf registration that will ensure that prospectus supplements filed after the initial effective date of a registration statement will be included in the registration statement for Securities Act Section 11 liability purposes. * Approved rules that will establish a new Section 11 effective date for each takedown off a shelf registration statement for issuers and underwriters, and not for experts, directors, and signing officers. If an expert provides a new report or opinion in an Exchange Act report or in connection with the takedown that would require consent, however, there would be a new effective date for that expert.   **(d) Improvements to registration procedures**  The rules will make improvements to the shelf registration provisions that will modernize the operation of the shelf registration process under the Securities Act.  The changes will:   * codify in a single rule the information that may be omitted from a base prospectus in a shelf registration statement at effectiveness and included later; * replace the requirement that issuers register only securities they intend to offer within two years with a requirement that the issuer update the registration statement with a new registration statement that is filed every three years; * eliminate restrictions on "at-the-market" equity offerings by seasoned issuers with a $75 million public float; * permit immediate takedowns of securities off of shelf registration statements; * permit issuers to use prospectus supplements (rather than post-effective amendments) to make material changes to the plan of distribution described in the base prospectus; * for seasoned issuers with a $75 million public float, revise the requirement to identify selling security holders by permitting selling security holders to be identified in prospectus supplements (rather than post-effective amendments), where the securities to be sold (or securities convertible into such securities) are outstanding when the registration statement is filed; and * establish a significantly more flexible version of shelf registration, referred to as "automatic shelf registration" for offerings by well-known seasoned issuers. Automatic shelf registration permits automatic effectiveness, pay-as-you-go registration fees, and the ability to exclude additional information from base prospectuses.   The rules also contain procedural changes that will allow reporting issuers that are current in filing their Exchange Act reports to incorporate by reference previously filed Exchange Act reports and other materials into a Securities Act registration statement on Form S-1 or Form F-1.  **(e) Prospectus delivery reforms**  The rules will change the way in which the final prospectus delivery obligations under the Securities Act are satisfied. The change will create an "access equals delivery" model for final prospectuses. Under this model, filing a final prospectus with the Commission and complying with other conditions will enable offering participants to conduct securities offerings without printing and actually delivering final prospectuses. A cure provision for inadvertent failures to file is included. In addition, the rules include a separate requirement to notify investors that they purchased securities in a registered offering.  The effective date of the rules will be 120 days following publication in the Federal Register.  More information is available on the SEC website at [http://www.sec.gov/news/press/2005-99.htm](http://www.sec.gov/news/press/2005-99.htm" \t "_new)  **1.9 CESR completes its final advice on dissemination of financial information and other implementing measures of the Transparency Directive**  On 30 June 2005, the Committee of European Securities Regulators (CESR) published its final advice (Ref. CESR/05-407), in response to the European Commission's mandate on possible implementing measures covering five aspects of the Transparency Directive:  (a) dissemination of regulated information; (b) notification of major holdings of voting rights; (c) half yearly financial reports; (d) equivalence of transparency requirements for third countries issuers; (e) the procedural arrangements whereby an issuer may elect its 'home Member State' competent authority for the purposes of the Directive.  (a) Dissemination of regulated information (such as price sensitive information, half yearly financial reports, interim management statements, major shareholdings information). Dissemination, in CESR’s understanding, is the process by which regulated information enters into the public domain. CESR advice now proposes a single set of minimum standards that issuers should meet when disclosing regulated information. CESR had originally proposed two sets of advice, one for the issuer and one for third parties (so called 'service providers'). However, as the issuer is responsible for its service provider being able to meet the requirements, it seemed appropriate to synthesize these requirements into one set of minimum standards for issuers. These principles include that the information should be made available without delay (particularly if the information is of a price sensitive nature), to all potential investors and across the European Union, free of charge to investors.  (b) Notifications duties of major holding of voting rights in companies whose securities are admitted to trading on regulated markets. The key aspects of this part of the advice include:   * clarification as to how shareholders and other holders of voting rights should fulfil their notification duties when the voting rights attached to their shares have been passed to someone else, so called 'Article 10 situations'; * CESR proposes in its advice that one should have learned of an acquisition or disposal no later than one day after the transaction was actually executed; * greater convergence regarding the information requirements that shall be required in the standard notification forms; * greater clarity in relation to the question of independence to be complied with by a management company wishing to benefit from the exemption of aggregating holdings.   (c) Specific implementing measures on half yearly reporting. CESR proposes implementing measures in relation to the definition of the minimum content of half-yearly financial statements not prepared in accordance with IAS/IFRS. In this context, CESR proposes that the minimum content should be defined by reference to the principles of IAS 34 on Interim Financial Information. Secondly, CESR provides advice on the definition of 'major related party transactions' that have to be reported on in half-yearly reports. CESR proposes that the definition of related party transactions that is given in IAS 24 should apply both when an issuer prepares consolidated accounts and when it does not.  (d) Equivalence of third countries' requirements with those disclosure requirements established under the Transparency Directive. This part of the paper develops further the concepts that will be used to establish equivalence. Briefly, CESR's proposed approach is to test equivalence by looking first at the key principles and objectives of the different disclosure requirements of the Directive, and then to establish what a third country's framework has to include in order to be deemed to be equivalent. The key principal is that the requirements of the third country do not need to be identical, equivalence can be declared when general disclosure rules provide investors with understandable information which will lead to a broadly equivalent assessment of the issuer’s position.  Further information is available on CESR’s [website](http://www.cesr-eu.org" \t "_new).  **1.10 CEBS opens consultation on recognition of external credit assessment institutions**  On 29 June 2005, the Committee of European Banking Supervisors (CEBS) presented for public consultation its guidelines for a common approach to the recognition of External Credit Assessment Institutions (ECAIs) under the proposed Capital Requirements Directive (CRD). The consultation period is three months.  The proposed CEBS guidelines are designed to promote consistent implementation of new EU legislation which seeks to make prudential capital requirements more risk-sensitive. Specifically, the legislation will allow institutions to use external credit ratings to determine the risk weights of their credit exposures, provided the entities in question have been recognised as eligible for these purposes by the supervisory authorities. This does not constitute a form of regulation or licensing of rating agencies to do business in Europe. Its sole purpose is to provide a basis for capital requirement calculations.  The Consultation Paper details the significant convergence that has been achieved among European supervisors over recent months on both procedural and substantive aspects of ECAI recognition. CEBS guidelines set out common procedures which aim at facilitating the recognition of both local and cross-border ECAIs. In addition CEBS has agreed on a common understanding of the criteria for recognition contained in the CRD. These guidelines also provide guidance for supervisors on mapping external credit assessments to the risk weights of the CRD.  More information is available on the CEBS website at: [http://www.c-ebs.org/Consultation\_papers/consultationpapers.htm](http://www.c-ebs.org/Consultation_papers/consultationpapers.htm" \t "_new)  **1.11 IFAC strengthens its code of ethics**  A newly revised Code of Ethics for Professional Accountants was released on 29 June 2005 by the Ethics Committee of the International Federation of Accountants (IFAC).  The revised Code establishes a conceptual framework for all professional accountants to ensure compliance with the five fundamental principles of professional ethics. These principles are integrity, objectivity, professional competence and due care, confidentiality, and professional behaviour. Under the framework, all professional accountants will be required to identify threats to these fundamental principles and, if there are threats, apply safeguards to ensure that the principles are not compromised. The framework applies to all professional accountants, those in public practice and those in business, industry and government.  The revised Code also conforms to the International Framework for Assurance Engagements, issued by the International Auditing and Assurance Standards Board, and definitions contained in the International Standard on Quality Control (ISQC) 1, Quality Control for Firms that Perform Audits and Reviews of Historical Financial Information, and Other Assurance Related Services Engagements. To assist with the implementation of these conforming changes, the Ethics Committee has also issued an interpretation providing guidance on the application of the independence requirements to assurance engagements that are not financial statement audit engagements.  The revised Code and the new ED, proposed revised section 290, Independence – Assurance Engagements, can be downloaded on the IFAC [website](http://www.ifac.org" \t "_new).  **1.12 APRA releases draft “fit and proper” standards and guidance notes**  On 29 June 2005, the Australian Prudential Regulation Authority (APRA) released for consultation revised draft "fit and proper" standards and guidance notes for authorised deposit taking institutions, general insurance and life insurance institutions. APRA also released a discussion paper addressing submissions received on the original draft fit and proper standards published in March 2004.  The package, which follows extensive industry consultation, outlines proposals for APRA-regulated institutions to:   * be responsible for assessing the fitness and propriety of persons to act as a director, senior manager, auditor or actuary; * develop and document appropriate policies for making fit and proper assessments; * require responsible persons to co-operate in the process of gathering information for such assessments; and * inform APRA of changes in responsible persons.   The standards and guidance notes are available on the APRA [website](http://www.apra.gov.au" \t "_new).  **1.13 Research on business ethics**  Leading superannuation funds have called on directors of Australia’s largest companies to encourage good business ethics in order to safeguard against potential regulation, litigation and reputation risks.  Research commissioned by 5 of Australia’s largest superannuation funds found 83 percent of companies listed on the S&P/ASX200 had no Board oversight of unfair business practices, such as price fixing, bid rigging, insider trading, giving of secret commissions or kick-backs to business associates.  The Public and Commonwealth Superannuation Schemes (PSSCSS), Catholic Super, VicSuper, the Northern Territory Government and Public Authorities Super Scheme (NTGPASS), and Emergency Services Superannuation, engaged the BT Governance Advisory Service to examine the business ethics practices in place for the companies in which they invested.  The research sought to gauge the extent of a company’s business ethics practices through measuring proxy issues including unfair business practices, consumer privacy, community safety and welfare, and responsible marketing and promotion.  The research found that:   * More than half of all companies did not publicly disclose information on their processes to protect against violations of consumer privacy. * Nearly half (46%) of companies made no mention of staff or contractor training with regard to product safety or the handling of materials hazardous to public health. * Nearly half (46%) of companies did not publicly disclose policies protecting whistleblowers. * Appropriate codes of conduct among 52% of companies did not address the company’s adherence to responsible marketing and promotion issues such as fair trading and truth in advertising.   **1.14 FSA launches debate on the impact of hedge funds in the UK**  On 23 June 2005, the UK Financial Services Authority (FSA) published two discussion papers that focus on related but separate aspects of hedge funds and retail investment products.  The papers look, respectively, at the impact of hedge funds on the UK's wholesale markets - Hedge Funds: A Discussion of Risk and Regulatory Engagement – and at the regulatory regime that applies to retail investment products - Wider Range of Retail Investment Products: Consumer Protection in a Rapidly Changing World.  **(a) Hedge Funds: A discussion of risk and regulatory engagement**  The FSA views hedge funds as a growing and beneficial component of the financial system. Not withstanding that, they do pose risks to the FSA's statutory objectives which the discussion paper seeks to identify. It also sets out current and potential future mitigating actions.  The paper, however, seeks views on further actions the FSA could take in a proportionate manner to increase regulatory transparency and thus improve the effectiveness of its regulatory engagement. In particular it seeks views on the costs and benefits of the FSA requiring the industry to provide it with certain additional data.  **(b) Wider range of retail investment products: Consumer protection in a rapidly changing world**  This paper looks at the regulatory regime that applies to sophisticated investment products. In recent years there has been an increase in the quantity and range of such products that utilise techniques similar to those used by unregulated collective investment schemes (CIS) including hedge funds. This paper is intended to stimulate discussion of issues arising from this development.  It identifies three risks: first, that consumers and companies may not fully understand these products; second, that consumers may be confused by different forms and distribution channels of wider range products, resulting in mis-buying or mis-selling; and third, that consumers may be missing out on investment opportunities because of the current restrictions on the marketing of unregulated products. The FSA puts forward a number of options including asking whether a new category of sophisticated products which highlight these increased risks should be developed.  Views are also sought on whether the marketing restrictions on unregulated CIS should be lifted. The paper recognises that the investment techniques used by some off-shore CIS may in fact offer lower risk investments than some of the more widely marketable vehicles. It also recognises, though, that as these products are based offshore there would be considerable challenges in ensuring adequate levels of consumer protection. The paper also discusses the consequence of adopting a no-change option.  The FSA is seeking industry and investor feedback on the issues raised in the papers and will be actively engaging with key market participants. It also seeks views from the industry and interested parties on what products should be marketed to retail investors.  The papers can be found on the FSA website at: [http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/068.shtml](http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/068.shtml" \t "_new)  **1.15 Australian M&A activity up 58% in 2005**  An aggressive and cashed up market has driven M&A activity in the first half of 2005 up by 58 percent on the same time last year, according to research by KPMG's Corporate Finance practice.  The value of deals involving Australian corporates for the first half of 2005 to 6 June totalled over US$27 billion, up from US$17.3 billion for the first six months of 2004; however, the market has cooled off from the takeover frenzy witnessed at the end of 2004 which generated US$53 billion in the last six months of the year.  **(a) Real estate and financial investment deals lead industry sectors**  Property and financial investment related transactions such as Macquarie Goodman's consolidation with its Industrial Trust for US$2.7 billion, Centro's US$0.6 billion bid for Kramont Realty Trust and Rubicon's US$0.4 billion stake in Property Portfolio led the M&A push in the first half of 2005.  Other industries that experienced increased M&A activity included a consumer market which was spurred on by Foster's US$1.9 billion bid for Southcorp. Transportation and logistics related deals also jumped from US$530 million in the first half of 2004 to US$2.6 billion in the first half of 2005. M&A activity in the utility sector waned between the second half of 2004 from US$7 billion to US$2.5 billion in the first six months of 2005, although there were still some solid transactions in this sector involving Australian assets such as Hong Kong's CLP Holdings buying SPI Australia Group's Merchant Business Division.  **(b) Asia Pacific surge in M&A**  Globally there has been US$671 billion worth of M&A deals so far for 2005 which is a fraction behind the US$675 billion for the whole of the first half of 2004. By the end of June, the total value of global activity is forecast to reach US$771 billion, a 14 percent increase on the same period last year.  The analysis of global bid numbers shows 10,641 deals completed in 2005 to date, two percent off the first half of last year but likely to reach in excess of 12,400 deal closures (equivalent to a 14 percent rise) by the end of June.  The greatest upturn in investment flows was experienced in the Asia Pacific region. Both the value and volume of activity improved right across Asia Pacific which recorded a 39 percent rise in deal value and a 34 percent increase in completed deal numbers compared to the first half of 2004.  Further information is available on the KPMG [website](http://www.kpmg.com.au" \t "_new).  **1.16 Study finds cost of being public rose 33 percent for small and mid-sized US companies in 2004**  The third annual study conducted by Foley & Lardner LLP on the costs associated with US corporate governance reform shows that the average cost of being public in 2004 increased 33 percent over 2003 for a company with annual revenue under $1 billion (all figures are in US$).  Audit fees accounted for the largest out-of-pocket costs increases, with average audit fees for public companies with less than $1 billion of annual revenues increasing 96 percent to $1 million in FY 2004 from $532,000 in FY 2003. The study attributes this increase to the phase-in of Section 404 of the Sarbanes-Oxley Act, as the dramatic rise in audit costs exceed the rate of average audit fee increases witnessed in FY 2002, the year Sarbanes-Oxley was enacted.  Beyond increasing audit costs, a significant shift occurred for the first time as lost productivity increased and the overwhelming majority of public companies reported that the Sarbanes-Oxley Act had impacted administrative expenses a great deal. The study found lost productivity costs soared 556 percent to $1.1 million in 2004 from $160,000 in 2003 for companies with annual revenue under $1 billion.  **(a) Section 404 costs**  The study found that the average cost of being public has increased 223 percent for public companies with under $1 billion in annual revenue since the enactment of Sarbanes-Oxley. The study also includes the following key findings:   * For companies with annual revenue over $1 billion, the cost of being a public company averaged $14.3 million in 2004, an increase of 45 percent over 2003. * Costs associated with lost productivity increased by nearly $900,000 in 2004 for respondents with annual revenue under $1 billion and nearly $440,000 in 2004 for respondents with annual revenue over $1 billion. * 70 percent of survey respondents said that Sarbanes-Oxley impacted administrative expenses a great deal up from 54 percent in 2004. * 82 percent of public companies surveyed responded that corporate governance and public disclosure reforms are too strict, an increase of 15 percent compared to 2004. * 20 percent of responding public companies are considering going private as a result of corporate governance costs, consistent with study results from last year.14 percent of responding companies surveyed are also considering merging with another company as a potential option. * With Sarbanes-Oxley related reforms now in their third year, 56 percent of respondents did not feel they were better able to predict associated corporate governance reform costs.   **(b) Audit fees increase for public companies of all sizes**  An analysis of data obtained from Standard & Poor's reveals that audit fees for public companies increased an average of 61 percent between the financial year of 2003 and 2004, broken down by market capitalization as follows:   * Small-cap company audit fees rose 84 percent from $567,000 in FY 2003 to $1,042,000 in FY 2004. * Mid-cap company audit fees rose 92 percent from $1,135,000 in FY 2003 to $2,177,000 in FY 2004. * Large-cap company audit fees rose 55 percent from $4,809,000 in FY 2003 to $7,443,000 in FY 2004.   **(c) Methodology**  In January of 2005, Foley & Lardner distributed public company and private organization surveys via mail and e-mail to approximately 9,000 CEOs, CFOs, General Counsel, Chief Compliance Officers, Board Members, Directors and other executives of both public companies and private organizations. A total of 147 public company surveys were returned. The firm also commissioned a statistical analysis of proxy statement data compiled and maintained by Standard and Poor's Investment Services Custom Business Unit. This database contains information from more than 700 public companies included in the S&P 500, S&P Mid-Cap 400 and S&P Small-Cap 600 indices.  Full study results can be downloaded on the Foley & Lardner website at: [http://www.foley.com/news/news\_detail.aspx?newsid=1270](http://www.foley.com/news/news_detail.aspx?newsid=1270" \t "_new)  **1.17 ABA task force supports attorney-client privilege as first line of defence against corporate corruption**  An American Bar Association task force report released in June 2005 warns that government policies eroding the corporate attorney-client privilege reduce rather than increase the ability of corporations to cooperate with government.  The task force report does not constitute association policy. It will be presented to the ABA House of Delegates for consideration as policy in August.  The report of the ABA Task Force on Attorney-Client Privilege urges support for preserving the privilege and the work-product doctrine, and acknowledges that clients can voluntarily waive either the privilege or the doctrine. It opposes government polices that erode the privilege and doctrine while supporting policies, practices and procedures that recognize their value.  R William Ide III, task force chair, said current government policies that leave corporations no practical option but to waive the privilege and work product doctrine have the unfortunate effect of chilling the use of counsel by corporations to prevent and detect violations of law.  "The effective assistance of counsel is dependent on confidentiality and allowing lawyers to create their work product in conjunction with providing assistance of counsel. Corporations are entitled to these same rights that our justice system affords to individuals, but overly aggressive government practices that require waiver operate to deny these rights," said Ide.  The risk is that corporations will respond with greater reluctance to employ counsel or to confide fully in counsel, undermining the public policy goal of encouraging legal compliance through guidance of informed counsel, says the report.  Ide said the task force has initiated discussions with federal agencies about the proper balance of policy concerning voluntary waiver and safeguards against abuse.  The full report is available on the ABA website at: [http://www.abanet.org/buslaw/attorneyclient/](http://www.abanet.org/buslaw/attorneyclient/" \t "_blank)  **1.18 SEC staff report on off-balance sheet arrangements, special purpose entities and related issues**  On 15 June 2005, the US Securities and Exchange Commission (SEC) announced the release of a staff report prepared by the Office of the Chief Accountant, the Office of Economic Analysis and the Division of Corporation Finance on off-balance sheet arrangements, special purpose entities and related issues. The report was prepared pursuant to Section 401(c) of the Sarbanes-Oxley Act of 2002. As required by that Act, the report has been submitted to the President, the Committee on Banking, Housing and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives. The staff report includes an analysis of the filings of issuers as well as an analysis of pertinent U.S. generally accepted accounting principles and Commission disclosure rules. The report describes the staff's study, details its findings, and provides recommendations.  The staff took a broad approach to the scope of the report by including a review of a range of topics with potential off-balance sheet implications, including consolidation issues, transfers of financial assets with continuing involvement, retirement arrangements, contractual obligations, leases, contingent liabilities and derivatives, as well as a discussion of special purpose entities (SPEs).  The report identifies several goals for those involved in the financial reporting community, including efforts to:   * discourage transactions and transaction structures motivated primarily and largely by accounting and reporting considerations, rather than economics; * expand the use of objectives-oriented standards; * improve the consistency and relevance of disclosures; and * focus financial reporting on communication with investors, rather than just compliance with rules.   The report also provides recommendations for certain changes in accounting and reporting requirements, each of which complement one or more of the goals mentioned above:   * The staff recommends the accounting guidance for defined-benefit pension plans and other post-retirement benefit plans be reconsidered. The trusts that administer these plans are currently exempt from consolidation by the issuers that sponsor them, effectively resulting in the netting of assets and liabilities in the balance sheet. In addition, issuers have the option to delay recognition of certain gains and losses related to the retirement obligations and the assets used to fund these obligations. * The staff recommends that the accounting guidance for leases be reconsidered. The current accounting for leases takes an "all or nothing" approach to recognizing leases on the balance sheet. This results in a clustering of lease arrangements such that their terms approach, but do not cross, the "bright lines" in the accounting guidance that would require a liability to be recognized. As a consequence, arrangements with similar economic outcomes are accounted for very differently. * The staff recommends the continued exploration of the feasibility of reporting all financial instruments at fair value. * The staff recommends that the Financial Accounting Standards Board continue its work on the accounting guidance that determines whether an issuer would consolidate other entities-including SPEs-in which the issuer has an ownership or other interest. * The staff believes that, in general, certain disclosures in the filings of issuers could be better organized and integrated.   The full text of the staff study can be found at the SEC website at: [www.sec.gov/news/studies/soxoffbalancerpt.pdf](http://www.sec.gov/news/studies/soxoffbalancerpt.pdf" \t "_new)  **1.19 European Commission opens sector inquiries into retail banking and business insurance**  In June 2005 the European Commission announced that it has launched sector inquiries in financial services in the European Union in the areas of retail banking and business insurance. The inquiries will examine whether competition is working in these markets and whether markets are competitive enough to deliver their full benefits to consumers. The inquiries will be complementary to the Commission’s parallel initiatives to remove regulatory barriers within the Single Market for financial services. In carrying out the sector inquiries, the Commission will work closely with market participants and Member State authorities. The Commission will begin its inquiries with an investigation into retail banking, and in particular payment cards. The inquiries into other aspects of retail banking and into business insurance will follow later in 2005.  More information on the Commissions’ competition sector inquiries is available at: [http://www.europa.eu.int/comm/competition/antitrust/others/#sector\_inquiries](http://www.europa.eu.int/comm/competition/antitrust/others/" \l "sector_inquiries" \t "_new)  **1.20 International survey of corporate responsibility reporting**  The KPMG triennial survey analyses trends in CR reporting of the world's largest corporations, including the top 250 companies of the Fortune 500 (Global 250, G250) and top 100 companies in 16 countries (National 100, N100). With its coverage of 1600+ companies the survey provides a global picture of reporting trends over the last ten years.  Major survey findings:   * CR reporting has been steadily rising since 1993 and it has increased substantially in the past three years. In 2005, 52 percent of G250 and 33 percent of N100 companies issued separate CR reports, compared with 45 percent and 23 percent, respectively, in 2002. If we include annual financial reports with CR information, these percentages are even higher: 64 percent (G250) and 41 percent (N100). * A dramatic change has been in the type of CR reporting which has changed from purely environmental reporting up until 1999 to sustainability (social, environmental and economic) reporting which has now become mainstream among G250 companies (68 percent) and fast becoming so among N100 companies (48 percent). * Although the majority of N100 companies (80 percent) in most countries still issue separate CR reports, there has been an increase in the number of companies publishing CR information as part of their annual reports. * At national level, the top two countries in terms of separate CR reporting are Japan (80 percent) and the UK (71 percent). Reporting has increased considerably over the last three years in most of the 16 countries in the survey, with the highest increases seen in Italy, Spain, Canada and France. * The typical industrial sectors with relatively high environmental impact continue to lead in reporting. At the global level (G250), more than 80 percent companies are reporting in electronics & computers, utilities, automotive and oil & gas sectors, whereas at the national level (N100), over 50 percent of companies are reporting in the utilities, mining, chemicals & synthetics, oil & gas, oil & gas and forestry, paper & pulp sectors. Most remarkable is the financial sector which shows more than a two-fold increase in reporting since 2002.   The survey includes a detailed analysis of the reports from the G250 companies which is focused on why companies are committed to corporate responsibility and what influences the content of reports. These results are summarized below:   * Business drivers for CR are diverse, both economic (74 percent) and ethical (53 percent). The top 3 reported economic drivers are innovation & learning, employee motivation and risk management & reduction with about 50 percent companies reporting these as motivating factors. * Almost two-thirds of CR reports include a section on corporate governance, although most reports lack specifics on how CR is structured and information on how governance policies are implemented within the organization. * The survey analysed how companies select the issues discussed in the reports and whether the users of the report are systematically consulted during the process. The survey revealed that report content is most commonly decided based on GRI guidelines (40 percent) with only a fifth (21 percent) mentioning stakeholder consultation. About a third of the companies (32 percent) invite stakeholder feedback on the report. * Stakeholder dialogue was mentioned in almost 40 percent of reports with dialogue focused more on CR policies rather than reporting.   Compared with environmental issues, coverage of social and economic issues and topics is far more superficial. Some topics are:   * Social topics are discussed by almost two-thirds of the companies, generally, in one or more of four areas: core labour standards, working conditions, community involvement and philanthropy. While the majority of companies express their commitment to these issues, reporting performance remains sketchy, possibly due to the lack of clear social indicators. * Economic issues are discussed by the minority of companies. Although 61 percent of reports include financial information such as profits, only 25 percent discuss the economic impacts of their business from a broader, sustainability perspective. * Reporting on the supply chain is now common. Supplier issues are mentioned in a vast majority (80 percent) of reports, albeit without specifics, as companies are increasingly being asked to extend their responsibility down the supply chain. * The survey analysed reports for one of the most pressing environmental issues of today, climate change, which was addressed in about 85 percent of reports.   Independent assurance remains a valuable part of reporting. In 2005 the number of reports with an assurance statement increased to 30 percent (G250) and 33 percent (N100) from 29 percent and 27 percent, respectively, in 2002. Major accountancy firms continue to dominate the CR assurance market with close to 60 percent of the statements.  The full report is available on the KPMG website at: [http://www.kpmg.com/Rut2000\_prod/Documents/9/Survey2005.pdf](http://www.kpmg.com/Rut2000_prod/Documents/9/Survey2005.pdf" \t "_new)  **1.21 Compliance with the ASX Corporate Governance Council’s Recommendation 7.2 in 2004**  A key feature of the ASX Corporate Governance Council's (ASX CGC) Principles and Recommendations is the CEO and CFO sign-off to the Board under Principle 7 ('recognise and manage risk').  A KPMG study shows that most Australian listed companies have elected to provide limited generic information to readers of 2004 annual reports about their compliance with the requirements of Recommendation 7.2.  Recommendation 7.2, which is often thought of as a principles-based version of the prescriptive US Sarbanes-Oxley Act Section 404 (SOX 404), requires listed companies to disclose:   * where they have not met the requirements for a CEO/CFO to sign-off to the Board on the financial statements and the systems of risk management and internal controls; and * specified items in accordance with suggested disclosure in Recommendation 7.3 and other guidelines including a description of the risk profile and the system of risk management and internal control.   As there are many variables within the CEO/CFO sign-off, readers of annual reports may reasonably expect to see some details of the sign-off including the results and perhaps how it was achieved in addition to the suggested disclosures.  Yet only 44 percent of companies surveyed disclosed that the Board received the CEO/CFO sign-off and only 45 percent of these companies provided any details of the sign-off despite these details being important for the reader in assessing how a company manages the system of risk management and internal control.  Surprisingly, only three companies surveyed referred to any limitations in the scope or response to the sign-off. Under SOX 404 where such disclosures are mandated, the incidence is much higher. In addition, only 18 percent of those surveyed disclosed their risk profile and only 32 percent of those surveyed disclosed a detailed description of the system of risk management and internal control.  Overall, in 2004 a core group of companies did make reasonably comprehensive disclosures under Recommendation 7.2. These companies have set a benchmark as we move on from what has been a transition year for disclosure under the ASX CGC Principles and Recommendations.  The paper examines some of the key issues in providing disclosure under Principle 7. It also discusses the practical considerations for CEOs, CFOs and boards in the context of the CEO/CFO sign-offs and offers guidance for companies wanting to improve their disclosure and take it beyond mere compliance.  The full report can be found on the KPMG website at: [http://www.kpmg.com.au/Portals/0/9346AAAPrinciple7WPElec.pdf](http://www.kpmg.com.au/Portals/0/9346AAAPrinciple7WPElec.pdf" \t "_new)  **1.22 2004 Centre for Corporate Law Annual Report**  The 2004 annual report of the Centre for Corporate Law and Securities Regulation (University of Melbourne) has been published.  The report is available on the website of the Centre for Corporate Law at [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/" \t "_new)  Highlights in 2004 included:  1. the publication of 5 books examining significant issues such as corporate governance, corporate law in Australia and Singapore, and eco-finance; 2. an active seminar program addressing topical issues in corporate law and corporate governance (14 seminars and conferences were held in 2004); 3. the publication of research reports on topics such as insolvent trading, enforcement activity in cartel cases, and the reform of not-for-profit regulation; 4. the obtaining of new research grants; 5. the publication of the 88th issue of the monthly Corporate Law Bulletin; 6. the ongoing supervision of 21 PhD theses, 4 SJD theses and 3 Master of Laws theses; 7. an influential role in the development of government and regulatory policy in relation to corporate law and corporate governance (in particular, auditors' independence, reform of the Australian Broadcasting Authority's enforcement powers, and disclosure of fees in superannuation and other managed investments); 8. continued development of the Centre for Corporate Law website. Among other advances during 2004, the 3,000th judgment was added to the corporate law judgments website hosted by the Centre for Corporate Law; 9. coordination of the University of Melbourne's graduate program in corporate law and securities regulation, in which 34 subjects are offered (one of the largest international programs of its type). In 2004, almost 120 subjects were taught in the University of Melbourne Law School's graduate program; 10. participation in key government bodies such as the Takeovers Panel and the Corporations and Markets Advisory Committee; 11. assisting the media, securities commissions and other organisations with questions about corporate law and corporate governance (in 2004, members of the Centre for Corporate Law gave over 160 reported interviews to the media); and 12. serving on the editorial boards of 18 journals. |
| **2. Recent ASIC Developments** |
| **2.1 ASIC issues latest report on relief applications from financial service providers**  On 26 July 2005, the Australian Securities and Investments Commission (ASIC) released an update report outlining its decisions on recent relief applications made by financial service providers. The applications relate to relief from the licensing, conduct, disclosure and managed investments provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  ASIC is vested with discretionary powers under the Act to grant relief, by exemption or modification, from provisions of Chapter 5C and Chapter 7 of the Act. The report covers the period from 1 January to 30 April 2005 and provides specific examples of circumstances in which ASIC has either exercised, or refused to exercise, those powers.  The report also outlines some instances where ASIC decided to take a no-action position regarding non-compliance with provisions of Chapters 5C and 7. The report includes an appendix detailing the relief instruments ASIC has executed for the matters referred to in the report. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report.  The report is available from the ASIC [website](http://www.asic.gov.au/" \t "_new) or by calling ASIC's Infoline on 1300 300 630.  **2.2 ASIC seeks industry comment on policy for disclosure in reconstructions**  On 6 July 2005, the Australian Securities and Investments Commission (ASIC) released a policy proposal paper (PPP) on disclosure in reconstructions.  Reconstructions are transactions that are not formal schemes of arrangement under Part 5.1 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), but are similar to them. A foreign scheme of arrangement or a trust scheme is a reconstruction.  Prospectus disclosure for reconstructions is currently dealt with in Practice Note 40 Reconstruction meetings [PN 40]. Legislative changes since the introduction of PN 40 in 1993 have rendered the practice note of little use to issuers. Issuers in reconstructions generally prepare a prospectus to comply with the on-sale prohibition in s707(3) of the Act.  ASIC proposes to replace PN 40 with a policy statement that requires prospectus disclosure where shares will be issued as consideration under the reconstruction. An invitation to vote constitutes an offer of the shares. The concept of 'offer' in the prospectus provisions is broad.  The PPP has been prompted by the increasing trend for entities to engage in reconstructions (e.g. stapling interests in a managed investment scheme to shares).  The PPP also seeks comments on:   * proposed case-by-case prospectus relief for foreign schemes of arrangement; * whether ASIC should give prospectus relief where the reconstruction does not change the underlying business of the entity; * proposed class order relief from technical requirements of the prospectus and Product Disclosure Statement (PDS) requirements in some reconstructions (e.g. relief so that no application form is required to accompany the prospectus); and * proposed class order relief to issue a PDS where managed investment scheme interests are offered or issued as consideration in a scheme of arrangement.   Copies of the PPP are available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by calling the ASIC Infoline on 1300 300 630.  **2.3 ACCC and ASIC issue further consultation draft of the joint debt collection guideline**  A second draft of the guideline on consumer protection laws for those involved in the debt collection industry has been issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).  More than 50 submissions were received about the first draft. In light of the submissions received, ASIC and the ACCC have decided to undertake a further round of consultations before finalising the guideline.  New or revised content in the guideline includes:   * the privacy obligations of debt collectors developed in conjunction with the Commonwealth Office of the Privacy Commissioner; * contact following bankruptcy - developed in conjunction with the Insolvency Trustee Service Australia; * dealing with debtors at a special disadvantage; and * dispute resolution.   Stakeholder comments are sought on the additional content and changes made to the guideline, including any new implementation issues posed by the revised draft.  The consultation draft and discussion paper are available on the ACCC and ASIC websites. Details on how to lodge a submission are contained in the discussion paper.  Submissions in response to the first consultation draft issued in February (when permission to publish was given) are available on the ASIC and ACCC websites.  Submissions in response to the current draft will also be published on these sites, again subject to the agreement of those making the submission.  The final version of the guideline is expected to be released by early October 2005. A brochure on consumers' rights and responsibilities in the debt collection context will also be released at the same time.  The second consultation draft, discussion paper and copies of submissions made to the review can be found at either the ASIC [website](http://www.asic.gov.au/dcsubmissions" \t "_new) or the ACCC [website](http://www.accc.gov.au" \t "_new).  **2.4 Insurance conflict management**  On 30 June 2005, the Australian Securities and Investments Commission (ASIC) released the results of a review of the remuneration practices of general insurance brokers.  The review did not find any evidence of the kind of systemic abuses uncovered in the United States recently. However, ASIC did identify some deficiencies in relation to Australian brokers' management of conflicts of interest and disclosure of remuneration. The review also highlighted the inherent conflict in the practice of paying volume bonuses or other types of contingent remuneration to brokers.  Australian law imposes strict requirements on insurance brokers to tell clients about remuneration incentives received from insurers. Where contingent and preferential remuneration arrangements are significant to broker revenue or profit, merely disclosing the conflict and imposing internal controls may not be enough. In such cases, the only way to adequately manage the conflict may be to avoid it. The appropriate arrangements will always depend on the circumstances.  ASIC will be performing follow-up work as a result of the review and will continue to monitor broker activities, particularly in relation to management of conflicts of interest and disclosure of remuneration.  In subsequent reviews, ASIC will expect to see robust conflict management arrangements. Where disclosure is appropriate to managing conflicts of interest, ASIC expects to see disclosure that is timely, specific, prominent and meaningful.  In administering the law, ASIC will take into account the proposals put forward in the Federal Government's proposals paper Refinement to Financial Services Regulation, issued in May 2005: see ASIC Information Release [IR 05-28] 'ASIC compliance guidance on the FSR refinement proposals and fees template requirements'.  **Background**  In 2004, the New York State Attorney General investigated allegations that some insurance brokers in the United States were encouraging their staff to place business with preferred insurers that paid them higher commissions – a practice known as 'steering'. The Attorney General also investigated allegations that brokers were engaged in 'bid rigging' – that is, soliciting fictitious quotes to make the preferred insurer's bid looked more competitive. In both cases, insurance brokers were found to have recommended insurance products based on the size of commissions they received from insurers, rather than acting in the best interests of their clients.  ASIC conducted its review to assess brokers' compliance with their legal obligations, particularly in relation to managing conflicts of interest and disclosing remuneration. ASIC's review also aimed to identify the types of remuneration arrangements that exist between brokers and general insurers in Australia and determine whether there was any evidence of the US practices in the Australian industry.  ASIC's report on insurance broker remuneration arrangements is available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by contacting the ASIC Infoline on 1300 300 630.  **2.5 ASIC reports on Stock Exchange of Newcastle**  On 29 June 2005, the Australian Securities and Investments Commission (ASIC) released the findings of its latest assessment of the Stock Exchange of Newcastle Limited (NSX).  Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC is required to conduct an annual assessment of how well the NSX is complying with its obligations to supervise its market. In this assessment, ASIC also examined other areas of the NSX's operations.  ASIC has concluded that the NSX has adequate operating rules, structures and policies for the supervision of its market and for handling conflicts of interest. However, the NSX has not yet established and fully implemented procedures for disciplining participants and listed entities, including procedures for notifying ASIC of disciplinary action taken.  ASIC released a report in December 2004 which identified a number of inadequacies in the NSX's arrangements. In ASIC’s view, although the NSX has subsequently dealt with most of the inadequacies described in that report, the NSX must still:   * implement its planned additional conflict handling arrangements, including a more effective structural or functional separation of business and supervisory roles; and * reconstitute its Listing Committee so that its members are all either independent or NSX supervisory staff, and develop procedures for its meetings.   In the December 2004 report, ASIC also expressed concerns about the adequacy of resources available to the NSX for the supervision of its market. NSX Limited has since raised further capital and is now listed on Australian Stock Exchange Limited (ASX). As a result of these changes, ASIC now has fewer concerns about the sufficiency of NSX's resources.  In April this year, NSX Limited became the parent company of Bendigo Stock Exchange Limited. The NSX is continuing to make structural and organisational improvements to fully implement this merger and address the issues ASIC has identified. NSX Limited is also subject to the continuous disclosure regime under the ASX listing rules.  A copy of the report is available on the ASIC [website](http://www.asic.gov.au/" \t "_new).  **2.6 ASIC further extends interim relief for actuaries**  On 20 June 2005, the Australian Securities and Investments Commission (ASIC) extended interim relief for actuaries from the requirement to hold an Australian financial services licence (AFSL) from 30 June to 31 December 2005.  The extension of the relief is provided under ASIC Class Order [CO 05/680] transitional relief for actuaries.  Under s911A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), a person who carries on a financial service business is required to hold an AFSL to perform those activities. Corporations Regulation 7.1.29 provides exemptions from the need to be licensed for certain classes of professional activities. Actuaries have previously raised concerns that the categories of exemption from licensing may not apply to all aspects of their ordinary business.  ASIC issued [CO 03/1096] to provide temporary relief to certain types of actuaries from the need to hold an AFSL when undertaking the usual activities of an actuary. The original relief and its extension have been granted pending Government consideration of whether it is appropriate to provide relief for actuaries by regulations.  Copies of the class orders are available on the ASIC [website](http://www.asic.gov.au/" \t "_new).  **2.7 ASIC takes action against 478 company officers following public complaints**  On 30 June 2005, the Australian Securities and Investments Commission (ASIC) announced that over the last 12 months it had successfully prosecuted 478 company officers for 905 contraventions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), leading to the imposition of fines and costs totalling more than $989,000, as a result of complaints from the general public and business.  Other results included 30 company directors receiving good behaviour bonds, one director receiving a three month jail sentence and another seven being disqualified from managing corporations for five years each because of their convictions.  ASIC's actions against the company officers were based on complaints about:   * failing to assist insolvency practitioners in the administration of their failed companies; * continuing to act as an officer of a company following appointment of a liquidator; * the officers and their companies failing to update ASIC registers with the addresses of their companies and company officers, in an attempt to thwart creditors' efforts at initiating debt recovery proceedings; * using unregistered company structures, meaning that customers and individuals can't pursue legal claims; * lodging documents with ASIC that contained false and misleading information; and * disqualified people managing corporations.   ASIC also conducted random assessments of more than 120 people who were company directors at the time they were declared bankrupt. These assessments found that most of the bankrupts visited were able to provide information that established that they were no longer involved in the company nor in a management role. Some seven others are presently under scrutiny and may become the subject of prosecution action. |
| **3. Recent ASX Developments** |
| **3.1 ASIC releases annual ASX assessment**  On 19 July 2005, the Australian Securities and Investments Commission (ASIC) released the findings of ASIC's most recent assessment of the Australian Stock Exchange (ASX).  Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC must conduct an annual assessment of how well the ASX is complying with its obligations to supervise its market. This is the third assessment ASIC has undertaken.  ASIC's report to the Government concludes that the ASX has adequate arrangements for supervising the market, including arrangements for:   * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way; * monitoring the conduct of participants; and * enforcing compliance with its rules.   The ASX has taken a number of positive steps since the release of ASIC's last report in September 2004, including:   * the establishment of arrangements for supervisory and compliance personnel to elevate issues of concern to the Audit and Risk Committee of the ASX Board; and * the establishment of an internal compliance function.   Further, ASIC believes that the ASX Corporate Governance Guidelines, which became fully effective during 2004, will have a positive impact on disclosure practices and the behaviour of market participants.  The ASX has agreed to review its practices in relation to some areas of concern identified by ASIC. These practices have been raised by ASIC in previous assessments, and include aspects of supervision of the warrants market, and consistency in monitoring and enforcing the disclosure provisions of the listing rules.  The assessment report is available on ASIC's [website](http://www.asic.gov.au" \t "_new).  **3.2 ASX review of supervision**  On 25 July 2005, ASX announced a review of its supervision division to improve efficiency and productivity and to add resources where needed. The decision to conduct the review was taken in the context of an overall review of ASX following the appointment of a new CEO and the ASIC assessment in 2004 which, while finding that ASX's arrangements for supervision were adequate, had made a number of suggestions for improvement.  This year's ASIC assessment (See Item 3.1 above) has concluded that ASX has adequate arrangements for supervision of its markets and has improved significantly in a number of areas. It made very few suggestions for improvement, all of which are being actioned by ASX. While this is positive, ASX still sees it as important to continue with the review it has outlined.  The supervision review will not lead to a reduction of overall staff numbers for supervision. In fact, an additional three full time staff will be added to supervision. The review is being conducted in two stages. The first stage is an internal reorganisation of the Market Supervision Division. It will be completed by September 2005.  The reorganisation is designed to:   * bring the specific needs of key stakeholders of supervision into better focus, with separate ASX teams responsible for issuers (listed companies) and for participants (including brokers). Each team will report to a General Manager reporting to Eric Mayne, the Group Executive, Market Supervision; * deliver improved outcomes through separation of the investigation and enforcement functions. While administration of, and investigation of possible breaches of, Listing Rules and Market Rules is to be performed by the issuers and participants teams respectively, a third team, Enforcement, will handle all referrals to ASIC and Disciplinary Tribunals. This team will also report to a General Manager reporting to Eric Mayne; * improve ASX analysis and development of regulatory policy through the creation of a Regulatory Policy Unit headed by a General Manager; and * retain ASX national presence with supervisory staff in Sydney, Perth, Adelaide and Brisbane as at present.   The second stage of the review, which will be completed this calendar year, will assess more broadly, how ASX can improve in the way it supports market integrity (eg, by reducing duplication in what it does and identifying where it may need to add further resources because of heightened market activity). Draft recommendations which come out of this broader review will be discussed with ASIC and the Government and will be subject to broader consultation before decisions are taken by ASX’s Board.  More information is available on the ASX [website](http://www.asx.com.au/" \t "_new). |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Austral Coal Ltd 02(R) - Declaration of unacceptable circumstances and final orders**  On 25 July 2005, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders relation to the Austral Coal Limited 02 matter.  Glencore International AG and Fornax Investments Limited (together, Glencore) applied under section 657EA of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) on 1 July 2005 to review the decision of the Austral Coal 02 Panel (Initial Panel) on 28 June 2005 to make a declaration that unacceptable circumstances existed in relation to the affairs of Austral Coal Limited and to make orders remedying those unacceptable circumstances. The Initial Panel’s decision was made following an application to the Panel by Centennial Coal Company Limited on 3 June 2005 in relation to the affairs of Austral Coal.  In mid to late March 2005, Glencore entered into cash settled equity swaps (Glencore Swaps) with Credit Suisse First Boston International and ABN AMRO Bank NV, Australia Branch (together, the Banks) over Austral Coal shares. At the time Glencore entered into the Glencore Swaps, Centennial had announced a takeover bid for Austral Coal on 23 February 2005, offering 10 Centennial shares for every 37 Austral Coal shares. Centennial's bid was unanimously recommended by the directors of Austral Coal in the absence of a superior bid.  The Panel has decided that Glencore's failure to disclose to the market, from 9.30 a.m. on 22 March 2005 until 4 and 5 April 2005, the fact that the combination of Glencore's holding of voting shares in Austral Coal and the swap exposure agreed to be provided under the Glencore Swaps (Combined Holding) exceeded 5% of the voting shares in Austral Coal, constituted unacceptable circumstances.  The Panel has further decided that Glencore's failure to disclose to the market, from 9.30 a.m. on each relevant trading day between 23 March and 5 April 2005, any increase of 1% or more of the Combined Holding, also constituted unacceptable circumstances.  The Panel considers that the existence and size of the Glencore Swaps, the identity of Glencore as the common entity behind the Combined Holding, and Glencore's holding as a material part of the Combined Holding, was information which, had it been announced, would have had an effect on the control or potential control of Austral Coal, an effect on the acquisition or potential acquisition of substantial interests (at least by Glencore and Centennial, and possibly by others), and an effect on the efficiency, competitiveness and information available to the market for control over Austral Coal shares. Accordingly the Panel considers that the information set out earlier in this paragraph is the information which the market would have expected, and needed, in proper disclosure by Glencore of the Combined Holding.  The Panel decided that it was unnecessary to decide whether or not unacceptable circumstances existed between 5 April 2005 and 1 July 2005. Although the Panel considers that Glencore failed to disclose all of the salient features of the Glencore Swaps to the market in its disclosures on 4 and 5 April 2005, the quantum of the Combined Holding was then disclosed and sufficient disclosure has since been made, particularly in the Media Release announcing the decision of the Initial Panel on 1 July 2005.  The Panel has varied the decision of the Initial Panel by making the declaration and has varied the orders of the Initial Panel by making the Restoration Order. In summary, the orders require Glencore:  (a) to make offers (Restoration Offers) to all persons who sold Austral Coal shares between 9.30 a.m. on 22 March 2005 and 9.30 a.m. on 5 April 2005 (Non Disclosure Period) by transactions (Uninformed Transactions) which were reported to Australian Stock Exchange Limited (ASX):  (i) to sell to those persons the same number of Austral Coal shares which those persons sold in any Uninformed Transaction (the persons may accept the offers in whole or part); (ii) at a price per share no higher than that of the relevant Uninformed Transaction; and  (b) to hold those Restoration Offers open for one month, during which time a person is entitled to withdraw the acceptance; and (c) to make a public announcement (in a form approved by the Panel) of the existence and terms of the Restoration Offers.  The Panel will allow Glencore to make one application to the Panel for a variation of the Restoration Order in relation to any particular Uninformed Transaction. The Panel will consider any application, after seeking submissions from any person whose interests would be affected by the proposed variation of the Restoration Order. The Panel will also allow Glencore to apply for further orders if it receives acceptances it must fulfil for more shares than it has.  At this stage, the Panel has made no orders concerning the Glencore Swaps. Glencore has announced an appeal to the High Court.  **4.2 Right issues – Panel seeks public comment**  On 18 July 2005, the Takeovers Panel released a draft Issues Paper seeking public comment on the circumstances in which the Panel may consider whether or not unacceptable circumstances exist in relation to a rights issue which has the potential to have an effect on control of a company.  Over the last two years, more than 10 matters have come before the Panel alleging that rights issues under which a shareholder or underwriter may have acquired a controlling interest in the company constituted unacceptable circumstances. The Panel considers that there are aspects of rights issues which have an impact on control of the company and the market would be assisted by the issue of a Guidance Note.  The purpose of the Issues Paper is to facilitate discussion among, and obtain feedback from, market participants and investors who may be affected by any guidance which the Panel develops on rights issues, or otherwise have an interest in such guidance. The Panel will use feedback received in response to the Issues Paper in the formulation of a draft Rights Issues Guidance Note which will be issued for further public comment later this year.  Because the Panel has already developed considerable experience in the issues associated with rights issues, the Issues Paper does more than set out a list of open-ended discussion points; in some areas it sets out the Panel's preliminary views on what will constitute unacceptable circumstances, and the Panel seeks the market’s views on these proposals for guidance. There are, however, many areas where the Panel's view are less developed and, in those cases, the relevant factors are canvassed in general terms and followed by a list of questions inviting feedback.  The Issues Paper is available on the Panel's website at: [http://www.takeovers.gov.au/display.asp?ContentID=963](http://www.takeovers.gov.au/display.asp?ContentID=963" \t "_new) |
| **5. Recent Corporate Law Decisions** |
| **5.1 Charges over book debts - Only a floating charge?**  (By Angela Flannery, Partner, Clayton Utz)  National Westminster Bank plc v Spectrum Plus Limited [2005] UKHL 41, House of Lords, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, 30 June 2005  The full text of this judgment is available at: [http://www.parliament.uk/judicial\_work/judicial\_work5.cfm](http://www.parliament.uk/judicial_work/judicial_work5.cfm" \t "_new)  **(a) Summary**  The decision of the House of Lords in Spectrum Plus has important ramifications for the manner in which security is created over book debts as it requires a financier to exercise some degree of control over the proceeds of the book debts of a chargor before the financier's security will be considered a fixed charge. The decision is not binding in Australia but Australian courts are likely to consider it closely. In the absence of a contrary Australian decision, where a chargor requires day to day use of the cash flow generated from its book debts for the operation of its business, it may be difficult for a financier to take a fixed, as opposed to a floating, charge over those book debts.  Where a floating charge is held, that charge may still be crystallised and enforcement action taken in accordance with the terms of the charge. So, why then does it matter whether a charge over book debts is fixed or floating? Under the Corporations Act, on the insolvency of a chargor, the priority rights of the chargee to any assets subject to a floating charge will be postponed to the rights of certain other creditors of the chargor, particularly employees (for example, see section 433). Accordingly, if a charge over book debts is a floating charge, this may disadvantage the chargee by limiting its priority rights to a significant asset of the chargor.  **(b) Facts**  Financiers face a dilemma in structuring security over book debts of a company. On the one hand, to ensure priority on insolvency, financiers wish to hold fixed charges over such debts. On the other, the restrictions imposed on dealing with assets subject to a fixed charge will not be acceptable to a chargor that, as is usually the case, requires use of the proceeds of its book debts to ensure it has sufficient cash flow to operate its business.  In putting in place its secured financing arrangements with Spectrum, National Westminster Bank adopted the practical approach to resolve this dilemma that is usually adopted in Australia and, as is clear from the comments of the House of Lords in Spectrum Plus, is also the approach that had commonly been adopted in the UK. Spectrum had an overdraft facility for a maximum of £250,000 and was required to provide a charge over its book debts as security for that facility. The charge expressly stated that it operated as a fixed or "specific" charge over the book debts of the chargor, required the proceeds of those book debts to be paid to an account with National Westminster Bank, restricted the sale, factoring and other dealings with the book debts and imposed an obligation on the chargor to create a legal mortgage over the book debts if required by the Bank. The account into which the proceeds of the book debts were deposited was operated as an overdraft account and the chargor was entitled to use the proceeds of that account in its discretion.  **(c) The decision**  Concern has been expressed over time as to whether the approach commonly adopted, and used in the Spectrum Plus case, creates a fixed charge. Although the charge is expressed to be a fixed charge, it has the characteristics of a floating charge - it is created over a class of assets the composition of which changes from time to time and the chargor is given rights to use those assets (or at least the proceeds of them) in the ordinary course of its business. Notwithstanding this concern, it had generally been thought, on the basis of the English decision of Siebe Gorman & Co Ltd v Barclays Bank Limited [1979] 2 Lloyd's Rep 142, that Australian courts would uphold the agreement of the parties that such a charge is a fixed charge. Slade J in Siebe Gorman took the view that a requirement in the charge document that the proceeds of the chargor's book debts be paid into an account with the chargee would be sufficient control over those debts to establish that a fixed charge was held.  The Privy Council decision in Agnew v Cmr of Inland Revenue; Re Brumark Investments Limited (2002) 20 ACLC 3051 had cast doubt on Siebe Gorman though as it was an appeal from a New Zealand Court of Appeal decision it was not binding on the English courts. Spectrum Plus however has now overturned Siebe Gorman. The House of Lords held that if a charge permits the chargor to deal with any proceeds of realisation of book debts in the ordinary course of its business until some further step is taken, the charge over the book debts is a floating charge.  Although the House of Lords was not prepared to go so far as to find that it is not possible to create a fixed charge over book debts, as a practical matter it will often be very difficult to meet the prescribed criteria to do so. Lord Walker commented (at paragraph 140) that not all restrictions imposed in respect of charged property would be taken as indicia of a fixed charge. A prohibition on dealing with unrealised book debts would be insufficient, as would a requirement that the proceeds of the debt are paid to an account held with the chargee. A blocked account arrangement which required the chargor to deposit the proceeds of its book debts to an account with the chargee and prohibited the chargor from making any withdrawal from that account without the consent of the chargee would, on the other hand, be sufficient. What was not made clear was the types of withdrawals that could be made with chargee consent and whether any other intermediate arrangements would be sufficient to create a fixed charge.  Implicit in the decision is that, as a matter of English law, it is not possible to consider a book debt and the proceeds of that debt as 2 separate assets. It is likely that, at the very least, this aspect of the decision would be accepted in Australia. As Lord Scott pointed out (at paragraph 110), the value of a book debt lies in the money received from the debtor.  To treat that money as a separate asset to the book debt itself involves an artificial analysis of the nature of a book debt.  Another key point of the House of Lords decision was the scant regard paid to the clear intention of the parties. The fact that the charge itself expressly stated that the charge was a fixed or "specific" charge was given very little weight. This may have been accepted on the basis that National Westminster Bank did not seek to argue this point, though this approach also seems to have been influenced by a general public policy view that the categories of assets subject to floating charges should be maximised, thereby giving priority to those classes of creditors that obtain preference to chargees over those assets.  Although the decision is not binding, as Australian judges will give serious consideration to the decision, Australian financiers should consider the implications of Spectrum Plus not only in future secured financing transactions, but also in transactions that have already been entered into.  If Spectrum Plus is applied in Australia, for a charge over book debts to be a fixed charge the chargee must have "control" over the charged book debts and the proceeds of those debts. It will not be sufficient for the charge instrument to create a blocked account arrangement that is not strictly implemented. The English decisions make it clear the courts are willing to look not only at the terms of the charge but also how the parties actually administer the charge (see for example Agnew v Commissioner of Inland Revenue [2001] 2 AC 710).  Establishing blocked account arrangements for particular cases, such as structured financing or project financing transactions where the chargor does not require day to day control of the proceeds of its book debts, may pose little problem. However, it is unlikely to be a practical solution in most circumstances. There may be alternative procedures that can be put in place to provide the degree of control that the House of Lords required to exist before a fixed charge will be created. One alternative structure would be to establish dual account arrangements, as had been suggested by the Court of Appeal (Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd and others [2004] 4 All ER 995 at paragraph 99). Under such an arrangement the proceeds of book debts would be paid into a blocked account. The chargor would be provided with a separate overdraft account which could be used by it to fund its day to day working capital requirements. The financier would then be able to apply the balance of the blocked account at agreed intervals to repay the outstanding overdraft balance. Although the Master of the Rolls in the Court of Appeal was of the view that it was beyond doubt that such an arrangement would be effective to create a fixed charge, Lord Walker in Spectrum Plus (at paragraph 161) commented that this may not provide a "simple solution" in every case. Where this approach is adopted but the 2 separate accounts are actually operated as one account, effectively meaning that the chargor has access on a day to day basis to the proceeds of its book debts, it would seem that the English courts would have no hesitation in holding that a floating, rather than a fixed, charge is held.  National Westminster Bank also raised an alternative argument that, if the House of Lords was to overrule Siebe Gorman, this should be done prospectively only, that is, existing security interests (including that held by the Bank) should remain unaffected. The Spectrum Plus decision affected the winding up of a significant number of companies in the United Kingdom and so it is unsurprising that the House of Lords analysed this issue in detail. As the High Court has shown little inclination to consider applying decisions on a prospective basis only, this aspect of the decision is of limited practical significance in Australia.  **5.2 Commercial contract not void for incompleteness and uncertainty**  (By Chris Skordas, Phillips Fox)  Helmos Enterprises Pty Ltd v Jaylor Pty Ltd [2005] NSWCA 235, Supreme Court of New South Wales, Court of Appeal, Hodgson JA, Young CJ in Eq, Stein AJA, 8 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswca235.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswca235.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Court of Appeal overturned the decision of Brownie AJ that although the parties intended to enter into legal relations, no contract in fact existed due to the absence of various terms. In the Court of Appeal's opinion, none of the absent terms were "essential" such that they rendered the contract incomplete. The Court of Appeal also rejected the respondents' cross-appeal that the trial judge erred in finding an intention to enter into a binding contract. Accordingly, the Court determined that the respondents had breached the contract, giving rise to an award of damages to the appellant. However the issue of quantum of damages was remitted to the Equity Division of the Supreme Court.  **(b) Facts**  Helmos Enterprises Pty Limited ('the appellant') sought to buy two restaurants, Kingsley's Australian Steak House located in Sydney's CBD and Kingsley's Steak and Crabhouse located in Woolloomooloo. The first restaurant was owned by Kingsley's Australian Steakhouse Pty Limited ('the second respondent'). The second restaurant was operated by a joint venture company, owned in equal proportions by the second respondent and Jaylor Pty Ltd ('the first respondent').  During negotiations for the first restaurant, solicitors for the appellant requested confirmation that the first respondent agreed to give the appellant a right to purchase its half-interest in the second restaurant. In reply, solicitors for the first respondent stated that:  "All I can offer you is a letter. I don’t have any instructions beyond that. The parties will need to deal with the terms of any contract later."  The letter, dated 15 January 2002, stated:  "We refer to recent telephone discussions between our respective offices regarding Helmos' interest in purchasing Jaylor's 50% ownership of Kingsley's Crab House. We are instructed to confirm the following:  1. Jaylor hereby offers Helmos the opportunity to purchase its 50% interest in Kingsleys Crab House ("offer to purchase") for $1,100,000 ("the purchase price"). 2. Helmos is to exercise the offer to purchase by notice in writing to our office no later than 5.00pm, 15 April 2002, time being of the essence ("exercise date"). 3. Upon receipt of the exercise of the offer Contracts for purchase of Jaylor's 50% interest in Kingsley's Crab House ("contract of purchase") shall be sent to your office no later than five days from the exercise date. 4. Subject to Jaylor and Helmos' agreement to the terms and conditions contained in the contract of purchase, settlement thereof shall take place no later than 14 days from the exercise date. 5. The purchase price shall be free of any deductions. 6. Jaylor undertakes until the exercise date not to enter into any contract, lease or any other arrangement with any other party as would prevent Jaylor from performing its obligations pursuant to the exercise of offer.  The purchase of the first restaurant was completed in February 2002. On 8 April 2002 the appellant wrote to the first respondent purporting to exercise the option to purchase the first respondent's interest in the joint venture.  Settlement for the second restaurant did not take place within the 14 days as stipulated in the letter, and indeed never took place. On 20 August 2002, the first respondent's solicitor informed the appellant's solicitor that at no time did the respondents intend to be legally bound by the letter. The appellant contended that the letter, subsequent to its acceptance, constituted a written contract.  The appellant commenced proceedings for specific performance. Subsequently the appellant purported to terminate the "contract" for repudiations by the respondents, and continued with the proceedings as a claim for damages for breach of contract.  **(i) Decision at trial**  The trial judge held that the parties did intend to immediately enter into a binding contractual relationship, whilst contemplating that there would be a further more formal agreement reached. However, his Honour considered that the letter did not create a binding contract, because "there was just too much still to be worked out". His Honour listed seven factors, including amongst other things the need to assign the property lease, hire purchase agreements, and liquor licence currently held by the current joint venture company, to the new joint venture company that the appellant wished to incorporate as the vehicle for operation of the second restaurant.  **(ii) Grounds for appeal**  The appellant challenged the decision of the trial judge on the basis that each of the seven factors were merely matters of "mechanics", capable of being worked out without the need for further agreement between the parties, and therefore the letter was not so uncertain as to preclude it from being a binding contract.  **(iii) The respondents' cross-appeal**  The respondents' contended that the trial judge was in error in finding an intention to create legal relations.  **(c) Decision**  **(i) The cross-appeal**  The Court of Appeal rejected the respondents' cross-appeal, agreeing with the findings of the trial judge that the language used in the correspondence of the parties, when coupled with conversations between the parties' solicitors, pointed towards the conclusion that the parties did intend to be bound by the letter.  Further, the Court agreed that the present circumstances fell within the so-called fourth class of categories set out by the High Court in Masters v Cameron (1954) 91 CLR 353, namely where the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing additional terms. The Court rejected the respondents' arguments that the situation fell within the third class, where the parties intend there not to be a concluded contract unless and until a formal document is executed.  **(ii) The appeal**  His Honour Chief Justice Young noted that there are various kinds of uncertainty which can prevent validity of a contract. One such instance is where an agreement leaves undetermined one of the terms which the law requires specifically to be agreed. His Honour noted in this respect that authority makes a distinction between a vital and essential term and other important matters. The question of whether a term is "essential" such that it renders a contract incomplete is one of degree and will depend on the nature of the circumstances surrounding the pre-contract negotiations and the nature of the contract itself.  His Honour emphasised that courts should adopt a commercial approach and endeavour wherever possible to enforce the promises imparted by the negotiating parties. However, his Honour noted that taking a realistic commercial approach does not mean abandoning contractual principles altogether, and in particular his Honour warned against going to unacceptable lengths to determine what the parties should have done for themselves.  The Court held that it is more likely that contracts will be enforced by the courts where they represent commercials dealings between parties who are familiar with the particular trade. In the Court's opinion, the present case was one where all the key players were involved in the restaurant industry and would have all been aware of what was necessary to be done in order to transfer a restaurant business from one owner to another.  With regard to the seven factors espoused by the trial judge, the Court agreed with the appellant that each of the issues was not essential and did not have the effect that the letter was incomplete such to be void for uncertainty. The Court rejected the arguments of the respondent stating that to require all third party contracts to be concluded to achieve completeness of the primary contract would be impractical and a commercially unrealistic situation. Accordingly, the Court held that a contract did in fact exist and the respondents' refusal to complete the contract constituted a breach, entitling the appellant to damages. The Court allowed the appeal with costs and dismissed the cross-appeal with costs, and referred the assessment of damages to the Equity Division of the Supreme Court. However, it was noted that the question of assessment could involve difficult questions of principle, linked to the matter as to whether the appellant was itself ready, willing and able to fulfil the contract on its part. As this was a split trial, costs of the first trial were reserved to the Judge who hears the second trial.  **5.3 Prioritising the Commonwealth – protecting advances to employees of insolvent companies**  (Jonathan Stewart, Blake Dawson Waldron)  Commonwealth of Australia v Rocklea Spinning Mills Pty Ltd (receivers and managers appointed) (subject to deed of company arrangement) [2005] FCA 902, Finkelstein J, Federal Court of Australia, 1 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/July/2005fca902.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/july/2005fca902.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Facts**  Rocklea Spinning Mills Pty Ltd (Rocklea) manufactured pure cotton and blended yarns. In October 2003, the company was placed in administration by the directors and had receivers and managers appointed by GE Capital Finance Pty Ltd (who was Rocklea's principal financier).  The Commonwealth, through its General Employee Entitlements and Redundancy Scheme (GEERS), advanced money to the receivers of Rocklea to meet the claims of former employees of Rocklea. That money was distributed to the employees in accordance with their respective entitlements. The GEERS advances did not satisfy the full entitlements of the Rocklea employees.  Under section 560 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), the Commonwealth has the same priority in respect of the GEERS advances that employees would have against Rocklea. The Commonwealth had recovered approximately a third of the GEERS advances from the receivers. Unsecured creditors had not received any distributions.  The administration came to end after a deed of company arrangement was approved by creditors and executed in February 2005. The deed provided for the distribution of $400,000 received by Rocklea, from the directors of Rocklea (in effective settlement of potential claims against them), to Rocklea's non-related party creditors in exchange for full settlement of their claims. Employees were to receive $100,000, the Commonwealth an additional $30,000, unsecured creditors $170,000 (which equated to 0.82 cents in the dollar) and the administrators were to receive $100,000 for the costs and expenses of the administration. Finkelstein J noted that the deed provided for a "radically different scheme" than would have applied in a winding up. On a winding up, the employees would receive $21,056, the Commonwealth $278,944, the remaining $100,000 to cover the costs and expenses of the administration and unsecured creditors would receive nothing.  The Commonwealth applied to the Federal Court to have the deed of company arrangement either terminated (under section 445D of the Act) or declared void (under section 445G of the Act).  **(b) Standing and the characterisation of the Commonwealth's advances**  Section 445D(2) of the Act permits a creditor of the company, the company or any other interested person to apply to have a deed of company arrangement terminated. Section 445G(1) permits the administrator, a member of the company, a creditor of the company or ASIC to apply to have a deed of company arrangement declared void. The Commonwealth claimed to be a creditor of Rocklea or, alternatively, an interested person.  Finkelstein J rejected the proposition that the Commonwealth was a creditor of Rocklea. He held that Rocklea's receivers (as agents for Rocklea) were unable, under both the common law and section 420(1), to have borrowed the GEERS advances from the Commonwealth as it is beyond a receivers power as agent to borrow money for a purpose that is not for the purposes of the receivership (such as paying past employees their entitlements). Similarly, Finkelstein J held that the GEERS advances were post-administration debts, they were costs and expenses of the administration for which the administrator is responsible and are not debts of Rocklea. Therefore, the Commonwealth was not a creditor in respect of the GEERS advances and did not have standing to maintain an action under section 445G(1).  Finkelstein J held that the words "interested person" in section 445D(1) of the Act should be given a wide scope. Accordingly, he held that the Commonwealth was an interested person for the purposes of section 445D(1) on the basis that the deed of company arrangement adversely affected its pecuniary rights.  **(c) Setting aside the deed of company arrangement**  Section 445D(1) of the Act sets out circumstances in which the Court can terminate a deed of company arrangement. Section 445D(1)(e) provides that a deed can be terminated if effect cannot be given to the deed without injustice or undue delay. Section 445D(1)(g) gives the Court the discretion to terminate the deed for some other reason. (Finkelstein J rejected section 445(1)(f) as a relevant ground on the basis that the Commonwealth was not a creditor of Rocklea.)  Finkelstein J rejected the Commonwealth's proposition that a deed of company arrangement must distribute the assets of an insolvent company in accordance with the rules that apply in a winding up. He considered that there were some circumstances where commercial commonsense dictated that some creditors should lose priority and other creditors be treated with some degree of discrimination. Finkelstein J considered that those circumstances would arise where a deed of company arrangement was used as a mechanism for resuscitating an ailing business. However, he considered that where a deed is used as a mechanism for a de facto winding up of the company, loss of priority and discrimination is inappropriate.  As Rocklea's deed of company arrangement was not directed to saving the business, the deed of company arrangement was a de facto winding up. Accordingly, Finkelstein J held that fairness required that the property be distributed as in an actual winding up. As the deed of company arrangement distributed Rocklea's property in another way it was unfair. He ordered (presumably pursuant to section 445D(1)(e) or (g)) that the deed of company arrangement be terminated.  **(d) Effect of the order**  The result of that termination of the deed of company arrangement was that Rocklea was wound up (due to the operation of section 446B of the Act and Corporations Regulation 5.3A.07). The employees received less money ($21,056) than they would have under the deed of company arrangement. This outcome "cannot be helped" according to Finkelstein J. The Commonwealth received $278,944. Finkelstein J considered that preserving the Commonwealth's priority protected the integrity of GEERS which would otherwise have faced "a real risk of being scaled back or itself terminated to the detriment of many employees of insolvent companies". The unsecured creditors received nothing but, according to Finkelstein J, as their potential distribution of 0.82 cents in the dollar is "so small" they "are of no real concern".  **5.4 Resolving inconsistencies between the Corporations Act and state legislation**  (By Lindsay Mackay, Freehills)  Tat Sang Loo v Director of Public Prosecutions (Victoria) [2005] VSCA 161, Supreme Court of Victoria Court of Appeal, Winneke P, Charles and Callaway JJA, 29 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/june/2005vsca161%20.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/june/2005vsca161%20.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case concerned an appeal regarding whether sections 70 and 72 of the [Confiscation Act 1997 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11956" \t "Default) applying pecuniary penalties could operate consistently with the winding up provisions in Chapter 5 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). This involved a consideration of the provisions in Part 1.1A of the Corporations Act which deal with the interaction between the Corporations Act and state and territory laws and specifically the application of section 5G(3).  **(b) Facts**  The Victorian Department of Prosecutions (DPP) had obtained a restraining order and applied for a pecuniary penalty order against Tat Sang Loo to recover the profits of his illegal abalone business for offences against the Fisheries legislation. The Confiscation Act 1997 (Vic) enables the State to recover assets alleged to be the proceeds of crime. The DPP sought a declaration under section 70 of the Confiscation Act that certain properties were available to satisfy the pecuniary penalty order on the basis that they had been under the effective control of Loo at the date when the restraining order was made. Under section 72 of the Confiscation Act, if the court makes such a declaration, a charge will arise over all the property to secure payment of the pecuniary penalty order for the benefit of the State.  Before the application of the DPP under section 70 of the Confiscation Act could be determined, an administrator was appointed to Loo’s company, Bow Ye Investments Pty Ltd (Bow Ye). A meeting of creditors of Bow Ye then resolved that the company be placed into liquidation and the winding up of the company was deemed to have commenced from the first day of the administration under the Corporations Act.  If a statutory charge had arisen over the properties by virtue of section 72 of the Confiscation Act, then this would confer upon the State the status of a secured creditor in the liquidation, and the ability to realize its secured asset outside of the liquidation.  The issues were as follows:   * whether a statutory charge had arisen over the properties; * whether there was a direct inconsistency between sections 70 and 72 of the Confiscation Act and Chapter 5 of the Corporations Act; and * whether any inconsistency was avoided by the operation of section 5G of Part 1.1A of the Corporations Act.   Part 1.1A of the Corporations Act aims to prevent provisions of state legislation being rendered invalid as a consequence of inconsistent operation with the Commonwealth Corporations legislation. It therefore:   * permits the concurrent operation of state legislation where the two instruments are capable of operating concurrently (section 5E); * excludes certain excluded matters declared by state legislation to be excluded from the operation of the Corporations Act (section 5F); and * avoids direct inconsistency by providing that the Corporations Act will yield to state legislation if certain conditions are satisfied (section 5G).   At first instance, the trial judge held that there was an operational inconsistency between sections 70 and 72 of the Confiscation Act and Chapter 5 of the Corporations Act. However the trial judge concluded that direct inconsistency was avoided by section 5G of the Corporations Act and therefore the judge made the orders sought by the DPP.  Loo appealed and was granted leave to appeal on the grounds that the trial judge erred in the application of the test in section 5G(3). On appeal, Barratt J allowed the appeal and held that the Confiscation Act did not satisfy the conditions in section 5G(3) and therefore the section did not operate to void the inconsistency. The DPP appealed this decision to the Court of Appeal.  **(c) Decision**  The Court of Appeal allowed the appeal and held that section 5G did not operate to avoid the inconsistency between the relevant sections of the Confiscation Act and the winding up provisions of the Corporations Act.  **(i) Operation of section 5G of the Corporations Act**  Section 5G prescribes different conditions that need to be applied to resolve an inconsistency depending of the type of state law provision. The Confiscation Act was held to be a "pre-commencement (commenced) provision" under subsection 5G(12). The condition to be satisfied under section 5G (condition (a)) was therefore that "the state provision operated, immediately before this Act commenced, despite the provision of the Corporations Law of the State… that corresponds to the Commonwealth provision".  Therefore the question was whether the provisions of the Confiscation Act operated despite the provisions of the Victorian corporations law, the [Corporations (Victoria) Act 1990](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=310" \t "Default). Sections 5 and 6 of this Act provide that the operation of existing laws is unaffected by the Victorian Corporations Law, but later laws are not to be interpreted as amending or appealing the Corporations Law unless it provides expressly for that Act “to have effect despite a specified provision, or despite any provision” of the Corporations Law.  However the Confiscation Act did not specifically provide that it should have effect despite any provision of the Corporations Law. The court found that there was a difference between "specifying" and being included "expressly" or "by necessary implication" and as the Confiscation Act did not specify the provisions of the Corporations Law relating to winding up, it did not satisfy the condition in section 5G of the Corporations Act.  The Court of Appeal held that the condition for section 5G to apply was therefore not satisfied and section 5G did not operate to avoid any direct inconsistency between sections 70 and 72 of the Confiscation Act and the winding up provisions of the Corporations Act.  **(Ii) Was there a direct inconsistency?**  The Court of Appeal also held that the Acts could not operate concurrently because the pecuniary penalty order was made against Loo personally and not against the company, Bow Ye. Therefore the effect of the order would be that Bow Ye’s assets would become security for the indebtedness of Loo and leave the unsecured creditors of Bow Ye subject to the secured debt of the State. Therefore the liquidator may potentially be deprived of assets that would otherwise be available to meet the claims of unsecured creditors of the company. While the Confiscation Act did disclose some intention to pierce the corporate veil, Callaway JA considered that much clearer language would be required before the claims of unsecured creditors in a liquidation would be subordinated.  Therefore sections 70 and 72 of the Confiscation Act were inconsistent with, and could not operate concurrently with, the winding up provisions of the Corporations Act.  **5.5 Is a debt extinguished by the deregistration of the creditor?**  (by Karen O'Flynn and Andrew Dienhoff, Clayton Utz)  John Frederick Lord as liquidator of Silverline Technologies Pty Ltd [2005] NSWSC 620, Supreme Court of New South Wales, Barrett J, 29 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/June/2005nswsc620.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc620.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In this case, the NSW Supreme Court considered whether a debt owed to a secured creditor (a New Zealand company) was extinguished by the deregistration of that company.  The decision also provides useful guidance on the steps a liquidator should take to deal with an unsatisfied charge registered with ASIC in the name of a deregistered company.  **(b) Facts**  The liquidation of Silverline Technologies Pty Ltd ("Silverline") was close to completion. However, the liquidator still had to deal with a charge in the name of Braithwaite Richard Pty Ltd ("Braithwaite") that had been created in 1996, and which was registered on the ASIC company register as unsatisfied.  The liquidator's investigations of Braithwaite (the correct name of which was, in fact, Braithwaite Richmond Pty Ltd) had identified it to be a New Zealand company that had been deregistered in June 2000.  The liquidator had:   * sent letters to the four individuals recorded on the New Zealand company register as the directors of Braithwaite, immediately before its deregistration. These letters had elicited no response; * sent a further letter to the New Zealand Treasury, which is responsible for administering the property of deregistered companies in New Zealand. (The Treasury had responded, and confirmed that as a matter of practice it did not endeavour to ascertain whether company property had vested in the Crown until someone sought the recovery of such property. Accordingly, the Treasury said it would neither consent nor oppose an application by the liquidator relating to the Braithwaite charge.); * obtained some limited evidence from a director of Silverline to the effect that the Braithwaite charge had only been an internal mechanism to secure the repayment of inter-company loans, and all liabilities secured by the charge had been satisfied prior to the liquidator's appointment on 8 April 2003.   The liquidator applied to the Court for:   * an order under section 274 of the Corporations Act to rectify the ASIC company register of Silverline, so as to add the words "Charge securing no indebtedness enforceable against [Silverline]" in respect of the Braithwaite charge; * alternatively, an order for rectification of the ASIC company register under section 1322(4)(b) of the Corporations Act; * alternatively, a direction pursuant to section 479(3) of the Corporations Act.   The rectification orders sought by the liquidator were submitted to require the Court to find that the removal of Braithwaite from the New Zealand register had extinguished any claims that it had against Silverline.  **(c) Decision**  **(i) The Court's analysis**  Barrett J considered firstly whether, at common law, the dissolution of a company extinguishes a debt owed to that company. After considering some older authorities, he concluded that it does not, and that the debt is simply vested in the Crown bona vacantia (ie, as unclaimed property).  He then considered the statutory scheme under the Companies Act 1993 (NZ) ("Companies Act"), holding that "the consequences of [Braithwaite's] removal must be ascertained by reference to [that Act], insofar as [it] deals with" the consequences of deregistration.  The statutory intention of the Companies Act was for the property of a deregistered company to vest in the Crown (section 324), and then vest back in the company if it were ever restored (section 331). Therefore, Barrett J decided that any debt owed under the Braithwaite charge remained in existence, as it had not been extinguished under the statutory scheme.  Having reached this conclusion, Barrett J then considered whether the debt had been discharged. The only relevant evidence was the bald assertion by the Silverline director that the debt had been satisfied (without any supporting evidence). In those circumstances, his Honour decided that he could not safely conclude the debt had been discharged.  In so deciding, Barrett J distinguished the decision in Re New South Wales Tennis Association Ltd [2004] NSWSC 175. In that case, Campbell J had ordered the rectification of the ASIC company register to state that no enforceable debt was secured by a charge granted by the company in 1908. This was because any unpaid debt owing under the 1908 charge was no longer enforceable (due to the expiration of relevant limitation periods), and because the company's financial records inferred that the debt had, in any event, been repaid before 1925.  **(ii) The Court's findings**  As the Court was not satisfied that any debt owed to Braithwaite was extinguished or discharged, the liquidator's application for rectification of the ASIC company register failed.  Barrett also noted, obiter, that section 1322(4) of the Corporations Act was probably inapplicable to an application for rectification of the ASIC company register.  However, Barrett J elected to make a direction under section 479(3) of the Corporations Act. He held that the liquidator had made all relevant inquiries to ascertain whether any claim of Braithwaite was being pressed. He also acknowledged that Braithwaite had shown no inclination to pursue any debt that was owed to it.  Accordingly, he directed that the liquidator proceed to finalise the winding up of Silverline on the footing that a claim would not be made by Braithwaite, and that property otherwise secured by the charge was available for distribution to creditors.  **(d) Ramifications**  The case suggests that the best approach for a liquidator confronted with an unsatisfied charge of a deregistered company (that is registered with ASIC) is to:   * write to the former directors of the deregistered company to elicit any response; * write to any (foreign) statutory body vested with the property of the company, and clarify whether that body wishes to take any steps in the liquidation; * obtain all available evidence to determine whether the debt(s) secured by the charge have been discharged; * if sufficient evidence exists that the debt(s) have been discharged, apply for rectification of the ASIC register under section 274 of the Corporations Act; * otherwise, apply for an appropriate direction under section 479(3) of the Corporations Act to proceed with the liquidation on the basis that the charge will not be enforced.   **5.6 Sentencing for insider trading – impact of similar information being available in the marketplace**  (By Lindsay Mackay, Freehills)  Regina v Frawley [2005] NSWSC 585, Supreme Court of New South Wales Criminal Division, Bell J, 24 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/June/2005nswsc585.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc585.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case considered a charge of insider trading against an employee who traded securities and made a substantial profit in possession of confidential information obtained through acquisition negotiations. The offender pleaded guilty and the case was primarily concerned with sentencing. As part of the sentencing determination, Bell J considered the effect of similar information being available in the public marketplace. Her Honour considered that the fact that similar but less detailed information was available did not lower the offender’s culpability nor did it affect the strength of the Crown’s case. The offending conduct which took place immediately on receipt of the confidential information and continued for a period of two months suggested that the offender understood that the information was not generally available and that it might have a material effect on the price of the securities.  **(b) Facts**  The offender was charged with the offence provided by sections 1002G(2) (now replaced by section 1043A) and 1311(a) (general offence provisions) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) in relation to insider trading. The offender pleaded guilty to the charge that he purchased securities, ordinary shares in JNA Telecommunications Limited, while in possession of information that was not generally available being information which a reasonable person would expect to have a material effect on the price of the securities if it was generally available, and which the offender knew, or ought reasonably to have known was not generally available.  The offender obtained the following information about JNA Telecommunications Limited, a listed public company:   * that confidential discussions were taking place between his employer, Cisco, and JNA with a view to Cisco acquiring shares in JNA; * that negotiations were taking place between JNA and rivals of Cisco about whether that company would offer to acquire all of the shares in JNA; and * JNA was expecting offers well above the current share price for its shares.   The offender obtained this information through confidential communications with officers and employees of JNA and his employer.  The offender purchased 253,500 shares, paying from about $1.39 per share to $2.15 per share, through 21 separate buy orders through brokers with a total outlay of $458,580.24. After this 2 month period where the offender purchased the shares, the ASX announced that Lucent Technologies had made an offer to acquire JNA at a price of $3.75 per share. In the next two days the offender sold all of his shares in JNA for a total profit of approximately $479,789.  **(c) Decision**  **(i) Impact of evidence of similar information being generally available in the marketplace**  The offender submitted documents to show that there was information generally available in the marketplace that JNA was undervalued and likely to be the subject of a takeover and that this information was having some influence on the share price. The offender’s case was that because of this similar information being generally available, the offender was less culpable and the Crown’s case was not as strong, therefore the offender’s guilty plea should be seen as a demonstration of his remorse and contrition.  Bell J considered that the documents submitted by the offender did not show that similar information was available in the marketplace. Her Honour found that, in any case, the offender’s culpability was not to be assessed as lower even if similar, less specific information was generally available in the marketplace.  Bell J considered that the offender had direct access to a confidential source of information and went straight to the market immediately after receiving the information to take advantage of it. He then continued to purchase securities over a period of two months. Bell J found that the offender’s pattern of purchasing was suggestive of his understanding that the information was not generally available and that it might have a material effect on the price of the shares. The offender had made a substantial initial outlay and derived a substantial profit.  **(ii) Sentencing**  Bell J considered that as insider trading has the capacity to undermine the integrity of the market in public securities, it is viewed as a serious offence and therefore imprisonment is appropriate. Bell J considered sentencing imposed in other insider trading cases, but stated that ultimately each case must be considered on its own facts.  Bell J suggested that this case was less serious than that of Hannes (2002) 173 FLR 1, because the offender made no attempt to disguise his trades in JNA shares. Bell J took into consideration the plea of guilty and the delays in the proceedings that had not been the fault of the offender and determined that the sentence should be served by periodic detention for two and a half years.  **(iii) Amended insider trading provisions – section 1043A**  This case considered the insider trading provisions under section 1002G of the Corporations Act. The current provision is now section 1043A, which commenced from 11 March 2002. The main differences between the provisions are as follows:   * section 1043A is broader in its application as it applies to trading in all "Division 3 Financial Products" rather than merely to "securities"; * section 1043A applies to "applying for"as well as purchasing or selling securities; and * the test under section 1043A is whether an insider "ought reasonably to have known that a reasonable person would expect the information to have a material effect on the price of securities" rather than the previous test under section 1002G which required the insider to "know or ought to have known that information might have had a material effect on the price".   However it is submitted that these amendments would not affect the outcome in this case.  **5.7 Sham transactions lead to winding up**  (By Sabrina Ng and Ainslie Baird, Corrs Chambers Westgarth)  Macquarie Bank Ltd v TM Investments Pty Ltd [2005] NSWSC 608, Supreme Court of New South Wales, Barrett J, 23 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/June/2005nswsc608.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc608.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  After finding the second, third and fourth defendants had engaged in sham transactions, Barrett J held that just and equitable grounds had been made out for the companies to be wound up under section 461(1)(k) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act).  **(b) Facts**  The plaintiff advanced funds on the faith of what it believed to be genuine applications and agreements relating to financial loan products. The apparent borrowers were introduced to the plaintiff under an arrangement that entitled the second to fourth defendants to commissions from the plaintiff. It became clear that the transactions entered into by the plaintiff with the borrowers were sham transactions.   The plaintiff sought a winding up order in respect of the third and fourth defendants. With the second defendant, it sought reinstatement of its registration and then an order that it be wound up. The applications were brought under section 462(1)(k) of the Act.  **(c) Decision**  **(i) The plaintiff’s standing**  The plaintiff argued that it had standing to apply for a winding up order as it was a creditor of each of the second, third and fourth defendants on the basis that "it paid commissions in respect of loans which were never in truth made, so there was a total failure of consideration giving rise to a claim for recovery of the commissions". Barrett J accepted the plaintiff's argument and held that the plaintiff was a creditor of each of the defendants and had standing.   **(ii) Winding up of the third and fourth defendants**  In concluding that it was just and equitable for the third and fourth defendants to be wound up, Barrett J took into account the fact that the "main actors" in the conduct of the sham transactions, were banned by ASIC for life from acting as financial advisers, and that the "human actors caused the companies to become involved in transactions that were, at best, highly irregular and, at worst, dishonest, being transactions based on fabrications calculated to produce, for the companies contractual rewards that they had not in reality earned". His Honour also took into account the administrators’ opinion that the companies were insolvent and that they did not oppose the making of winding up orders.  **(iii) Reinstatement and winding up of the second defendant**   Barrett J accepted that the second defendant was involved in the sham transactions, and satisfied that the plaintiff was a person who is a person aggrieved by the deregistration for the purposes of section 601AH(2) of the Act, ordered its reinstatement.   Barrett J then made orders for the winding up of the second defendant.  **5.8 Acting in aid of foreign courts in a cross-border insolvency**  (By Tim Perry, Mallesons Stephen Jaques)  Re Independent Insurance Company Ltd [2005] NSWSC 587, Supreme Court of New South Wales, Barrett J, 22 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/June/2005nswsc587.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc587.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Section 581 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") confers on Australian courts jurisdiction to exercise their powers in aid of a foreign court in insolvency proceedings. This auxiliary jurisdiction does not affect the general principles which govern how Australian courts exercise their powers.  An Australian court will not grant declaratory relief to recognise the existence of foreign insolvency proceedings where the proceedings’ existence is not in dispute. For an Australian court to recognise such proceedings, it is sufficient for the court to note that it does so.  An Australian court can grant an injunction or a stay of proceedings in exercise of its jurisdiction under section 581 of the Act on a case by case basis. However, injunctions against unspecified persons will only be given ex parte in exceptional circumstances under Australian law, regardless of whether such injunctions have been given in other jurisdictions in aid of a foreign court.  **(b) Facts**  A petition to wind up Independent Insurance Company Ltd ("Company") was made to the High Court of Justice of England and Wales ("English High Court") and liquidators were appointed by order of the English High Court. The Company carried on an insurance business in the United Kingdom, but had written policies in favour of Australian residents. The English High Court ordered that the aid of the Supreme Court of New South Wales ("Court") be sought to assist it in relation to the insolvency and sent a letter to the Supreme Court of NSW requesting its assistance. The Company and the liquidators then applied to the Court for the following relief:   * a declaration that the Court recognised the presentation to the English High Court of the petition to wind up the Company; * a declaration that the Court recognised the appointment by the English High Court of the liquidators; and * orders to restrain any action against the Company in Australia, without the leave of the English High Court, while the liquidators were appointed to the Company or after a winding up order had been made.   **(c) Decision**  **(i) Jurisdiction to aid foreign courts in insolvency proceedings**  The jurisdiction to act in aid of a foreign court in insolvency proceedings, conferred on a relevant Australian court by section 581 of the Act, requires that there must first be an "external administration matter" as defined in section 580. Barrett J considered that in this case, because no winding up order had been issued in relation to the Company, the plaintiffs had to prove "the insolvency of a body corporate" under part (c) of the definition. Barrett J was satisfied that the Company was a body corporate and that the existence of “insolvency” was evidenced by the opinion of the directors as to insolvency in the petition for winding up, which was shared by the liquidators.  Barrett J noted that the Court had jurisdiction under sections 581(2)(a) and 581(3) and discussed the distinction between these sections. Section 581(3) gives the Court discretion, on receipt of a letter of request from a foreign court in relation to an insolvency matter, to treat the foreign matter as if it had arisen within the Court's own jurisdiction. Section 581(2)(a) imposes on the Court an obligation to act in aid of a court of the United Kingdom (among other jurisdictions) by exercising any aspects of its own jurisdiction.  Both of these sections extend the geographic reach of the Court's jurisdiction, but neither confers new powers, such as English statutory powers, on the Court. Accordingly, Barrett J considered the orders sought with respect to the general principles governing exercise of the Court's powers under Australian law.  **(ii) Claim for declaratory relief**  The Court recognised the presentation of the petition for winding up to the English High Court and the appointment of the liquidators, in accordance with the principles of private international law and apart from any order the Court could make under section 581 of the Act or otherwise.  However, it did not follow that the Court was bound or empowered to grant declaratory relief in circumstances where the subjects of the declarations sought were not in dispute.  Barrett J noted that the Court’s inherent power to make declarations of right was limited by the Court's own discretion. Given the factors limiting that discretion considered by Mason CJ, Dawson, Toohey and Gaudron JJ in Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, Barrett J found that although the Company and the liquidators had a clear interest in seeing the Court recognise the English insolvency proceedings, the declarations sought would have no consequence and should therefore not be granted. His Honour considered that it was sufficient for the plaintiffs’ purposes for the Court to record its recognition of the insolvency proceedings.  In the course of his reasoning, Barrett J distinguished this case from Re AFG Insurances Ltd (2002) 43 ACSR 60 (“AFG Insurances”), where the Court made declaratory orders as to the appointment and tenure of voluntary administrators (appointed non-curially under Part 5.3A of the Act) to help them to obtain the aid of the English courts.  **(iii) Claim for injunctive relief**  The third order sought was essentially a permanent injunction against unidentified persons to forestall any proceedings against the Company in Australia. Barrett J accepted that the Court could restrain a person subject to its in personam jurisdiction from commencing or continuing proceedings against the Company by injunction (or in the case of proceedings in the Court, by order to stay proceedings) on a case by case basis, and that such an order would be in aid of the English High Court within the jurisdiction conferred upon the Court by section 581(2)(a) of the Act.  However, Barrett J held that the general rule, that an injunction cannot be granted ex parte or against an unidentified class of persons (Maritime Union of Australia v Patrick Stevedores Operations Pty Limited [1998] 4 VR 143 ("Maritime Union")), applies to the Court’s jurisdiction under section 581 of the Act.  Counsel for the plaintiffs submitted that an exception to the general rule should apply because although persons against whom an injunction was sought were unidentified, they belonged to an identifiable class of persons (Electricity Commission of New South Wales v Arrow (unreported, NSWCS, Hodgson J, 7 December 1990) ("Electricity Commission")). Barrett J distinguished Electricity Commission because the making of the order in that case was opposed by particular persons who, as well as a class of unidentified person, were subject to the order. Further, there were no circumstances of urgency in this case to warrant the grant of an ex parte injunction.  Barrett J also rejected counsel's submissions based on English cases decided after Maritime Union. His Honour held that these cases did not illustrate further exceptions to the general rule, as they were concerned with the protection of rights recognised by human rights laws that have no parallel in Australia.  Counsel also made submissions with reference to principles of reciprocity and comity. These were:   * that, in response to a request of the Court in AFG Insurances, an English court had made an order similar to the one requested; * that courts in the United States and Ireland had granted orders of the kind requested; and * as a matter of comity in a cross border insolvency, the Court should make the order requested.   Barrett J rejected these submissions. His Honour stated that while similar orders had been granted in AFG Insurances, they had not been sought by the Court and no reasons underpinning those orders had been presented. Further, Barrett J took the view that the request of the English High Court could be met by granting injunctions on a case by case basis, as noted above.  Barrett J found that the approach to the grant of such injunctions in the United States and Ireland differed from the Australian approach. His Honour held that comity did not require the Court to grant the order sought. Until relevant provisions of the UNCITRAL Model Law in relation to insolvency were imported into Australian law, the only source of the Court's authority in this case was the Act, which remained subject to general principles under Australian law.  **5.9 When a court will exercise its powers under the Corporations Act to summon a person for examination about a corporation’s examinable affairs**  (By Jane Mevel, Corrs Chambers Westgarth)  Wainter Pty Ltd, in the matter of New Tel Limited (in liq) ACN 009 068 955 [2005] FCAFC 114, Federal Court of Australia, Full Court, Ryan, Lander and Crennan JJ, 15 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1154.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1154.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The respondent, Wainter Pty Ltd (Wainter) obtained orders from the Court at first instance, allowing the issue of examination summonses in respect of two former directors of New Tel Limited (in liq) (New Tel) and a partner of the solicitors advising New Tel. The purpose of such summonses was to ascertain the state of knowledge of these people at the time certain representations were alleged to have been made by them to Wainter. It was alleged that these representations induced Wainter to enter into an agreement which, when New Tel went into liquidation, caused Wainter significant loss.  The appellants challenged the issue of the examination summonses on the grounds that they were being sought for an improper purpose, namely to gather evidence in relation to possible actions against the New Tel directors and the solicitors. To that extent the appellants argued the application constituted an abuse of the Court’s process.   The Court accepted the appellants’ submission that orders allowing for the issue of examination summonses should only be granted where they are sought for a proper purpose, being the benefit of the corporation, its contributors or its creditors.   In the present case, the Court concluded that the order would be beneficial to New Tel and its creditors. This was because, if Wainter was able to find evidence of misleading or deceptive conduct on behalf of the people examined, it would pursue claims against these parties, rather than New Tel. This would provide a substantial benefit to New Tel and, in turn, its creditors, who would have a larger pool of funds from which to claim. The Court did not accept that the applications amounted to an abuse of process. The court therefore upheld the decision at first instance.  **(b) Facts**  Wainter entered into an agreement with New Tel to assign to New Tel a debt owed to Wainter by a company which was the target of a conditional scrip offer by New Tel. New Tel required Wainter to assign the debt in order to facilitate the bid. Wainter was a shareholder in the target and became a shareholder in New Tel under the scrip bid. New Tel subsequently went into liquidation.   Wainter alleged that it only entered into the transaction on the basis of representations made by New Tel and its solicitors that it would be in Wainter’s best interests to agree to the assignment. Wainter filed a proof of debt with the liquidator of New Tel for $60 million claiming the amount was due for damages for misleading or deceptive conduct in relation to a financial product, pursuant to section 1041H and section 1041I of the Act, arising out of the conduct of a director of New Tel and its solicitors.   Wainter sought orders under section 596A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) for the Court to issue examination summonses directed to two former directors of New Tel, in order to ascertain the state of knowledge of the directors and solicitors of New Tel as to the business affairs of New Tel at the time the alleged representations were made.  Wainter also sought an order under section 596B of the Act for the Court to issue an examination summons directed to a partner of the law firm engaged by New Tel.  **(c) Decision**  Section 596A of the Act relevantly states that:  "The Court is to summon a person for examination about a corporation’s examinable affairs if:   (a) an eligible applicant applies for the summons; and (b) the Court is satisfied that the person is an examinable officer of the corporation or was such an officer during or after the two years ending: (i) if the corporation is under administration – on the section 513C day in relation to the administration".  Section 596B of the Act states that:   "The Court may summon a person for examination about a corporation’s examinable affairs if:  (a) an eligible applicant applies for the summons; and (b) the Court is satisfied that the person: (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or (ii) may be able to give information about examinable affairs of the corporation".  The appellants argued that the applications by Wainter for examination summonses constituted an abuse of process because they were made for an improper purpose and not for the benefit of New Tel, its contributors or creditors.  The decision of the Court was given by Lander J, with Ryan J and Crennan J concurring in the decision. After a comprehensive summary of the relevant legislative and case history, Lander J held that the decision of the judge at first instance, that such orders be granted, should be upheld.  In reaching this conclusion, Lander J found that the purposes of the Court’s power to summon a person for examination are:   * To enable an eligible applicant to gather information to assist them in the administration of the corporation; * To assist the corporation’s administrators to identify the corporation’s assets, both tangible and intangible and to allow the corporation’s liabilities to be identified; * To protect the interests of the corporation’s creditors; * To enable evidence and information to be obtained to support the bringing of proceedings against examinable officers and other persons in connection with the examinable affairs of the corporation; and * To assist in the regulation of corporations by providing a public forum for the examination of examinable officers of the corporation.   Lander J concluded that an order for the examination of a person for a purpose unconnected with the purposes authorized by legislation will be an abuse of process. To that extent, the procedure may not be used to allow a party to obtain a forensic advantage or be a dress rehearsal for the cross-examination of a person in a pending or later action.  In determining whether a particular applicant has abused the procedure, regard will be had to the applicant’s reason for seeking the order and all the surrounding circumstances. Lander J accepted the proposition that it is an abuse of process to use the examination procedure if the predominant purpose of the applicant is not for the purpose of benefiting the corporation, its contributories or its creditors. Where the applicant has a number of purposes, it will only be an abuse if an illegitimate purpose is at least the predominant purpose.  In applying these principles to the particular facts of the case, Lander J held that, as Wainter wanted to use the information in an action against the solicitors of New Tel, New Tel and its creditors would benefit. This was because New Tel’s exposure to Wainter’s claim would be reduced if Wainter recovered from the appellants. The pool of funds available to the other creditors of New Tel would therefore increase.  Whilst Wainter would obtain a significant advantage that would not have been available to it if New Tel had not gone into liquidation, this did not mean that granting such an order would amount to an abuse of process. The fact that New Tel stood to benefit from any action brought by Wainter against the directors or the solicitors was apparently sufficient for the court to conclude that the application was not an abuse of process.  **5.10 Remuneration of liquidators**  (By Simon Martin, Phillips Fox)  Walker v Liquidators of One.Tel Ltd [2005] NSWSC 557, Supreme Court of New South Wales, Barrett J, 10 June 2005  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc557.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc557.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Peter Walker and Stephen Sherman in their capacity as the liquidators ('the plaintiffs') of One.Tel Limited ('the Company') sought from the New South Wales Supreme Court ('the Court') various orders pursuant to the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') regarding the determination of their remuneration for several months' work for which they had not been remunerated. The plaintiffs failed to gain such orders, primarily because his Honour, Justice Barrett, felt that in the circumstances the mechanism and operation of the Act did not confer on the Court the power to make such orders.  **(b) Facts**  The Company had gone into liquidation and was engaged in a creditors’ voluntary winding up process in accordance with section 446A of the Act. The Inspection Committee ('the Committee') was appointed as part of this process. In December 2004, the plaintiffs sought by way of a circular resolution the Committee's approval of a sum for remuneration for work performed in October/November 2004. Three members of the Committee indicated their approval for the passing of the resolution while two members indicated their disapproval and the sixth member expressed no opinion. Taking the view that the Committee could only make a determination concerning approval for the plantiffs' remuneration at a Committee meeting, the plaintiffs intended to seek such confirmation at the next meeting. Subsequently, in April and May 2005, two members of the Committee resigned.  A meeting of the Committee members was finally held on 13 May 2005. Prior to this meeting the plaintiffs had sent the Committee members an agenda for the meeting which included a proposed resolution approving the plaintiffs' remuneration for the period December 2004 to May 2005. At this meeting the Committee members were unable to agree to proposals for the fixing of the plaintiffs' remuneration. On every substantive motion, two members of the Committee voted in favour of the proposal while two voted against. The plaintiffs then found themselves in the position where their remuneration for work rendered from September 2004 to May 2005 had not being fixed.  The plaintiffs then sought orders from the Court regarding the fixing of their remuneration.  **(i) Submissions of the plaintiff**  By originating process, the plaintiffs sought the following orders:  **Order 1**  Pursuant to section 511(a) of the Act an order that if the Committee:  (a) fails to fix the remuneration to be paid to the plaintiffs in the capacity as liquidators of the company; or  (b) fails to agree to such remuneration with the plaintiffs, the creditors of the Company may, by a resolution passed at a duly convened meeting of creditors, determine the remuneration to be paid to the plaintiffs.  **Order 2**  Pursuant to section 511(1)(b) of the Act, an order that in the absence of the creditors of the Company passing a resolution determining the remuneration to be paid to the plaintiffs in their capacity as liquidators of the company, the Court may determine such remuneration pursuant to the provisions of section 473(3) of the Act.  **(c) Decision**  His Honour first set out the relevant law which the plaintiffs relied upon. Section 511(1) provides:  "The liquidator, or any contributory or creditor, may apply to the Court:  (a) to determine any question arising in the winding up of the company; or (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court."  His Honour noted that in the case of a creditors' winding up, section 499(3) of the Act specifically allows for the Committee to fix the remuneration to be paid to the plaintiff. His Honour then considered section 504 of the Act which he noted was the only provision which directly confers jurisdiction upon the Court in relation to the remuneration of a liquidator in a voluntary winding up. Section 504 of the Act provides that:  "Any member or creditor, or the liquidator, may at any time before the deregistration of the Company apply to the Court to review the amount of the remuneration of the liquidator, and the decision of the Court is final and conclusive."  His Honour noted that section 504 of the Act involves an implicit assumption that the machinery for the fixing of the remuneration for a liquidator will always operate to produce a remuneration sum and that the only need for the Court's involvement will be to review such an amount. In this case no sum had been established.  In relation to Order 1 his Honour noted that the proposed order contemplated that if the Committee failed to fix the plaintiffs' remuneration or failed to agree to their remuneration with them, the creditors could, by a resolution passed at a necessary meeting of the creditors make the necessary decision. However, his Honour found no basis for the operation of section 511(1)(a) of the Act in such a way. Instead, section 511(1)(a) of the Act simply permits the Court to "determine" a "question." Further, section 499(3) of the Act is clear: if a Committee exists, that Committee has power to fix the remuneration sum to be paid to the liquidators. Only if there is no such Committee may a meeting of creditors fix the remuneration sum. Where a Committee does exist, section 499(3) of the Act denies the creditors the power to fix the plaintiffs’ remuneration.  In relation to Order 2, his Honour noted that the orders sought relied upon the use of section 473(3), which allows for the Court to determine the remuneration for a liquidator in a court-ordered winding up. This power can only be exercised if the liquidators and the Committee fail to agree and there is no resolution by the Committee. However, in the case of a creditors' voluntary winding where a Committee exists, the creditors are denied a right to fix the remuneration and therefore the final step before the default power of the court becomes exercisable can never occur. For that reason, a remuneration fixing power of the Court somehow imported by section 511(1)(b) can never arise.  Therefore, his Honour found that there is no power for the Court to invest a meeting of creditors with functions not given to it by the Act. The body upon which such a power is conferred by statute may not transfer it or delegate it to another body and the Court does not possess any "default" power to exercise such a power.  His Honour dismissed the plaintiffs' application and ordered that their costs be payable out of the assets of the Company as an expense of the winding up of the Company.  **5.11 Non-negotiable cheques: What is a banker's duty?**  (By Yee-Fui Ng, Clayton Utz)  Oris Funds Management Ltd v National Australia Bank Ltd [2005] VSCA 148, Supreme Court of Victoria, Court of Appeal, Chernov, Vincent and Eames JJA, 10 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/june/2005vsca148.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/june/2005vsca148.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Oris Funds Management Ltd ("OFM") began proceedings against the National Australia Bank ("NAB") for damages in respect of three non-negotiable cheques, the proceeds of which had been collected by NAB on behalf of the respective endorsees. The cheques were payable into the endorsee's respective bank accounts with NAB in order to reduce their indebtedness to the bank.  OFM alleged that there was fraud on OFM or breach of fiduciary duties by the directors of OFM in dealings with one cheque, while there was negligence by NAB in the dealing with the other two cheques under the [Cheques Act 1986 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "Default).  The Victorian Court of Appeal unanimously dismissed OFM's appeal. There was no fraud on OFM or breach of fiduciary duties because the mere endorsement by a director of a cheque belonging to a company in favour of himself/herself is not prima facie evidence of breach, but merely puts the bank on enquiry. There was no negligence as the bank fulfilled its duty to OFM by satisfying itself through the 'basic contractual documentation' that the payments were made consistently with its terms.  **(b) Facts**  OFM was incorporated to operate a master trust fund for a superannuation business conducted by OFS Pty Ltd ("OFS"). To raise the necessary capital to fund this, OFM approached Tower Life Australia ("Tower") to purchase 40% of OFM for the price of $960,000. Tower agreed. An "in principle" agreement was reached with Tower by executing Heads of Agreement for Tower's purchase of 40% of OFM, where in return Tower would lend OFM $100,000. If the transaction proceeded to completion, the $100,000 would be treated as part payment of the purchase price.  The Heads of Agreement was amended twice to state that Tower would provide three payments to OFM. These cheque payments were the subject of dispute. The cheques were dealt with in the following manner:   * The March cheque for $100,000, made payable to OFM and crossed "Not negotiable- bank account payee only". Two directors of OFM (Stanley and Ponting) endorsed this cheque under the seal of OFM to Tasvinum Management Pty Ltd ("Tasvinum"), a company involved in vineyards and in which Stanley and Ponting held interests. In addition, the transaction was approved by the only directors and shareholders of OFM (Stanley, Ponting and Cygler). NAB credited the proceeds to Tasvinum. * The May and June cheques for $150,000 each, payable to OFM and crossed "Not negotiable- bank account payee only". Only one director of OFM endorsed the cheque and deposited it into the account of OFS. NAB credited the proceeds to OFS.   OFM's constitution stipulated that two directors could endorse a cheque, so that the March cheque was endorsed in accordance with OFM's constitution, while the May and June cheques were not.  At first instance, Osborn J found for NAB. His Honour held that, for the March cheque, the endorsement complied with OFM's constitution, and the absence of an express record of authority by the board was insufficient to prove that there was no authority. For the May and June cheques, Osborn J found that, as there was only one director endorsing the cheques, which was contrary to OFM's constitution, the director lacked authority. However, his Honour held that NAB was not liable because it acted in 'good faith and without negligence' under section 95 of the Cheques Act.  **(c) Decision**  The Victorian Court of Appeal unanimously dismissed the appellant's appeal and upheld the trial judge's decision, with the main judgment by Chernov JA (Vincent and Eames JJA agreeing).  **(i) March cheque: Fraud or breach of fiduciary duty**  OFM claimed that, even if the directors had the necessary authority to endorse the March cheque, such endorsement constituted a fraud on OFM or a breach of fiduciary duty; therefore the cheque was misappropriated and NAB was liable to its true owner, OFM, in conversion.  The Court of Appeal held that there was no fraud on OFM or breach of fiduciary duties because the mere endorsement by the director of a cheque belonging to a company in favour of his or her own business is not prima facie evidence of breach such that the director bears the burden of establishing that the endorsement was not made in breach of duty. Rather, it merely puts the bank on enquiry.  OFM's next contention was that, although the directors of OFM had the necessary authority to endorse the cheque, there was wrongful appropriation of the cheque. The trial judge was said to have wrongly concluded that, once it was established that OFM had failed to make out lack of authority in the directors, it automatically followed that it could not be said the two had acted fraudulently or in breach of duty to OFM.  The Court of Appeal said that the trial judge was not in error for the following reasons:   * implicit in the trial judge's conclusion was the recognition that mere endorsement of the cheque to Tasvinum did not constitute its misappropriation; * the endorsement to Tasvinum was explicable as a proper commercial transaction; * the words 'no wrongful appropriation' in the trial judgment suggested that his Honour had given consideration to whether the directors had acted fraudulently in endorsing the cheque and rejected it; * there was no evidence in support of the claim that Stanley and Ponting acted fraudulently.   Thus, OFM failed in its argument based on the alleged misappropriation of the March cheque.  **(ii) May and June cheques: Negligence**  OFM alleged that NAB was negligent for the purposes of section 95(1) of the Cheques Act in collecting the proceeds of the May and June cheques. The onus of proving NAB acted without negligence was on NAB in terms of section 95 of the Cheques Act. It is noted that, according to these provisions, the concept of 'negligence' is equivalent to 'carelessness'.  OFM argued that the bank:   * exercised no care in ensuring that the interests of OFM in the two cheques were protected, as NAB was only interested in clearing the excess debt in the OFS account; and * did not make independent enquiries about the propriety of the endorsement.   The Court held that there was no negligence as the bank fulfilled its duty to OFM by satisfying itself through the 'basic contractual documentation' that the payments were made consistently with its terms. The Court concluded that NAB acted in accordance with prudent banking practice. The fact that further enquiries about the propriety of the transaction would have been fruitless was a relevant factor in both their Honours' and the trial judge's decision, but not determinative.  Thus, OFM failed in its negligence claim for the May and June cheques.  **(iii) Section 128 and 129 Corporations Act**  The Court of Appeal found it unnecessary to consider the operation of sections 128 and 129 of the Corporations Act about NAB being entitled to make assumptions about the cheques, but found no error in the trial judge's view. In particular, the trial judge had dismissed the appellant's claim that section 128(4) was concerned with constructive knowledge or constructive suspicion.  **5.12 Misleading and deceptive conduct**  (By Tatiana Rudometova, Mallesons Stephen Jaques)  Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199, Supreme Court of Queensland, Court of Appeal, Williams and Keane JJA and Atkinson J, 10 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qca199.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qca199.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments" \t "_new)  **(a) Summary**  This case is a good illustration of the courts’ current approach to misleading and deceptive conduct. The interpretation of section 52 of the [Trade Practices Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) in this case by the Court of Appeal of the Supreme Court of Queensland is very broad and covers a wide range of conduct. Keane JJA (with whom the other judges agreed) held that Carlson Hotels engaged in misleading and deceptive conduct by providing another company with the capacity to convey information to third parties about Carlson Hotels’ own opinions and expectations. The phrase “on behalf of” in section 84(2) of the Act was also interpreted very broadly and allowed the court to attribute misleading and deceptive conduct to Carlson Hotels even if it had not directly engaged in such conduct.  The effect of the misleading and deceptive conduct in this particular instance could have been negatived by the appropriate use of disclaimers. A disclaimer must be clearly directed at the information it seeks to qualify, and it must erase the misleading and deceptive effect of the conduct.  **(b) Facts**  The respondents (plaintiffs) purchased lots in a proposed building unit plan in "Radisson Suites" ("the Suites"). The contract was subject to a lease for five years between them as lessors and 570 Queen Street Management Pty Ltd ("570 QSM") as a lessee. The Downeys (the first respondent) signed their contract in 1997 and settled on 22 November 1999. In February 2000, 570 QSM failed to pay the rental due and subsequently a receiver and manager was appointed to the vendor and 570 QSM.  In 1997 the vendor, 570 QSM and a company Southern Cross Investments Pty Ltd ("SCI") advertised the Suites using the name of the appellant (the defendant) who was previously known as Radisson Hotels Pty Ltd. The appellant approved of the advertising materials used and even suggested amendments to the draft. In one of the brochures it was suggested that the expected growth in demand for visitor accommodation in Brisbane, coupled with guaranteed success of the Suites, 'has propelled Radisson’s decision to enter into a Hotel Management agreement to operate the development'.  The respondents alleged the appellant represented that it regarded the development as a guaranteed success and that it offered five years 7% per annum rental guarantee to the investors. By making that representation the appellant was found to have engaged in misleading and deceptive conduct in trade or commerce in contravention of section 52.  **(c) Decision**  The trial judge found in favour of the respondents, and in relation to the claim by the Downeys the trial judge found that they entered into the contract in reliance upon the appellant's misleading and deceptive conduct and that they had suffered loss as a result. The trial judge's conclusion on causation, the effect of section 82(2) and the assessment of damages were not disputed by the appellant.  **(i) The appellant’s conduct**  Keane JJA accepted the trial judge's opinion that the conduct in which the appellant engaged provided SCI with the capacity to convey information to third parties about the appellant's own opinions and expectations. It had a role in the publication in that it had the capacity to control what information was published on its behalf.  Keane JJA distinguished Cassidy v Saatchi & Saatchi Australia Pty Ltd, where it was held that the advertising agency did not make any representation to the public by mere involvement in the preparation of the advertisement. His Honour applied Barton v Croner Trading Pty Ltd and held that the publication of the material was merely providing the means for the appellant to communicate its own message to prospective consumers.  Keane JJA said in obiter that even if the conduct in question was engaged in by SCI, rather than by the appellant, the respondents were entitled to succeed on this issue by reason of section 84(2) of the Act, because SCI acted with the appellant’s consent and "on behalf of" the appellant. His Honour endorsed the wide interpretation of the phrase "on behalf of" by Lindgren J in NMFM Property Pty Ltd v Citibank Ltd (No 10). He suggested that it was enough that (a) SCI held itself out, with the appellant's approval, as representing the appellant's views, and (b) some aspects of the appellant's business were promoted by the advertising material. The fact that the responded did not specifically allege section 84(2) was not crucial as that allegation was, in his Honour’s view, implicit.  **(ii) The appellant’s representations and use of disclaimers**  His Honour adopted the approach used in Butcher v Lachlan Elder Realty Pty Ltd that reasonable purchasers were expected to read all of the material available to them given that the information contained in it was important and that the purchasing process was conducted fairly and with the opportunity to obtain independent advice. Therefore, it was important to analyse the effect of the disclaimers contained in some brochures on the representations.  Keane JJA accepted that if a disclaimer unambiguously communicated to the reader that it was relevant to the information it was seeking to qualify and actually had the effect of erasing whatever was misleading in the conduct, then the disclaimer could be effective.  His Honour found that the appellant made representations to the respondents that it considered the Suites a guaranteed success and that the Suites would be a good investment. The disclaimers contained in the brochures were not effective as they did not disclaim the appellant’s views. He held that the concept of "guaranteeing a result"was associated with the making of the firm commitment for which responsibility should be taken.  With respect to the 7% guaranteed return, his Honour accepted the trial judge’s view that the appellant in fact made that representation, that it related to future matter, and therefore it was deemed to be misleading and deceptive in the absence of reasonable grounds according to section 51A of the Act. The appellant failed to discharge its evidentiary onus. Keane JJA emphasised that it was for the court to decide whether the evidence established reasonable grounds.  As a result, Keane JJA (Williams JJA and Atkinson J agreeing) dismissed the appeals and ordered the appellant to pay the costs of the respondents.  **5.13 Successful application not to lodge financial reports with ASIC**  (By Carla Alviano, Blake Dawson Waldron)  'SAQ' v Australian Securities & Investments Commission, [2005] AATA 553, Administrative Appeals Tribunal, Deputy President S A Forgie, 3 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/aata/2005/june/2005aata553.htm](http://cclsr.law.unimelb.edu.au/judgments/states/aata/2005/june/2005aata553.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The applicant, SAQ, due to, amongst other factors, its size (comparative to its competitors) and market placement, wished to be relieved of the requirement under section 319 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) regarding the lodgement of financial reports, claiming that the requirement would impose unreasonable burdens upon it (within the meaning of section 342(1)(c) of the Act).  On 26 April 2002, SAQ applied to the Australian Securities & Investments Commission (ASIC) for an order relieving it of its requirements under the Act in respect of the financial year ending 31 December 2001. ASIC decided that it was unable to make a decision regarding this period as the application for relief had only been lodged a short period of time before the cut-off date of 30 April 2002. It advised SAQ that it should have allowed at least three weeks for the application to be considered.  On 2 May 2002, SAQ applied to ASIC for relief in respect of its financial reporting requirements for the financial years ending 31 December 2002, 2003 and 2004. On 24 February 2003, ASIC again advised SAQ that its application had been refused.  SAQ appealed these decisions to the Administrative Appeals Tribunal (Tribunal). After considering all the evidence heard, the Tribunal, per Forgie DP:   * affirmed ASIC's decision dated 1 May 2002 in respect of the financial year ending 31 December 2001; and * set aside ASIC's decision dated 24 February 2003 and substituted for it a decision that, in relation to the financial reports of SAQ for financial years ending 31 December 2002, 2003 and 2004, SAQ was relieved of the requirement imposed by section 319 of the Act to lodge a financial report with ASIC as the requirement would impose unreasonable burdens upon SAQ.   **(b) Facts**  The applicant, SAQ, was a large proprietary company which had begun the commercial production of a product in 2001. The market for this product was contained entirely outside of Australia. Relative to the size of total worldwide production of this product, SAQ was only a small producer. Evidence was put to the Tribunal that, as SAQ was limited to only smaller contracts; it was highly vulnerable to the market share desires or strategic designs of larger producers. It was for this reason that SAQ sought an order from ASIC to relieve it of its obligations under the Act to lodge its financial reports publicly.  SAQ's main motivation behind this application related to SAQ's belief that it would be unfairly disadvantaged if it were forced to comply with the requirement to lodge its financial reports. SAQ's counsel stated that the market in which SAQ produces its product had been a buyer's market for over 20 years. As a consequence, the other Australian producers of this product – which were much larger producers - could easily become a threat to SAQ, especially in the context of an extremely competitive bidding process for the product described to the Tribunal by SAQ. SAQ argued that if buyers were able to obtain a detailed knowledge of SAQ's financial position they could influence the bidding process to a greater extent. SAQ, being one of the smallest producers of this product, would be immensely affected by such a process.  In an attempt to further justify its position, evidence was presented at the hearing by SAQ's counsel that, despite the fact that SAQ had borrowed a large amount of funds from Nannouc Pty Ltd, its parent company, a bank and a finance company, these parties were not disadvantaged by the non-disclosure of its financial reports as SAQ had provided its annual accounts to all three of these parties.  Further, in regards to its trade creditors, SAQ argued that not lodging its accounts would also not be detrimental to its creditors. It contended that trade creditors could be referred to its bank or other long-standing suppliers of SAQ for views on the credit worthiness of SAQ. So too with its employees. SAQ's counsel argued that the non-disclosure of company's accounts would not cause any detriment to any of its employees.  ASIC argued to the contrary. The regulator contended that there was not enough evidence to suggest that the availability of SAQ's financial reports would create an environment of competitive disadvantage for it. Further, it was not unusual for competitors to be able to calculate the cost of a competitor's production without using the information typically contained within a financial report. ASIC's counsel further added that, if SAQ's competitors wanted to undercut SAQ, they could do so whether they had access to its financial reports or not.  ASIC reasoned that creditors, employees and customers of SAQ may all have an interest in having access to its financial reports. In particular, ASIC's counsel thought that, because of a particular interest in this industry by these groups and the community generally, there was demand for greater transparency on the part of SAQ. ASIC argued that it was inappropriate for a company not to comply with its legal requirements just because financial information about a company was available from other sources such as banks or a company's parent.  **(c) Decision**  Forgie DP said that in coming to a decision, ASIC had to consider whether there would be an unreasonable burden placed upon the applicant if the requirements under the Act were enforced. Under section 342(2) of the Act, ASIC is to have regard to whether the requirements would impose an unreasonable burden on the company by reference to particular criteria specified in that subsection.  In deciding what is meant by unreasonable burdens, Forgie DP stated that whether a burden could be described as unreasonable required an evaluation of the evidence, whilst having regard to the nature of the requirements to be performed and the policy objectives of the legislation regarding whether there would be economic detriment as a result of compliance with the legislation.  Forgie DP went on to consider many factors in the SAQ situation which may affect whether or not the requirement to produce financial reports would be unreasonable in the circumstances.  Specifically, Forgie DP considered that:   * a requirement upon a company would only become a burden if it cannot easily be complied with in terms of time and money and would have a significant impact on the company if it was required to comply with the requirement; * if SAQ was forced to provide financial reports, these, along with other publicly available information could be used to calculate the production costs of SAQ's product. This information could be used by SAQ's competitors to its disadvantage; * disclosure of SAQ's financial report would expose it to scrutiny in the market place, and as a consequence, this may have a serious economic impact on SAQ's ability to negotiate in a bidding process and expose it to being squeezed out of the market. Forgie also noted that the shares in SAQ were closely held by a small number of individuals and as a consequence SAQ's shareholders would be expected to be well-informed about the financial standing of the company.   For these reasons, Forgie DP concluded that requiring SAQ to submit financial reports under section 319 of the Act was beyond what was considered fair and reasonable in the circumstances as it would "impose unreasonable burdens upon it while it was becoming established in the industry".  Forgie DP further stated that, based on the facts before him, SAQ would not be in a position where it would be reasonable to expect it to be subject to the same market scrutiny as other large proprietary companies until 2008. Having made this decision, Forgie DP then had to decide whether to exercise his discretion to make an order relieving SAQ from complying with its financial reporting obligations under Chapter 2M of the Act. Based on the evidence before him, Forgie DP was of the opinion that he should make an order relieving SAQ of its obligations until the end of its financial year on 31 December 2004.  In respect of later years, Forgie DP stated that he would leave open whether or not the discretion should be exercised. In making this decision, Forgie DP said that he was mindful of the fact that a company's place within a market can change quite rapidly and that to make an order in respect of the future would not be prudent. If SAQ would like an order in respect of future financial years, it would have to make further application to the Tribunal at that time. |
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