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| **1. Recent Corporate Law and Corporate Governance Developments** | |
| **1.1 Centre for Corporate Law 2003 annual report** The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published its 2003 annual report. Highlights in 2003 included:  1.      the publication of 6 books covering significant issues such as corporate governance and investment fiduciaries, securitisation, corporate law, and experts' reports;  2.      an active seminar program addressing topical issues in corporate law and corporate governance;  3.      the publication of research reports on topics such as managed investments, ASIC enforcement patterns, and use of prospectuses by investors and professional advisers;  4.      the obtaining of new research grants;  5.      the publication of the 76th issue of the monthly Corporate Law Bulletin which is the leading publication of its type;  6.      the supervision of 25 PhD theses, 5 SJD theses and 4 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 and disclosure of fees in superannuation and other managed investments);  8.      continued development of the Centre for Corporate Law website. Among other advances during 2003, the 2,000th 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 35 subjects were taught in 2003 (one of the largest international program of its type);  10.  participation in the independent task force commissioned by the International Federation of Accountants that lead to publication of the report "Rebuilding Confidence in Financial Reporting"; and 11. participation in key government bodies such as the Takeovers Panel and the Corporations and Markets Advisory Committee.  The report is available on the Centre's website at:[http://cclsr.law.unimelb.edu.au/annual-report/index.html](http://cclsr.law.unimelb.edu.au/annual-report/index.html" \t "_new)  **1.2 Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill passed by Parliament**  On 25 June 2004, after extensive debate, the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) was passed by Parliament. Several of the amendments proposed by the Labor Party were agreed to by the Government.  **(a) Amendments agreed to on 24 June**  The key amendments to the Bill which were passed on 24 June are as follows:  (i) Additional disclosures in relation to executive remuneration including**:**  -          disclosure of the performance conditions attaching to remuneration packages (including a summary of the performance conditions; an explanation as to why the performance conditions were chosen; if the performance conditions include factors external to the company - a summary of those factors); -          disclosure of the value of options when granted, exercised and lapsed; -          disclosure of the percentage of the value of the person’s remuneration which consists of options; -          disclosure of the duration of the contract for directors and executives; -          disclosure of the periods of notice required to terminate the contract for directors and executives; -          disclosure of the termination payments for directors and executives; -          disclosure of the relationship between the remuneration policy and the company's performance including the consequences of the company's performance on shareholder wealth in the current financial year and previous 4 financial years; and -          disclosure of other matters as per the regulations.  (ii) Directors and the auditor must give an explanation in a report as to why additional information has been included to help give a true and fair view of the company’s financial position. (iii) The chairman of the annual general meeting of shareholders must allow a reasonable opportunity for shareholders to ask the auditor questions relevant to the conduct of the audit, about critical accounting polices and about the independence of the auditor. (iv) The qualifications and experience of company secretaries are to be disclosed in the annual report.  **(b) Background to the Bill**  On 4 December 2003, the Treasurer, the Hon Peter Costello, introduced the Bill into Parliament. The Bill represents the ninth instalment of the Government’s corporate law reform program.Significant measures contained in the Bill include: (i) Continuous disclosure            ASIC will have the power to issue infringement notices to disclosing entities where ASIC has reason to believe that have been breaches of the continuous disclosure provisions in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The notices will contain financial penalties based upon a company’s market capitalisation, up to a maximum of $100,000. The power will enable the corporate regulator with the ability to deal with less serious contraventions of disclosure laws in a more timely manner.            The maximum civil penalty that a court can impose on a body corporate for breaching continuous disclosure requirements will increase from $200,000 to $1 million.  (ii) Executive remuneration            Directors’ and senior executives’ remuneration is to be clearly disclosed in a remuneration report, contained in the directors’ report.           The Bill expands the number of executives whose remuneration must be disclosed, from the top 5 within the listed company to the top 5 across the corporate group in addition to the top 5 within the listed company.           Directors will be required to hold a non-binding shareholder vote to adopt the remuneration disclosures within the remuneration report. This recognises that directors, while responsible for setting executive remuneration, are accountable to shareholders for their decisions.  (iii) Audit oversight and independence            The Bill establishes a regulatory framework governing audit oversight and independence. It provides for the Financial Reporting Council (FRC) to have oversight over a reconstituted Australian Auditing Standards Board, with a Government-appointed Chair. The FRC will also have an oversight role to advise the Treasurer in relation to auditor compliance with independence requirements.            Auditing standards will have the force of law. There will be a 2 year transition period to enable the auditing standards setter to re-issue standards in a format suitable for legal enforcement.           Mandatory auditor rotation for listed companies will be required after 5 consecutive years (with an option for ASIC to extend the period to 7 consecutive years where appropriate) .           Significant post-audit employment restrictions, including a 2 year ‘cooling off’ period for auditor partners wishing to join a client as a director or senior manager, will be imposed.  The Bill responds to the recommendations of the Ramsay Report on the independence of Australian company auditors and takes account of relevant recommendations of Report 391 of the Joint Parliamentary Committee of Public Accounts and Audit. The Bill also incorporates recommendations of the HIH and Cole Royal Commissions.  **1.3 Business Council executive pay position paper**  On 24 June 2004 the Business Council of Australia released a Position Paper in response to the continuing debate over pay for CEOs and other senior business managers.  The BCA Paper says clear examples of excessive pay and reward for under performance had damaged Australia's corporate sector, but warns further regulation of publicly-listed companies in this area would be counterproductive.  The Paper outlines the level and extent of regulation that already applies to executive pay, as well as steps taken by corporate Australia to supplement this through clear and concise guidelines on pay structures, Board decision-making and disclosure. It also highlights how the majority of Boards of publicly-listed companies were now taking steps to make sure contracts of senior company managers were more closely tied to performance hurdles, and were seen to be so.  BCA Chief Executive Ms Katie Lahey said that because increasing levels of regulation and disclosure were being applied exclusively to publicly-listed companies, the issue of executive pay and the regulatory response was focused almost entirely on the listed company sector. In contrast, private companies or firms operating locally but owned overseas were competing for the same pool of executive talent but were not subject to the same level of regulation and scrutiny. As a result, listed companies may not be able to attract the best executive resources if regulation became excessive or overtly inhibitive.   At the same time, the listed company sector should do more to better communicate the structure of executive contracts to shareholders, including spelling out in clear detail how the contracts are structured, and the link between executive pay and shareholder value,Ms Lahey said.  While there had been clear examples of excess within some executive contracts, the Paper says executives in Australia were paid in line with global benchmarks needed to attract the best executive resources to run local listed companies.   The Paper argues that CEO salaries have increased because of three factors:           the scale of the position has increased as the scope, size and responsibilities of major listed companies expands;          its complexity has increased, reflecting how companies operate in an increasingly competitive and global market; and          the position has become riskier, as short-termism and lower tolerance of corporate under performance combine to make the average tenure of Australian listed company CEOs much shorter.  To assist companies better communicate executive contracts, the BCA is developing a series of guidelines for listed companies to consider when communicating the level and rationale for pay.   The Executive Pay Position Paper is available on the Business Council website at: [http://www.bca.com.au/](http://www.bca.com.au/" \t "_new)  **1.4 IASB publishes discussion paper on standards for SMEs**  On 24 June 2004, the International Accounting Standards Board (IASB) published a Discussion Paper on its proposal to develop a separate set of international accounting standards for small and medium-sized entities (SMEs). The Discussion Paper sets out the IASB's preliminary views on aspects of the proposal and invites comments on them by 24 September 2004.  The Discussion Paper does not include proposals for specific financial reporting standards for SMEs. That will come later. Instead, the Discussion Paper focuses on the Board's approach to the project.  Introducing the Discussion Paper, Sir David Tweedie, IASB Chairman, said:   "In most countries, many or even all entities have a legal obligation to prepare financial statements that conform to a required set of accounting principles that are generally accepted in that country. Those statutory financial statements are normally filed with a government agency and are available to creditors, suppliers, employees, government and others. The great majority of those entities are small or medium-sized entities,no matter how you define "small" or "medium-sized". Few countries require those entities to prepare financial statements that comply with the full requirements of the IASB's standards developed primarily for use in international capital markets. Consequently the IASB is looking for ways to simplify its standards for use by SMEs. At the same time, it will take care to adhere to the basic concepts that underlie those standards."   To assist in the development of its proposals, the IASB has set up an advisory panel whose members can provide views and comments on specific issues. Also, because a number of the IASB's preliminary views on standards for SMEs require an assessment of the needs of users of financial statements of SMEs, an informal user advisory group has been set up.  Printed copies of the Discussion Paper Preliminary Views on Accounting Standards for Small and Medium-sized Entities (ISBN 1-904230-63-6) are available, at £10 each including postage, from IASCF Publications Department.  From 5 July, the text of the Discussion Paper will be available freely from the IASB's website at [www.iasb.org](http://www.iasb.org/" \t "_new).  **(a) Issues raised in the IASB's Discussion Paper on Standards for SMEs**  1.      Should the IASB develop special financial reporting standards for SMEs? 2.      What should be the objectives of a set of financial reporting standards for SMEs? 3.      For which entities would IASB Standards for SMEs be intended? 4.      If IASB Standards for SMEs do not address a particular accounting recognition or measurement issue confronting an entity, how should that entity resolve the issue? 5.      May an entity using IASB Standards for SMEs elect to follow a treatment permitted in an IFRS that differs from the treatment in the related IASB Standard for SMEs? 6.      How should the Board approach the development of IASB Standards for SMEs? To what extent should the foundation of SME standards be the concepts and principles and related mandatory guidance in IFRSs? 7.      If IASB Standards for SMEs are built on the concepts and principles and related mandatory guidance in full IFRSs, what should be the basis for modifying those concepts and principles for SMEs? 8.      In what format should IASB Standards for SMEs be published?  **(b) Views of national standard-setters about an IASB project on SMEs** National standard-setters around the world strongly support an IASB initiative. In September 2003, the IASB hosted a meeting of 40 of the world's national accounting standard-setters. In preparation for that meeting the IASB surveyed them about standards for SMEs. With near unanimity, the 30 standard-setters that responded said that the IASB should develop global standards for SMEs. And nearly all indicated that their own national accounting requirements, in one way or another, already provided exemptions or simplifications for SMEs. The IASB has developed a list of some 25 disclosure and presentation simplifications and another 25 recognition and measurement simplifications already in place at the national level for SMEs in those 30 countries. IFRSs already provide several such as exemption of unlisted companies from providing segment information and earnings per share data.  Of the 30 countries that responded to the survey, 29 said that IASB standards for SMEs should include disclosure and presentation simplifications. And 24 of the 30 said that recognition and measurement simplifications are needed as well.  **1.5 Establishment of Shareholders and Investors Advisory Council**  On 21 June 2004, the Parliamentary Secretary to the Treasurer, the Hon Ross Cameron MP, announced the establishment of the Shareholders and Investors Advisory Council as part of the Government’s Corporate Law Economic Reform Program.  According to Mr Cameron, the Council will improve opportunities for effective participation by Australian retail shareholders and investors, and will constructively influence the activities and governance practices of the entities in which retail shareholders invest.  The Council’s role is to:           inform the Government on developments and issues affecting retail investors; and           provide advice and feedback to the Government on development of policies and strategies relating to issues of corporate disclosure and governance as they affect retail investors.  The Council is being established as part of Phase 9 (CLERP 9) of the Government’s Corporate Law Economic Reform Program. CLERP 9 reviews the effectiveness of the corporate disclosure framework, including the continuous disclosure regime, analyst independence, audit independence and enforcement issues.  **1.6 Improved disclosure of superannuation fees** On 16 June 2004, the  Parliamentary Secretary to the Treasurer, The Hon Ross Cameron MP, released a comprehensive package of reforms to improve and simplify the disclosure of fees and charges by superannuation funds. This will be achieved by requiring additional information to be disclosed in product disclosure statements and periodic statements. Product disclosure statements are documents that set out the key features of superannuation funds to prospective members. Periodic statements provide fund members with regular information on the progress of their investments.   The package consists of five complementary measures:           Mandating the ASIC fee template in product disclosure statements.          Mandating the extension of the ASIC fee template to periodic statements to investors.          New single figure fee comparison table in product disclosure statements.          New boxed consumer advisory warning in product disclosure statements.          Facilitating use of the ASIC Superannuation Calculator which is on the ASIC website.  The Government is currently developing the regulations necessary to implement the package. These will be released for public comment when they have been drafted.   It is anticipated that the measures contained in the package will be introduced progressively between 1 January 2005 and 1 July 2005. This will ensure that industry participants have sufficient time to make necessary changes to their internal processes and disclosure documents.   Further details of the new fee comparison table and the other elements of the package are available on the Treasury website at [http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=850](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=850" \t "_new)  **1.7 US shareholder proposals in 2004: a snapshot**  Institutional Shareholder Services, a proxy advisory service, has published a summary of 2004 shareholder proposals in the United States. Some key findings are:           The number of political measures increased nearly eight-fold.          The number of shareholder rights plans on the ballots at companies decreased by slightly more than 40 percent. A number of companies negotiated with proponents prior to their annual meetings and redeemed their poison pill provisions. Thus, in many cases the investor items were withdrawn.          The total number of items requesting a majority of independent board directors remained relatively flat, as did the number of socially responsible proposals.          Expensing stock options has received much press coverage this year, but only 38 proposals made the agenda at companies' annual meetings. This is more than a seventy percent increase from last year.  **Shareholder Proposals Comparison   2003 vs 2004** (the first figure is for 2003 and the second figure is for 2004)  **Board-Related**  Separate chair/CEO 29, 40 Declassify board 58, 46 Term limits for directors 8, 7 Cumulative voting rights 21, 28 Majority independent board 6, 8   **Poison Pills**  Shareholder rights plans 102, 58   **Executive Compensation**  Submit/restrict severance agreements 17, 24 Limit/prohibit stock awards to executives 57, 39 Limit/report/submit for approval executive compensation 56, 65 Link executive compensation to performance/index 58, 7    **Expense Stock Options**  Expense stock options 22, 38   **Socially Responsible Investing**  (Includes proposals such as: MacBride Principles, language on board diversity, divesting tobacco, and reports on greenhouse gases, among others.) 271, 270    **Political Contributions** (report, limit, or prohibit, among others) 5, 39  **1.8 SEC adopts changes to short sale rules, disclosures regarding advisory contract approval and investment company governance provisions**  On 23 June 2004 the United StatesSecurities and Exchange Commission voted to adopt changes to its rules regarding short selling; its requirements for disclosures by investment companies concerning board approval of advisory contracts; and its investment company exemptive rules, designed to improve fund governance practices.  **(a) Amendments to short sale regulation**  The Commission voted to adopt new Regulation SHO under the Securities Exchange Act of 1934. Regulation SHO, which provides a new regulatory framework governing short selling of securities, includes the following.           Rule 202(T), which establishes procedures to allow the Commission to temporarily suspend the operation of the current "tick" test in Rule 10a-1, and any short sale price test of any exchange or national securities association, for specified securities.  o        Through a separate order, the Commission will suspend, on a pilot basis for a period of one-year, the tick test provision of paragraph (a) of Rule 10a-1, and any short sale price test of any exchange or national securities association, for approximately one-third of stocks in the Russell 3000 index.   o        The order also will suspend, on a pilot basis for a period of one year, the tick test provision of paragraph (a) of Rule 10a-1 for short sales executed in any security included in the Russell 1000 index after 4:15 p.m. Eastern, and all other securities after the close of the consolidated tape, and until the open of the consolidated tape the next day.  o        The pilot will commence on 3 January 2005 to permit broker-dealers and self-regulatory organizations to make the necessary programming adjustments.           The Commission deferred consideration of the proposal to replace the current "tick" test of Rule 10a-1 with a new uniform bid test. The Commission could reconsider any further action on these proposals after the completion of the pilot.           Rule 203, which will incorporate current Rule 10a-2 and will create a uniform Commission rule requiring broker-dealers, prior to effecting short sales in all equity securities, to "locate" securities available for borrowing.  o        There will be limited exceptions from the locate requirement, including for short sales by registered market makers in connection with bona-fide market making.  o        Rule 203 also imposes additional requirements on designated "threshold securities." Rule 203 defines a threshold security to mean an equity security for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more and that is equal to at least 0.5% of the issue's total shares outstanding.   o        Where a clearing agency participant has a fail to deliver position in threshold securities that persists for ten consecutive days after settlement, the participant must take action to close out the position. Until the position is closed out, the participant, and any broker-dealer for which it clears transactions, may not effect further short sales in the particular threshold security without borrowing or entering into a bona fide arrangement to borrow the security.  o        Rule 203 will become effective 30 days after publication with a compliance date of 3 January 2005, to permit firms to make programming and procedural adjustments.           Rule 200, which among other things, will redesignate current Rule 3b-3 with some modifications to define ownership and aggregation of securities positions, and include a requirement to mark all sell orders in all equity securities. Rule 200 will become effective 30 days after publication.          The Commission also adopted amendments to Rule 105 of Regulation M to remove the current shelf offering exception, and issued interpretive guidance addressing sham transactions designed to evade the rule.    o        The amendment applies to short sales effected within five days prior to the pricing of a shelf offering. Such short sales may not be covered with offering securities purchased from an underwriter or other broker-dealer participating in the offering.   o        The Rule 105 amendments will be effective 30 days after publication in the Federal Register, and the interpretive guidance will be effective upon such publication.  **(b) Disclosure regarding approval of investment advisory contracts by directors of investment companies**  The Commission voted to adopt amendments to its rules and forms that are designed to improve the disclosure that mutual funds and other registered management investment companies provide to their shareholders regarding the reasons for the fund board's approval of an investment advisory contract. The amendments are intended to encourage fund boards to consider investment advisory contracts more carefully and to encourage investors to consider more carefully the costs and value of the services rendered by the fund's investment adviser.   The amendments will require fund shareholder reports to discuss, in reasonable detail, the material factors and the conclusions with respect to these factors that formed the basis for the board of directors' approval of advisory contracts during the most recent fiscal half-year. Because fund shareholder reports will contain disclosure with respect to all advisory contracts approved by the board, the amendments will remove the existing requirement for disclosure in the Statement of Additional Information.  The amendments will include the following enhancements to the existing disclosure requirements in fund proxy statements that will parallel the disclosure in fund shareholder reports.           **Selection of adviser and approval of advisory fee.** The amendments will clarify that the fund must discuss both the board's selection of the investment adviser and its approval of amounts to be paid under the advisory contract.           **Specific Factors.** The fund will be required to include a discussion of (1) the nature, extent, and quality of the services to be provided by the investment adviser; (2) the investment performance of the fund and the investment adviser; (3) the costs of the services to be provided and profits to be realized by the investment adviser and its affiliates from the relationship with the fund; (4) the extent to which economies of scale would be realized as the fund grows; and (5) whether fee levels reflect these economies of scale for the benefit of fund investors.            **Comparison of fees and services provided by adviser.** The fund's discussion will be required to indicate whether the board relied upon comparisons of the services to be rendered and the amounts to be paid under the contract with those under other investment advisory contracts, such as contracts of the same and other investment advisers with other registered investment companies or other types of clients (*e.g*., pension funds and other institutional investors). Fund reports to shareholders for periods ending on or after 31 March 31 2005, and fund proxy statements filed on or after 31 October 2004, will be required to comply with these amendments.  **(c) Investment company governance**  The Commission voted to adopt amendments designed to improve the governance of investment companies (funds) and the independence of fund directors. These amendments are the latest in a series of reforms pursued by the Commission to address problems identified with the management of mutual funds. The Commission proposed these amendments last January and received over 180 comment letters in response.  Mutual fund boards of directors play an important role in protecting fund investors. They have overall responsibility for the fund, and they oversee the activities of the fund adviser and negotiate the terms of the advisory contract, including the amount of the advisory fees and other fund expenses. Certain exemptive rules under the Investment Company Act require the oversight and approval of the independent directors if the fund engages in transactions with the fund manager and other affiliates, which transactions can involve inherent conflicts of interest between the fund and its managers. The Commission voted to adopt the following amendments to these exemptive rules, to enhance the independence and effectiveness of the fund's independent directors in overseeing or approving these transactions:           **Independent composition of the board.** Independent directors will be required to constitute at least 75 percent of the fund's board. An exception to this 75 percent requirement will allow fund boards with three directors to have all but one director be independent. This requirement is designed to strengthen the presence of independent directors and improve their ability to negotiate lower advisory fees and other important matters on behalf of the fund.           **Independent chairman.** The board will be required to appoint a chairman who is an independent director. The board's chairman typically controls the board's agenda and can have a strong influence on the board's deliberations.            **Annual self-assessment.** The board will be required to assess its own effectiveness at least once a year. Its assessment will have to include consideration of the board's committee structure and the number of funds on whose boards the directors serve.           **Separate meetings of independent directors.** The independent directors will be required to meet in separate sessions at least once a quarter. This requirement could provide independent directors the opportunity for candid discussions about management's performance, and could help improve collegiality.          **Independent director staff.** The fund will be required to authorize the independent directors to hire their own staff. This requirement is designed to help independent directors deal with matters on which they need outside assistance.  Compliance with these amendments will be required 18 months after their publication in the *Federal Register*.  **1.9 SEC approves PCAOB Auditing Standard regarding audits of internal control in conjunction with an audit of financial statements**  On 18 June 2004 the United States Securities and Exchange Commission announced that it had approved US Public Company Accounting Oversight Board (PCAOB) Release No 2004-003: An Audit of Internal Control over Financial Reporting Performed in Conjunction with an Audit of Financial Statements.   Earlier, on 5 June 2003, the Commission amended its rules under the Securities Exchange Act of 1934, pursuant to Section 404 of the Sarbanes-Oxley Act. The amendments require a company to include in annual reports a report by management on the company's internal control over financial reporting and an accompanying auditor's report. The auditing standard approved by the Commission applies to the auditor's involvement and report.   Various implementation questions were identified during the comment period, and implementation guidance will be provided shortly for the benefit of issuers and their auditors. Guidance will be forthcoming from both the SEC and PCAOB staffs. The guidance will address recent acquisitions, consolidated but non-controlled subsidiaries, and equity investees, as well as concerns raised by issuers surrounding qualification of the report on internal controls, transition periods, disclosure requirements relating to significant deficiencies and material changes made in internal controls, and the timing of assessment of internal control over financial reporting in relation to certain foreign subsidiaries.  **1.10 FSA consults on a basic advice regime for stakeholder financial products**  On 17 June 2004 the UK Financial Services Authority announced it is to consult on proposals for a simpler, quicker and lower-cost form of financial advice to consumers. At present, the new regime would be limited to the Government's proposed suite of "stakeholder" products, details of which were also announced on 17 June. The proposed regime would support the Government's objective of making it easier for all consumers to have access to "risk-controlled" products, with low charges, that match their needs and preferences, while still providing an appropriate level of consumer protection.   The proposed simplified selling model has three limbs:           The products recommended will have to be suitable for the customer to whom they are being sold. The advice will cover a specific range of products and the firm must satisfy itself that those products are suitable for the customer's needs by establishing his or her position on broad issues such as risk, savings objectives, significant financial priorities and obvious counter-indications. This will be considered to comprise 'advice' as defined under the Financial Services & Markets Act 2000.           The sales interviews are pre-scripted by the firm and the salesperson has clear limits as to the issues on which he/she may advise. The FSA will require the process to deliver warnings about the need to address financial priorities, such as debt, and to end if the firm has reason to believe that the customer will not be able to afford any product. The customer will be given a record of the interview and those responses he or she has given on which the advice has relied.          Firms must be FSA-authorised and are required to ensure that their salespeople are competent to administer basic advice, through a combination of training and supervision. Salespeople providing basic advice are not required to hold formal financial planning qualifications. The FSA's proposals form only one part of the framework for providing stakeholder products. The Government's own consultation document and draft regulations, published on 17 June, prescribe charge caps for each product and it will be for product providers to decide whether the level at which the caps are set make it worthwhile for them to offer stakeholder products.  Customers will be able to take unresolved complaints to the Financial Ombudsman Service. In considering complaints, the FOS will take into account the specific rules on suitability for simplified selling, rather than those that apply in the case of full advice.   During the consultation period the FSA will do further research and testing with the aim of further refining the effectiveness of the process. The results of this work and any new information received during the consultation will provide important inputs to the FSA's final decision on whether to go ahead with a simplified sales regime.   The FSA Consultation paper 04/11: 'A basic advice regime for the sale of stakeholder products', can be found on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  **1.11 European Commission announces results of consultation on directors’ remuneration**  On 15 June 2004 the European Commission announced the results of its consultation on "Fostering an Appropriate Regime for the Remuneration of Directors". The initial consultation document, published on 23 February 2004, proposed a set of measures primarily covering disclosure of remuneration policy and of individual remuneration, as well as shareholder approval of share-based remuneration schemes for directors. The document was open to public consultation until 12 April. The Commission now intends to bring forward a Recommendation on directors remuneration in autumn 2004, taking account of the consultation results.   **(a) Positive responses** The Commission received 101 responses to the consultation. These came from 14 countries in total, including 12 Member States, as well as from representative organisations at EU and international level. Responses were received mainly from industry, issuers' representatives, institutional investors and professional service providers (auditors, accountants, lawyers).  There was widespread support for the Commission's proposal to raise transparency in remuneration by disclosing remuneration policy for the next financial year and by unveiling the remuneration of individual directors in the preceding financial year. Most respondents also agreed with the Commissions plan to boost shareholders' role in approving share-based remuneration schemes, for example share options, for directors. Concerns were, however, expressed over the Commission's intention to invite Member States to implement the requirements of the future Recommendation through regulatory measures. Doubts were also expressed as to the need to involve the Annual General Meeting in discussing and approving directors' remuneration policy.  **(b) Next steps** The Commission will draft a Recommendation on fostering an appropriate regime for the remuneration of directors, taking due account of the comments expressed in the consultation. The aim is to adopt the Recommendation in autumn 2004.  **(c) Background** The Commission's Action Plan to modernise company law and enhance corporate governance in the EU, announced in May 2003 (see [IP/03/716](http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/716&format=HTML&aged=1&language=EN&guiLanguage=en" \t "_new) and [MEMO/03/112](http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/03/112&format=HTML&aged=1&language=EN&guiLanguage=en" \t "_new)) contains a set of initiatives aimed at strengthening shareholders' rights, reinforcing protection for employees and creditors, increasing the efficiency and competitiveness of European business and boosting confidence on capital markets.   The Action Plan recognises the need for shareholders to be able to appreciate fully the relationship between the past and future performance of companies and directors' pay and to make decisions on aspects of remuneration linked to the share price such as share options for directors.  Public consultation on the Plan as a whole, which ended in mid-September 2003, showed a strong consensus behind the main measures within it. The Commission is now committed to further open consultation on each of those key measures and the consultation exercise on directors' remuneration was the first of several arising from the Action Plan.   For the full text of the report, please see: [http://europa.eu.int/comm/internal\_market/company/directors-remun/index\_en.htm](http://europa.eu.int/comm/internal_market/company/directors-remun/index_en.htm" \t "_new)  **1.12 Parliamentary Committee reports on the CLERP 9 Bill**  The [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default), which is currently before Parliament, represents one of the most significant reforms to Australia’s corporate regulation in many years.  The Bill has been examined by the Parliamentary Joint Committee on Corporations and Financial Services. The Committee has released two reports on the Bill. These were published on 15 June 2004 and 4 June 2004.  **(a) Report on financial reporting and audit reform**  In releasing this report, Senator Chapman, Chaiman of the Committee, made the following comments:  "In common with many of the submissions to this inquiry, it is the Committee's firm view that there is much to commend in the proposed reforms."  "The Committee believes the Bill will improve the content and reliability of financial reporting, among other things, through its CEO/CFO sign-off requirements and Operating and Financial Review."  "The audit reform proposals should help to restore and maintain public confidence in the assurance role performed by external auditors in relation to a company's financial reports."  "It is not enough merely to impose new requirements on auditors. Companies must bear some responsibility for ensuring their external auditors bring an independent mind to the task of auditing financial reports. Furthermore, enforcement mechanisms must be up to the task of ensuring there is compliance with the new provisions".  "The Committee fully supports the multi-faceted approach taken by the Bill to the regulation of auditors and notes that this conforms with Professor Ian Ramsay's recommended approach."  "Under the Bill, auditors will have to ensure they have systems in place to identify and manage conflicts of interest. They will have to attend AGMs and answer shareholders' questions about the company's accounts. They will have to report on a wider range of corporate malfeasance to ASIC. The Companies Auditors and Liquidators Disciplinary Board will be reorganised to function as a more credible and effective disciplinary outfit. The Auditing & Assurance Standards Board will be reconstituted as a Commonwealth authority and brought within the supervision of the Financial Reporting Council."  "Auditors' clients will be subject to detailed disclosure requirements regarding non-audit services which their auditors have provided."  "Notwithstanding the Committee's general support for the Bill, the Committee considered there were important omissions from the Bill and also saw scope for a number of amendments. These include:            the introduction of a requirement for alternative accounting positions to be discussed in financial reports;           the introduction of additional true and fair view requirements;            limitation of the auditor rotation requirements to the top 300 listed entities by market capitalisation;           deletion of the prohibition against a former auditor taking up a management position with a client if a former auditor from the same firm already occupies such a position;           clarification of the role of the Financial Reporting Council;           postponement of the conversion of auditing standards into disallowable instruments until the implications are thoroughly reviewed and any problems resolved;            introduction of a range of requirements to restore confidence in the Financial Reporting Council and strengthen the standard-setting arrangements in Part 12 of the ASIC Act.  **(i) Financial Reporting Council**  "The Bill's proposal to give the FRC oversight of the AUASB raised a number of issues about the FRC's performance to date. The central issue was whether the FRC should and could take on new responsibilities."  "The Committee's view after examining the evidence, is that the FRC and the standard-setting regime need some extensive changes. To start with, the FRC needs restructuring to function more efficiently and competently. In addition, it must be more transparent and accountable where issues of public interest are concerned. And finally, the bodies for which the FRC has or will have oversight—the AASB and AUASB, must have more autonomy to ensure the independence of accounting and auditing standard setting".  "The Committee has recommended that:           the FRC should conduct its meetings in public and seek public submissions on proposals having a public interest element;           the FRC should have an independent secretariat;          FRC membership should be appropriately qualified and experienced; and          the FRC's ability to influence the standard-setting functions of the AASB and AUASB should be restricted."  "Funding of the Financial Reporting Council needs attention. On this point, the Committee welcomes the Government's provision of $3.4 million in funding to the FRC for 2004-05. However, the Committee wants to ensure that funding will not emerge as a problem in future years and has sought the Government's commitment to fund the FRC and the standard-setting bodies beyond 2004-05".  **(ii) Mandatory rotation of audit partners**  "The Committee is concerned that the Bill's audit partner rotation requirements will effectively amount to audit firm rotation for many small to medium-sized firms. The irony of this is that familiarity and fee dependence is rarely an issue for partners in smaller firms. Partners in these firms manage a comparatively large number of clients which limits opportunities for extensive client contact. Furthermore, with clients typically paying between $20,000 to $100,000, fee dependence, at the most would pose a negligible threat to auditor independence".  "To ensure the legislation does not go beyond what is needed, the Committee has recommended that the definition of 'review auditor' should be amended to reflect the rationale underlying the rotation requirements. The Committee has also recommended that the rotation requirements should only apply to the top 300 listed entities by market capitalisation to protect the interests of smaller audit firms and their clients."  **(iii) Alternative accounting treatments**  "In the interests of more 'user-friendly' financial reports, the Committee has recommended that the Bill should provide reasons for a company's choice of one accounting treatment over another when the choice has a material impact on a company's bottom line."  "The Committee notes that Professor Ian Ramsay, the JCPAA and the HIH Royal Commission have all advocated such a requirement".  **(iv) True and fair view requirement**  "The Committee believes that financial statements should, but do not necessarily, provide users with information that will help them to assess a company's financial position and performance. The Committee has consequently recommended the insertion of a definition to clarify the purpose of the true and fair view requirements. In addition, the Committee has endorsed the JCPAA's recommendations for the inclusion of additional explanatory material in the notes to the financial statements if they do not otherwise give a true and fair view".  **(v) 'Multiple-officer' restraint**  "No evidence was presented to the Committee to show that an audit client's employment of more than one former auditor from the same firm in senior management or on the board posed a serious threat to auditor independence.  "However, the Committee considers the arguments are clear that the 'multiple-officer restraint' will restrict auditors' career opportunities, make it more difficult for accounting firms to attract and keep new recruits and will place unreasonable limitations on companies' choice of people to appoint to senior management positions.  "The Committee believes this provision is ill-founded and excessive, and has recommended that it be deleted from the Bill  ."While the appointment of ex-auditors to senior management of former clients might carry some risks for auditor independence, the Committee's view is that the cooling-off provisions also in the Bill should be sufficient to deal with these.  **(vi) Auditing standards**  "The Committee does not oppose auditing standards having legislative force. However, it appears to the Committee that the conversion of auditing standards into disallowable instruments could adversely affect audit quality and also interfere with Australia's program of convergence with International Standards of Auditing. Until these problems have been examined and resolved, the introduction of amendments giving auditing standards legislative force should be postponed.  "The Committee believes a thorough review should be undertaken to examine these issues.  **(b) Report on the proposed whistleblower protection scheme, executive remuneration, infringement notices, the continuous disclosure provisions, conflicts of interest, shareholder participation and related matters**  In releasing this report, Senator Chapman, Chaiman of the Committee made the following comments:  “These aspects of the Bill place a heavy reliance on disclosure and on the active involvement of shareholders and, in the case of the whistleblowing scheme, on persons working in or for companies to promote good corporate governance. The Committee believes that these measures are a vital first step toward enhancing trust and confidence in Australian corporations. Clearly, while participants in the inquiry offered general and wide support for CLERP 9, many held reservations about particular features of the proposed legislation. The Committee has made recommendations to address some of these concerns but, as with the majority of witnesses, welcomes the reforms.  **(i) Whistleblowing**  “CLERP 9 contains provisions that would allow protected disclosures to be made to ASIC and within a company.  “The Committee believes that the proposed whistleblowing provisions are a step in the right direction, but only a first step. It has made a number of recommendations which are intended to send a message firstly to companies that they should have in place an effective whistleblower scheme to assist them in monitoring, exposing and it is to be hoped, preventing wrongdoing in their own organisation and secondly, that they have a responsibility to protect from retaliation people who make disclosures. The Committee believes that Boards should not be able to turn a blind eye to unlawful reprisals. The recommendations are intended to achieve a balance between encouraging the reporting of serious contraventions whilst at the same time discouraging frivolous or vexatious reports.  **(ii) Executive Remuneration**  “CLERP 9 proposes to amend provisions governing the disclosure of directors' and executives' remuneration. They are designed to strengthen the current provisions of the Corporations Act and address concerns about the lack of disclosure of payments made to directors and executives. The Committee supports these provisions and in summary recommends that:                  section 300A should ensure that—         all forms of remuneration are captured;         the total remuneration package includes accrued benefits and payments;        information is presented in such a way that shareholders are able to fully appreciate the total remuneration package including accrued benefits and payments such as termination benefits; and        a clear link is established between remuneration and performance;                  the top executive contracts containing the remuneration package be disclosed at the time they are agreed;                  equity based schemes as a form of executive remuneration be subject to shareholder approval;                  all forms of director remuneration be subject to shareholder approval including termination benefits; and                 penalties for breaches of section 300A should be reviewed to ensure that ASIC is able to take action against less serious breaches without having recourse to the courts.  **(iii) Non-binding vote on the remuneration report**  “In light of the recent publicity given to executive remuneration and the public perception that boards have failed in their duty to restrain the size of executive payments, the Committee accepts that it is important for shareholders to have a more effective voice in the setting of executive remuneration and the determination of performance benchmarks.  “The Committee endorses the proposal for a non-binding vote on the remuneration report. At this stage, however, the Committee does not support the view that the remuneration report be subject to a binding vote of shareholders. It notes that the non-binding vote is an innovation and suggests that a sensible approach is to allow the non-binding vote ample time to be tested for its effectiveness before any further reforms are considered.  **(iv) Infringement notices for breaches of the continuous disclosure provisions**  “CLERP 9 proposes to allow ASIC to issue infringement notices for breaches of the continuous disclosure provisions.  “The Committee appreciates the advantages to be gained by allowing ASIC to issue an infringement notice for breaches of the continuous disclosure regime. It cannot, however, ignore the weight of opposition to the proposal, particularly the concern about the perceived lack of safeguards to protect the rights of those deemed to have breached the continuous disclosure provisions and the conflicting functions of ASIC as investigator, prosecutor and judge.  “The Committee has made a number of recommendations designed to remedy what appears to be shortcomings in these provisions but accepts that uncertainty about the appropriateness of the proposal still lingers. It underlines the need for this proposal to be monitored closely and reviewed after two years.  **(v) Individuals liable for breaches of the continuous disclosure provisions**  “The Bill would make a person involved in a contravention of continuous disclosure provisions liable to a civil penalty.  “The Committee understands the concerns expressed by witnesses about the possibility that the proposal may affect persons who do not have a significant role in the management of the corporation. It refers, however, to the wording in the Explanatory Memorandum which states that involvement in a contravention 'requires some form of intentional participation and actual knowledge of the essential elements of the contravention'. It further notes that the Government intends to amend the provisions by including a due diligence defence.  **(vi) Promoting shareholder participation—notices of meetings and use of electronic technology**  “The Bill seeks to apply the 'clear, concise and effective' standard to notices of meetings and to facilitate the use of electronic communication to enhance shareholder participation in meetings.  “The Committee fully supports the use of modern technology to enhance shareholder participation.  **(vii) Promoting shareholder participation**  “The evidence considered by this Committee clearly indicates that the law needs to be revised to ensure that the voting intentions of shareholders through their proxyholder are carried out according to their instructions.  **(viii) Institutional shareholders and voting**  “A number of witnesses raised the matter of institutional shareholders voting at meetings. The Committee does not endorse compulsory voting by institutional shareholders. It does see merit, however, in requiring institutional investors to disclose how they voted at meetings, including abstentions.  **(ix) Managing conflicts of interest**  “The proposed legislation is intended to supplement the existing general duty to provide financial services 'efficiently, honestly and fairly' by imposing a new obligation regarding the management of conflicts of interest on financial services licensees.“The Committee would like to see the legislation stipulate certain disclosure requirements and particular circumstances that should or must be avoided. Clearly a ban sends an unmistakable message that certain conduct or situations will not be tolerated. As it stands, the legislation does not deliver that strong message.  **(x) Political donations**  “During the course of the inquiry, a number of matters were raised which are not contained in CLERP 9, although they relate to some of the fundamental principles that underpin the legislation—accountability, transparency and shareholder participation.  “The Committee notes the support given to the concept that companies should disclose their policy on political donations. The Committee agrees that shareholders are entitled to know about their company's approach to making donations.  **(xi) Beneficial ownership**  “The Committee appreciates the arguments put forward to increase the transparency of company ownership by making available to shareholders the names of beneficial owners of their companies. The suggestion is that companies, if they have the information, make it available to their shareholders, appears reasonable, sensible and in the public interest.”  The two reports are available on the Committee’s website [http://www.aph.gov.au/senate/committee/corporations\_ctte/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm" \t "_new)  **1.13 US private companies addressing accounting practices**  Reform in the accounting profession has compelled US non-public companies to take a closer look at their financial and accounting practices, and many are implementing changes voluntarily.  In a survey of privately held businesses released on 14 June 2004, 48 percent of chief financial officers (CFOs) said they have made adjustments to their firms' accounting processes since the introduction of new regulations.  Respondents cited payroll and benefits as the most frequent areas of change.  The survey was developed by Robert Half Management Resources, provider of senior-level accounting and finance professionals on a project and interim basis.  It was conducted by an independent research firm and includes responses from 1,359 CFOs from a stratified random sample of US private companies with more than 20 employees.  CFOs were asked, "In which of the following areas, if any, has your company made changes to its current financial accounting and reporting processes in light of regulations such as the Sarbanes-Oxley Act of 2002?"  Among the 48 percent who cited a specific area of change, their responses\* were: Payroll/benefits -  44% Expenditure/purchasing -  37% Accounts receivable/sales -  31% Capital assets -  31% Conversion/inventory -  31% Credit management/collections -  29% Disbursements -  25% Financial close -  22% Other - 3% (\*multiple answers were allowed)  Fifty-two percent of the 1,359 CFOs polled indicated they have not made any changes in the above areas.  **1.14 CalPERS releases 2004 corporate governance focus list**  On 9 June 2004, the California Public Employees' Retirement System (CalPERS) announced that four US companies were on its 2004 Focus List for poor financial and corporate governance performance. The companies are Emerson Electric Company of St. Louis, Missouri; Maytag Corporation in Newton, Iowa; Royal Dutch Shell Petroleumin The Netherlands, and The Walt Disney Company in Burbank, California. Corporate governance reforms are needed for these companies to restore long-term profitability and investor confidence, said  CalPERS.  CalPERS Focus List is selected from the pension fund's investments in more than 1,800 US corporations, and is based on the companies' long-term stock performance, corporate governance practices, and an economic value-added (EVA) evaluation. EVA measures a company's net operating profit after tax, minus its cost of capital. By using EVA and stock performance, CalPERS has pinpointed companies where poor market performance is due to underlying financial performance problems as opposed to industry or extraneous factors alone.   Maytag's stock lost more than 40 percent over the last 5 years for the period ended March 31, 2004 , and its debt levels have drastically increased. The Company's board refused to implement two shareowner proposals that have passed by a majority vote during the past six years. CalPERS wants Maytag to declassify its board by the 2005 annual meeting, seek shareowner approval of its poison pill, and adopt formal equity ownership requirements for its directors.   Royal Dutch Shell of The Hague, Netherlands, is on the list because its stock has underperformed its peers for the last five years and because it restated its oil reserves twice since the beginning of the year. CalPERS is concerned that the Dutch board, one part of Shell's complex dual corporate structure, has failed to respond effectively to shareowner demands. CalPERS is seeking the establishment of a board-level committee comprised of independent directors from Royal Dutch and Shell Transport to undertake a rigorous re-examination of the group's management, including management succession, nomination of independent directors, and composition of the Board.   Disney made the list because of its continuing issues with corporate governance. Last month, CalPERS and other institutional investors met with members of the Disney board to discuss the company's performance problems, following a resounding lack of confidence at the Company's annual meeting earlier this year. Disney agreed to allow the pension funds to suggest nominees for the Company's board and said it would consider an advisory panel to serve as a liaison between the board and investors. CalPERS has been in discussions with Disney about tying more of the Company's long-term compensation to performance-based measures.   Emerson Electric was placed on the list because of its board structure and the excessive retirement package of its Chairman. CalPERS is dissatisfied with the Company's classified board and the generous retirement package granted to former CEO and current Chairman Charles Knight. The pension fund wants Emerson to reduce the employee representation on the Board, declassify the board by the 2005 annual meeting, and renegotiate the terms of Mr Knight's contract.   In March, CalPERS completed its latest economic analysis of the impact on stock price of companies named to its Focus List. The study found companies put on the list between 1992 and 2001 had an additional (excess) return to shareholders of about 12 percent on average over the three months after release of the List. The period 95-184 days after publication was associated with additional positive cumulative excess return of 5.37 percent. The latest update of this analysis with an additional 18 months of data showed the cumulative excess return for a 1 year period after the publication of the Focus List was on average 46 percent.   CalPERS is the largest public pension fund in the US with assets totalling approximately US$160 billion.  **1.15 Discussion paper on financial literacy**  On 11 June 2004, the Australian National Consumer and Financial Literacy Taskforce released its discussion paper on financial literacy. The Taskforce was appointed in February 2004 by the Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, to develop a national strategy for consumer and financial literacy.  The Taskforce found that consumers need guidance to find different information as they entered new financial phases in their lives. The Taskforce found more than 700 consumer information initiatives are currently being produced by public, private and community sector bodies in Australia, leaving consumers feeling confused. The Taskforce also found that Australia also lacks a formal network for information providers to communicate with each other, resulting in duplication and inefficiencies in the provision of information to consumers.  The Taskforce developed a Consumer Behaviour Model to better understand the problems that exist for consumers and has suggested the formation of a coordinating body to help streamline information provision and connect information providers with consumers.  The Taskforce will now embark on a national community consultation roadshow, with stakeholders and consumers invited to public meetings to share their own personal money stories and receive a briefing on the discussion paper.  Copies of the Taskforce’s discussion paper are available at [cfltaskforce.treasury.gov.au](http://cfltaskforce.treasury.gov.au" \t "_new) and public submissions are welcomed.  **1.16 Institute for Corporate Ethics announces key findings from "mapping the terrain" survey of US CEOs**  On 10 June 2004 the Business Roundtable Institute for Corporate Ethics announced key findings from its initial research project, "Mapping the Terrain".  The Mapping the Terrain study surveyed US Business Roundtable CEOs to understand the most important ethics issues facing corporate leaders. In survey responses, CEOs indicated that the five most important corporate ethics issues facing the business community are: (1) regaining the public trust; (2) effective company management in the context of today's investor expectations; (3) ensuring the integrity of financial reporting; (4) fairness of executive compensation; and (5) ethical role-modelling of senior management.   A majority of CEOs (81%) believe that in the wake of recent controversies standards for corporate ethics have risen. Also, most CEOs (74%) indicated their companies have made changes in how ethics issues are handled or reported within the last two years. Specific changes most cited include: enhanced internal reporting and communications (33%), ethics hotlines (17%), improved compliance procedures (12%) and greater Board oversight (10%).   With regard to the top corporate ethics priority for business, the majority of CEOs (57%) cited establishing a framework for business decision making that integrates ethics as the top priority followed by encouraging pushback and a culture for proactively addressing potential bad news early (35%).  **1.17 Record year for IPO activity but momentum is waning**  The 2003-04 financial year will set new records for Australian IPO activity, according to Deloitte Corporate Finance’s quarterly review of Initial Public Offerings.  Preliminary report results, released in June, show that **153 floats are set to raise a total of $10.8 billion** by the time the financial year draws to a close at the end of this month.  The number of IPOs is set to increase by 178% to 153 in 2003-04, while the amount of new equity raised will jump by 155% to $10.8 billion. This is double the value of IPO funds raised at the height of the dot com boom in 1999-2000 when 154 IPOs were launched on to the stock exchange with combined equity raisings of $5.4 billion.  **However, the market momentum for IPOs has waned towards the end of the year.**  After 84 IPOs in the first half (raising a total of $6.6 million), IPO activity slowed in the second half to 69 IPOs (raising a total of $4.2 billion).  The **loss of momentum has accelerated dramatically in recent weeks**, with less favourable market conditions leading to the deferral or possible withdrawal of up to 15 IPOs with plans to raise between $1 billion and $2 billion. This includes Bradken, B & D Doors, W & W Hotels and Primus Australia.  With a further 11 IPOs scheduled to list in the final three weeks of the 2003-04 year, including CEC Group Ltd, CyGenics Ltd and Ceramic Fuel Cells Ltd, more floats could be pulled before 30 June. However, the relatively small size of the remaining IPOs means the total value of funds will still be close to $10.8 billion.   |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | |  | **2000** | **2001** | **2002** | **2003** | **2004** | | **Number of IPOs** | 154 | 125 | 60 | 55 | 153 | | **Amount raised ($m)** | 5,354 | 3,836\* | 1,981 | 4,247 | 10,781 |   \*excludes Telstra 2 IPO of $9,778 million, listed Oct. 2000  The slow-down reflects a waning interest towards new equity issuers.  Equities are still the preferred asset class for many investors in the current market. However, perceived high exit valuations and poor after market share price performance by many IPOs in the past 12 months has led to a more cautious look at new and unproven companies and renewed focus on existing established issuers.  Only 63 of the 142 IPOs to list in the 2003-04 year to date (or 44% of all IPOs year to date) were trading at their issue price or better by the end of last week.  The sluggish results of the top 10 largest IPOs have also had a big impact on market sentiment. The top 10 largest floats accounted for two thirds of all capital raised during the year, but half of them are currently trading below their issue price.  So far on average, the top 10 largest IPOs produced zero share price appreciation for investors, but there is still a way to go before it can be determined whether this is part of a longer term trend.  Four of the five largest IPOs that were now trading below issue price – Zinifex, Australian Leisure and Hospitality, virgin blue and Repco – raised equity through a book build process.  Book builds have helped vendors to raise the maximum amount of capital with a higher degree of certainty, particularly as conditions became less favourable, but they may be a potential negative for subscribers to IPOs. Book builds bring forward price competition into the offer period and reduce the upside for investors, according to Deloitte Corporate Finance.  There were still windfall gains. An investor in any of the 10 best performing IPOs during the past year would have made a capital gain of at least 90%, while those who were fortunate enough to obtain shares in the year’s best performing IPO – Kip McGrath Education Centres – have seen their 50 cent shares soar in value to $2.65, a gain of 430% since August 2003.  **For more information download the full Deloitte IPO Report on the Deloitte website at** [http://www.deloitte.com/dtt/press\_release/0,2309,sid=5527&cid=50945,00.html](http://www.deloitte.com/dtt/press_release/0,2309,sid=5527&cid=50945,00.html" \t "_new)  **1.18 SEC adopts rules on breakpoint disclosure and adviser ethics codes, proposes transfer agent rule**  The United States Securities and Exchange Commission voted on 26 May 2004 to adopt form amendments regarding disclosure requirements for mutual funds concerning discounts on front-end sales loads and a new rule as well as amendments to rules and forms dealing with investment adviser codes of ethics. The Commission also voted to propose for comment a new rule regarding transfer agent operations.  **(a) Enhanced disclosure of mutual fund breakpoint discounts**  The Commission voted to adopt amendments that will require a mutual fund to provide enhanced disclosure regarding breakpoint discounts on front-end sales loads. This enhanced disclosure is intended to assist investors in understanding the breakpoint opportunities available to them.  Some mutual funds with a front-end sales load provide discounts for larger investments. The investment levels required to obtain a reduced sales load are commonly referred to as "breakpoints." In late 2002, the staffs of the Commission and NASD identified concerns regarding the extent to which mutual fund investors were receiving breakpoint discounts. As a result, the Commission and NASD launched a multifaceted action plan to address these concerns, including an examination sweep with the New York Stock Exchange of 43 broker dealers that sell front end sales load mutual funds and the formation of the Joint NASD/Industry Task Force on Breakpoints to recommend ways in which the mutual fund and broker dealer industries could prevent breakpoint problems in the future.  As a result of the examination sweep and a report by the Task Force, the Commission is attacking industry failures to deliver breakpoint discounts through both enforcement actions and regulatory initiatives. The Commission and NASD recently announced enforcement and disciplinary actions against 15 brokerage firms for failure to deliver mutual fund breakpoint discounts during 2001 and 2002. The firms agreed to compensate customers for the overcharges, pay fines that total over US$21.5 million, and undertake other corrective measures.  The amendments will require enhanced disclosure by mutual funds regarding breakpoints, as recommended by the Task Force.  The amendments will           require a mutual fund to provide a brief description in its prospectus of arrangements that result in sales load breakpoints, including a summary of eligibility requirements, with more detailed information permitted to be in the statement of additional information;          require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints;          require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary; and            require a mutual fund to state in its prospectus whether it makes available on its Web site information regarding its breakpoints.  Investors can learn more about reduced front-end sales loads by going to [http://www.sec.gov/answers/breakpt.htm](http://www.sec.gov/answers/breakpt.htm" \t "_new) and [http://www.nasd.com/Investor/Choices/breakpoints\_brochurehtm](http://www.sec.gov/cgi-bin/goodbye.cgi?www.nasd.com/Investor/Choices/breakpoints_brochure.htm" \t "_new).  The examination sweep report "Joint SEC/NASD/NYSE Report of Examinations of Broker Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds" is available at [http://www.sec.gov/news/studies/breakpointrep.htm](http://www.sec.gov/news/studies/breakpointrep.htm" \t "_new).  A copy of the Joint NASD/Industry Task Force on Breakpoints report can be found at [http://www.nasdr.com/breakpoints\_report.asp](http://www.sec.gov/cgi-bin/goodbye.cgi?www.nasdr.com/breakpoints_report.asp" \t "_new).  An NASD status report regarding the Task Force's recommendations is available at [http://www.nasdr.com/breakpoints\_status.asp](http://www.sec.gov/cgi-bin/goodbye.cgi?www.nasdr.com/breakpoints_status.asp" \t "_new).  Funds must provide the disclosure required by the amendments starting 1 September 2004.  **(b) Investment adviser codes of ethics**  The Commission also voted to adopt a new Rule 204A-1 under the Investment Advisers Act and related amendments to Advisers Act Rule 204-2, Advisers Act Form ADV, and Rule 17j-1 under the Investment Company Act. New Rule 204A-1 would require registered investment advisers to adopt and enforce codes of ethics applicable to their supervised persons. The new rule is designed to prevent fraud by reinforcing the fiduciary principles that must govern the conduct of advisory firms and their personnel. An adviser's code of ethics will have to include certain minimum provisions.           Standards of Business Conduct. The code will be required to establish standards of conduct that are expected of the adviser's supervised persons and that reflect the adviser's fiduciary duties. Supervised persons will have to acknowledge, in writing, receipt of a copy of the code of ethics and any amendments.           Compliance with Federal Securities Laws. An adviser's code of ethics will have to require the adviser's supervised persons to comply with applicable federal securities laws.            Personal Securities Reporting. An adviser's code of ethics will have to require certain supervised persons called access persons to report their personal securities holdings and transactions, including transactions in mutual funds advised by the adviser or an affiliate.             Pre-Approval of Certain Transactions. The code of ethics will have to require access persons to pre-clear any personal investments in initial public offerings and limited offerings.             Reporting of Code Violations. The code of ethics will have to require supervised persons to report, promptly, any violations of the adviser's code of ethics to the firm's chief compliance officer or to other designated persons.  The compliance date for these provisions is 7 January 2005.  **(c) Transfer agent rule proposal**  The Commission approved publication for comment of proposed new Rule 17Ad-20 that would prohibit registered transfer agents from transferring any equity security registered under Section 12 of the Securities Exchange Act of 1934 or any equity security of an issuer reporting under Section 15(d) of the Securities Exchange Act of 1934 where the transfer of such security to or from a securities intermediary is limited or prohibited. A securities intermediary is an entity that in the ordinary course of its business maintains securities accounts for others. They include entities such as registered clearing agencies acting as securities depositories (for example, The Depository Trust Company), broker-dealers, and banks. The Commission also decided to propose that the rule take effect 90 days after the date of Commission adoption in order to allow issuers whose securities are restricted in a manner prohibited by the rule sufficient time to obtain any necessary changes to their bylaws or charters to remove the restrictions.  Comments concerning the rule proposal should be submitted to the Commission within 30 days of its publication in the Federal Register.  **1.19 New study of structure of UK boards of directors**  This report is the second edition of a Deloitte survey on Board Structure and Policies. The report summarises the responses of 75 FTSE 350 companies to questions relating to current practice and how they are responding to the requirements of the revised Combined code. The information was collected during the first quarter of 2004.  The main findings of the report are summarised below. Completed questionnaires were received from Company Secretaries in 75 FTSE 350 organisations. Participants were asked to complete the questionnaires on behalf of their company and to reflect company policy rather than individual options.  **(a) Board structure**           As last year, the majority of companies, 70%, classify their chairman as non-executive. In 12% of companies the chairman is classified as a full-time executive chairman and in 5% as a part time executive chairman. In 13% of companies the chairman is described simply as chairman.          A non-executive chairman typically works one or two days per week, with the median number of days worked being two days per week.          The typical board consists of ten directors with a chairman, four executive directors and five non-executive directors.           More than 80% of participating companies have undergone changes to their board in the last year with 49% of these undergoing a change of executive directors and 73% undergoing a change of non-executive directors.          The most common source of director recruitment continues to be other major FTSE companies. There has been a significant number (41%) of appointments of directors with recent and relevant financial experience. Other areas that companies have been recruiting from include professionals from advisory firms (e.g. lawyers, accountants etc) and individuals from non-UK companies.          Despite over 50% of companies in the 2003 survey expecting to recruit more female directors, only 27% of companies have actually done so over the past year.  **(b) Board positions**           69% of participating companies actively encourage their executives to take up non-executive board positions compared with 56% of companies last year.           Directors are permitted to retain any fees earned for external appointments in 84% of companies           In 71% of companies at least one director holds a non-executive position in another company.          Senior management below board level hold external non-executive board positions in 19% of companies, an increase since last year when only 10% of companies reported this group doing so. In companies where this is the case they will typically have one senior manager who holds an external position.  **(c) Independence of non-executives**           There is generally a greater level of agreement with the criteria of independence set out in the Combined Code than last year. The only areas where there is a significant level of disagreement are cross-directorships, with 24% disagreeing with this definition this year compared to 34% last year, and service in excess of nine years, with 48% disagreeing this year compared to 50% last year.          77% of companies consider all their non-executives to be independent, although only 55% consider them all independent when judged against the Combined Code criteria.          44% of companies have boards of which less than 50% are independent directors, based on the Combined Code independence criteria. In order for these companies to comply they would need to appoint a further 50 non-executives which equates to around 13% additional non-executives.  **(d) Committees**           The audit committee and the remuneration committee typically consist of three or four independent non-executive directors. The nomination committee is likely to be slightly larger with the typical size being five directors.          In 92% of companies the audit committee includes an individual with recent and relevant experience.           In 28% of companies the audit committee contains at least one director who is not considered to be independent and in 23% of companies the remuneration committee contains at least one director who is not independent.           All companies have written terms of reference for their audit and remuneration committees and only one company does not have written terms of reference for its nomination committee.  **(e) Fees and commitment**           The median and average fees for full-time executive chairmen in participating companies in the FTSE 100 and FTSE 250 are as follows:   |  |  |  |  |  | | --- | --- | --- | --- | --- | |  | **Median** | **FTSE 100 Average** | **Median** | **FTSE 250 Average** | | **Full time executive chairman fees** | £535,000 | £707,600 | £412,500 | £419,150 |            The median and average fees for non-executive chairmen, irrespective of time commitment are as follows:   |  |  |  | | --- | --- | --- | | **Non executive chairman fees** | **Median** | **Average** | | **FTSE 100** | £257,000 | £280,326 | | **FTSE 250** | £125,000 | £129,459 |            The median and average basic fees for non-executive directors by market capitalisation for 2004 and 2003 are as follows:   |  |  |  |  |  | | --- | --- | --- | --- | --- | | **Basic fees Market capitalisation £m** | **Median** | **2004 Average** | **Median** | **2003 Average** | | **100-500** | £27,500 | £27,700 | £25,000 | £26,200 | | **500-2,000** | £30,000 | £29,910 | £30,000 | £29,008 | | **2,000-8,000** | £32,500 | £32,906 | £30,000 | £31,227 | | **More than 8,000** | £41,000 | £43,125 | £35,875 | £36,313 |            Approximately one third of companies provided details of separate fees paid for committee membership and chairmanship. The median committee membership and chairmanship fees are as follows:   |  |  |  | | --- | --- | --- | |  | **Median committee membership fee** | **Median committee chairmanship fee** | | **Audit committee** | £5,000 | £7,000 | | **Remuneration committee** | £5,000 | £5,000 | | **Nomination committee** | £4,500 | £5,000 |            The typical board will have eight board meetings a year, four audit committee meetings and four remuneration committee meetings. Nomination committee meetings are usually held on an ‘as required’ basis.  **(f) Additional meetings**           In 80% of companies the non-executives meet regularly without the executives being present, compared with 41% last year. The senior independent director meets with the other non-executives at least once a year without the chairman being present in 68% of companies compared with 21% of companies last year.          34% of companies indicated that their non-executive directors meet with major shareholders either on induction or on a regular basis compared with only 10% of companies last year.          The chairman and/or senior independent director attend regular meetings with major shareholders in 48% of companies and a further 7% will be ensuring this happens in the coming year.  **(g) Remuneration advisers**           In the majority of companies (56%) the remuneration committee selects and appoints advisers who have access to management views.          During the year, 17% of companies have changed their policy for appointing advisers in light of the increased disclosure requirements relating to advisers.  **(h) Recruitment**           All but one company responding to the survey has a nomination committee and the one company that does not is currently reviewing the situation.           In 59% of companies, there is a formal process in place for the nomination committee to regularly evaluate the balance of skills, knowledge and experience of the board.          In 84% of companies external search consultancies are used to recruit new directors.  **(i) Training and development**           72% of companies provide formal training on appointment to their directors, compared with 45% last year.          On-going training policies are in place in 68% of companies, compared to 33% last year, with a further 32% planning on introducing a formal training and development process in the future.  **(j) Performance management**           A performance management process is in place for executive directors in 72% of companies and for non-executives in 63% of companies, compared with 63% and 12% respectively last year.          In addition to this, 49% of companies are implementing performance management processes for their directors in the coming year.           59% of companies have a formal board evaluation process in place and a further 35% report that they will be implementing a new process in the future.  The full study is available on the Deloitte website at [http://www.deloitte.com/dtt/home/0,2334,sid%253D2825,00.html](http://www.deloitte.com/dtt/home/0,2334,sid%3D2825,00.html" \t "_new)  **1.20 Former NYSE chief sued over excessive pay package**  New York attorney General Eliot Spitzer has sued the former CEO of the New York Stock Exchange, a former Director, and the Exchange, citing violations of New York's Not-for-Profit Corporation Law in the award of an excessive compensation package.  The civil law suit comes after a four-month investigation by Spitzer's office determined that Directors of the NYSE were misled about various aspects of the US$187.5 million payment package awarded by the Exchange to former Chairman and CEO Richard Grasso.  In a related action, Spitzer announced settlements with an NYSE executive and an independent consultant who both admitted providing information to the board that was inaccurate and incomplete.  The suit asks a state court judge to rescind the pay package and to determine a "reasonable" level of compensation for Mr. Grasso. The suit, which names Grasso and Kenneth G. Langone, former chairman of the NYSE Compensation Committee, was filed in State Supreme Court in Manhattan. The New York Stock Exchange was named in the suit because it failed to ensure compliance with the not-for-profit-law and made the excessive payments to Grasso.  "This case demonstrates everything that can go wrong in setting executive compensation," Spitzer said. "The lack of proper information, the stifling of internal debate, the failure of board members to conduct proper inquiry and the unabashed pursuit of personal gain resulted in a wholly inappropriate and illegal compensation package."  Spitzer's suit alleges that:           The NYSE Board of Directors was misled on various aspects of the Grasso compensation contract.  Inaccurate and misleading information in the form of incomplete and incorrect analyses were provided to Board members. Frank Z. Ashen, a top deputy to Grasso, admitted providing "incomplete, inaccurate and misleading" information in documents to the Board. In one example, the Board was not aware of $18 million in so-called Capital Accumulation Plan (CAP) bonus awards to Grasso for 1999-2001. In addition, Mercer Human Resource Consulting, Inc., a consultant asked to prepare a financial analysis of a proposed $187.5 million payment to Grasso, has admitted that its report to the Board contained "inaccuracies and omissions."          The compensation formula that generated huge payments for Grasso was flawed and under Grasso's control.  The compensation formula was inappropriately driven by a comparison with the salaries of top executives in the world's largest corporations. In addition, the investigation found that Grasso, in effect, set his own performance targets, which he easily exceeded. In any event, the NYSE disregarded its own formula on numerous occasions and awarded Grasso funds well beyond the formula's product.           The compensation provided to Grasso was not "reasonable" according to state law.  New York Not-for-Profit Law requires that compensation for executives be "reasonable" and "commensurate with services provided." In this case, however, the compensation far exceeded what would have been permitted by that standard. Indeed, the amount expended by the NYSE for Grasso's compensation and benefits for 1999 through 2001 nearly equalled the NYSE's total net income for those years.           Grasso's dual role as regulator and NYSE employee raised a conflict of interest.  Heads of major Wall Street investment banks were also members of the Compensation Committee. During the same period they approved Grasso's excessive pay packages they had joined him in a private SEC-sponsored meeting at which they were assured that analyst conflicts of interest were "for the industry to resolve" without regulatory action.  The complaint also cites the testimony of one compensation committee member who privately expressed concern about a component of Grasso's proposed compensation for the year 2000 and, subsequently, was personally confronted by Grasso. The director testified that he "was taken aback that my hesitancy was reported immediately (to Grasso)." The committee member, who ultimately approved Grasso's compensation package, said: "Thank God I escaped that one. This man was also our regulator, and I'm a member of the New York Stock Exchange ... and when he's ... your supervisor or your regulator, you have to be careful."  Under the terms of his settlement with the Attorney General's office, Ashen will return $1.3 million to the NYSE. Mercer Human Resources, Inc. will return the fees it charged the NYSE in 2003.  Spitzer thanked the SEC for working with his office on the investigation. The Attorney General is responsible for enforcing the Not-for-Profit-Corporation Law (NPCL), which governs New York not-for-profit corporations and the conduct of their officers and directors. NPCL Section 720(b) authorizes the Attorney General to commence an action against a director or officer of a not-for-profit corporation to "to compel the defendant to account for his official conduct" with respect to "the neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets." The law further authorizes the Attorney General to seek recovery of unreasonable compensation.  **1.21 Separating the roles of CEO and chair of the board**  The Wharton School of Business has published a short article which examines the debate in the US on whether the roles of CEO and Chair of the Board should be held  by separate people. According to the article, there may be good reasons, based on specific circumstances, for companies to divide the roles of CEO and chairperson between two people. But there is no evidence that separating these positions, as a general philosophical rule, improves corporate performance. And indeed, while figures show that many companies are dividing the jobs of CEO and chairperson, the trend is not widespread. Yet members of the Wharton faculty who are quoted in the article also note the benefits of separating the two positions, especially in companies that are plagued by scandal or struggling to compete.   The article is available at [http://knowledge.wharton.upenn.edu/index.cfm?fa=viewArticle&id=987](http://knowledge.wharton.upenn.edu/index.cfm?fa=viewArticle&id=987" \t "_new)  **1.22 Government progress in implementing the HIH Royal Commission recommendations**  On 12 September 2003, the Treasurer, the Hon Peter Costello MP, announced the Government’s response to the recommendations of the HIH Royal Commission. Since then considerable progress has been made in implementing these recommendations.  Two reviews that were commissioned in September 2003, arising from the HIH Royal Commission recommendations, have now been completed.  Mr Gary Potts, a former Executive Director of the Department of the Treasury, was appointed to look at issues associated with insurance like products provided by institutions not regulated by APRA (Recommendation 42). Mr Potts examined the nature and extent of discretionary mutual funds (DMFs) and direct offshore foreign insurers (DOFIs) operations in Australia and their contribution to overall insurance capacity.  The Review recommendations and a summary of the Review was released in June. The Government has announced that it will be implementing the recommendations contained in the Potts Review.  Professor Kevin Davis, Professor of Finance at the University of Melbourne, was appointed to consider the merits of introducing a limited explicit guarantee into parts of the Australian financial system and the appropriate design features of any such guarantee scheme (Recommendation 61 of the HIH Royal Commission). This report was released in June.  Consistent with the terms of reference for the Study, the Davis Report does not contain recommendations. Rather, it presents a technical discussion of the costs and benefits of any limited guarantee scheme. It outlines also the issues that would need to be considered in designing any limited scheme to suit Australia’s circumstances. While interested parties were invited to bring relevant material to the attention of the Study, the process to date has generally involved targeted consultation with relevant experts and industry and consumer representative groups.  As foreshadowed at the time of commissioning the Davis Study, the Government will now conduct a broader consultation process before making a final decision on this matter. To help facilitate the consultation process, the Treasurer released a Government discussion paper outlining the key issues and questions on which the Government is seeking public comment.  A number of HIH Royal Commission recommendations will be implemented through the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "defaullt) (CLERP 9). The CLERP 9 Bill passed through the House of Representatives on 16 February 2004 and it is being debated in the Senate during the Winter Parliamentary sittings. The HIH Royal Commission also made a number of recommendations that related to issues that are the responsibility of independent bodies. In September 2003, the Treasurer referred these recommendations to the relevant bodies for their consideration. All have now responded to the Treasurer in relation to these recommendations.  There are also a number of recommendations which would require State and Territory Government action to implement.  The Government also will shortly release the findings of a separate review into the financial assistance arrangements provided under Part 23 of the Superannuation Industry (Supervision) Act 1993. The review examines the operation of compensation arrangements for superannuation losses arising from fraudulent conduct and theft.  The Potts Review recommendations and summary are available at [http://dmfreview.treasury.gov.au](http://dmfreview.treasury.gov.au" \t "_new).  The Davis Report, a Government discussion paper on financial system guarantees and further information on the public consultation process are available at [http://fsgstudy.treasury.gov.au](http://fsgstudy.treasury.gov.au" \t "_new).  **1.23 Research study of insolvent trading**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne and Clayton Utz have published a research report which is an empirical investigation of Australian judicial findings relating to the duty to prevent insolvent trading.  The duty to prevent insolvent trading is the most controversial of the duties imposed upon company directors. Those who support the duty argue that it provides appropriate protection for the unsecured creditors of companies. Those who oppose the duty argue that it has the effect of making directors unduly risk adverse which can result in directors too quickly putting companies into voluntary administration or liquidation for fear of personal liability (which may have a negative financial impact on unsecured creditors).  **(a) The elements of the duty to prevent insolvent trading**  The duty to prevent insolvent trading is contained in section 588G of the Corporations Act. This section applies to impose liability upon a person if:           the person is a director of the company when the company incurs a debt;           the company is insolvent when it incurs the debt or becomes insolvent because it incurs the debt;           when it incurs the debt there are reasonable grounds for suspecting that the company is insolvent or would become insolvent because it incurs the debt; and           the director is aware at the time the debt is incurred that there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent (as the case may be) or a reasonable person in a similar position in a company in the company’s circumstances would be so aware.  Even if a director has breached section 588G, there might be a defence for the director. Section 588H contains four defences. These are:           reasonable grounds on which to expect solvency;           reasonable reliance on information provided by others;           absence from management; or           taking reasonable steps to prevent incurring of debt.  **(b) Research methodology**  The project involves an empirical study of insolvent trading cases based on court judgments. Insolvent trading provisions were first introduced by each of the States and Territories in their Companies Acts in 1961. Various searches (both text based and electronic) were undertaken to obtain relevant cases from the introduction of the insolvent trading provisions until February 2004.  The searches undertaken revealed a large number of cases which then needed to be considered for the purposes of determining whether they would be included in the study. This process resulted in 103 cases forming the basis of the study. Each case was read and, for each case, eighteen questions were, to the extent possible, answered.  **(c) Key findings of the study**  The key findings of the study are as follows:  Whilst there has not been a large number of insolvent trading cases in Australia, they are generally increasing in frequency. Although the insolvent trading provisions were introduced into companies’ legislation in 1961, there were no cases in the 1960s. In the 1970s there were ten cases and in the 1980s there were sixteen cases. There was a rapid increase to 62 cases during the 1990s. However, the number of cases decided has since slowed, with only 15 cases decided since the end of the 1990s.  In the vast majority of the insolvent trading cases (75%), the defendant is found liable for insolvent trading.  Where the defendant is found liable for insolvent trading, the amount of compensation the court orders the defendant to pay varies significantly. The largest amount of compensation a director was ordered to pay by a court was $96.7 million. The smallest amount of compensation ordered in a case was $517. The average amount of compensation ordered to be paid by courts was $1.7 million although this amount is skewed by the large judgment referred to above. The median amount of compensation was $110,600.  In addition to ordering the defendant director to pay compensation where the director has engaged in insolvent trading, the court may also impose other orders including an order banning the director from managing companies for a specified period of time. It is rare for courts to impose other orders (this was only done in seven cases). There were only two cases in which a management banning order was made. One of those cases involved 3 directors, with the length of the management banning orders against each of the directors involved in this case being 4, 7 and 10 years respectively. The period of the ban was twelve years in the second case.  It is possible to bring criminal proceedings in relation to insolvent trading. 15% of the cases involved criminal proceedings.  91% of the companies alleged to be engaged in insolvent trading are private companies with only about 8% being public companies (and 1% being unknown).  The type of business that companies alleged to be engaged in insolvent trading undertake varies widely. However, the most common business is construction (22% of all the cases) with the next two most common categories of business being retail trade (17%) and manufacturing (17%). These findings may have implications as to where ASIC should be devoting its remedial and enforcement resources.  Insolvent trading actions are most commonly brought against executive directors. Excluding those cases where the type of director was unknown, 55% of the cases involved executive directors and 22% involved non-executive directors. A further 6% of cases involved people who were both a director and secretary. 4% of the cases were brought against the chairman of the companies.  Most cases of insolvent trading against directors (60%) were brought by creditors of the companies. About 17% of the cases were brought by the corporate regulator with another 16% being brought by the liquidators of the companies.  About 80% of the insolvent trading cases are brought in the state courts with about 20% being brought in the Federal Court. This trend is reversing given that the Federal Court has only had the jurisdiction to hear insolvent trading cases since the 1990s. In the period since 1991, 36% of the insolvent trading cases have been brought in the Federal Court.  In relation to the cases brought in the state courts, 30% were brought in NSW, 22% in Western Australia, 18% in South Australia, 17% in Victoria and almost 10% in Queensland.  There are defences available in a case involving insolvent trading. These defences are summarised above. In 63% of the insolvent trading cases, the defendants argued that a defence applied to them. However, in only about 11% of the cases in which a defence was argued was the director held not liable because a defence applied.  In order for there to be insolvent trading, the company must incur a debt. In about 64% of the cases, the debt related to the purchase of goods or services by the company. In about another 8% of the cases the debt was a loan to a bank or another financier. In a small number of cases the debt related to unpaid taxation.  The research 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)  **1.24 Study of the impact of ACCC enforcement activity in cartel cases**  A new study has been published which examines the compliance impact of ACCC enforcement activity in cartel cases. The authors are Dr Christine Parker (Centre for Corporate Law and Securities Regulation, The University of Melbourne), Dr Paul Ainsworth and Natalie Stepanenko.  The study examines four case studies of significant ACCC cartel enforcement action in detail using empirical evidence form interviews with ACCC staff, lawyers and business people involved in each case, and documentary reports of the case and its impact. The four cases are the Freight, Concrete, Transformers and Queensland Fire Protection cases. Each case was chosen because of its significant impact on industry compliance and on the reputation and effectiveness of the Commission, according to preliminary interviews with ACCC staff. The analysis shows that each case did have significant impacts, but also weaknesses.  In all four cases the ACCC followed the same pattern of investigation and enforcement, with relatively minor variations. These are the use of informers and leniency/immunity, the section 155 process for gathering evidence, negotiated settlements of enforcement action, the publicity associated with proceedings, and implementation of compliance programs as a remedy for misconduct. The study evaluates the strengths and weaknesses of each of the investigation and enforcement strategies used by the ACCC in the cartel cases in the chronological order in which each strategy is usually used. The study concludes that despite failures in the impact of both the ACCC's deterrent and moral messages, the data suggests that ACCC enforcement activity has significantly influenced a change in social norms in Australian business related to cartel behaviours through a mix of enforcement techniques that have begun to extend a web of control over market behaviour.  The report is on the Centre for Corporate Law website at [http://cclsr.law.unimelb.edu.au/research-papers/index.html](http://cclsr.law.unimelb.edu.au/research-papers/index.html" \t "_new) | |
| **2. Recent ASIC Developments** | |
| **2.1 Changes to financial reporting relief for wholly-owned entities**  On 24 June 2004 the Australian Securities and Investments Commission (ASIC) announced changes to Class Order 98/1418 [CO 98/1418] that remove the need for companies, their directors and professional advisers to obtain approval before being able to rely on the class order.   The changes to the class order take effect from 1 July 2004.  Under Class Order 98/1418, certain wholly-owned companies may be relieved from the requirement to prepare and lodge audited financial statements under Chapter 2M of the Corporations Act 2001 (the Act), where they enter into deeds of cross guarantee with their parent entity and meet certain other conditions.  Previously, a deed of cross guarantee or an assumption deed joining a company to an existing deed of cross guarantee was not effective unless approved by ASIC. Until approval was granted, a wholly-owned company did not have relief under the class order.  From 1 July 2004, ASIC will no longer approve these deeds of cross guarantee and assumption deeds. However, it will remain a requirement for relief that the deeds are lodged with ASIC.  From 1 July 2004 it will be necessary for:  (a)        The wording of all deeds to be exactly in the form of the relevant ASIC pro-forma (with the exception of specific information such as company names and dates); and (b) Companies wishing to take advantage of relief under Class Order 98/1418 to lodge, with the deed, certifications that:  (i)           the deed wording is exactly the same as that in the relevant ASIC pro-forma, and it has been properly executed by the parties to the deed and binds the parties in accordance with the terms of the deed; (ii)         the audit reports of each company for the last three years were unqualified; and (iii)        the financial reports of each company for the last three years were lodged with ASIC on time.  The certification required in (i) must be provided by a legal practitioner holding a current practising certificate, which should include most in-house lawyers. The certifications in (ii) and (iii) must be provided by such a legal practitioner or by a registered company auditor.  These changes apply only to deeds and assumption deeds lodged with ASIC from 1 July 2004.  ASIC has made a checklist available as an aid to companies to ensure that they meet certain requirements for relief. The checklist is not exhaustive and is not a substitute for the company and its directors ensuring that all requirements for relief are met. This checklist is available from the ASIC website ([www.asic.gov.au/financialreporting](http://www.asic.gov.au/financialreporting" \t "_new)).  ASIC will check compliance with certain requirements for relief through surveillance on a random selection of companies. These checks may not occur around the time deeds are lodged, and companies and their directors should be aware the consequences of non-compliance can be serious.  Should a deed not be in the required form and/or any other conditions of CO 98/1418 not be met in respect of a particular financial year, relief will not be available. Each affected wholly-owned subsidiary will be required to comply with the normal financial reporting requirements of Chapter 2M of the Act for that financial year.  In ASIC's experience, some common problems with the deeds and other documents lodged with ASIC include:           The required statutory declaration by directors not being properly witnessed or containing incorrect statements such as:  o        The wording of the deed was substantially in the form of ASIC's relevant proforma when it wasn't; and  o        the entities substantially complied with their financial reporting and audit obligations under the Act, annual financial reports of the holding company or wholly owned entities not being lodged at all, or not lodged on time, for the past 3 years, contrary to a statement in the statutory declaration;           The deed containing typographical errors or incorrect ACNs;           The deed being incorrectly executed; and           An alternative trustee being required to be appointed but has not been.  ASIC intends to take appropriate corrective action where a company that has not met the requirements for relief has failed to prepare and lodge an audited financial report with ASIC for one or more years.  **2.2 ASIC clarifies audit and procedural requirements for IDPS**  On 17 June 2004, the Australian Securities and Investments Commission (ASIC) clarified the auditing and other procedural requirements for investor-directed portfolio services (IDPS) and IDPS-like schemes by amending Class Order [CO 02/294] that relates to IDPS, Class Order [CO 02/296] that relates to IDPS-like schemes, and Class Order [CO 02/295] that relates to nominee and custody services.   An IDPS is a service for acquiring and holding investments that generally involves custody arrangements and consolidated reporting to investors. The service is typically marketed as a master fund or wrap account. At the end of the financial year of an IDPS, the operator is required to give each client an annual investor statement and an annual statement prepared by a registered company auditor. Similar provisions are required of responsible entities of IDPS-like schemes.   The main amendments to the class orders are:            definitional changes;            clarification of the auditing requirements and procedures, including where there are multiple operators or different auditors associated with the operation of an IDPS;            prohibition of disclaimers and exclusion clauses; and            other changes to the definition of 'regular savings plan' and the concept of 'giving' and 'sending' documents.  More information about the amendments to the class orders is available on [the ASIC website](http://www.asic.gov.au/" \t "_new).  **2.3 ASIC issues draft guidance paper on CLERP 9** The Australian Securities and Investments Commission (ASIC) on 16 June 2004 called for comments on Authorised audit companies: Insurance arrangements, a draft guidance paper dealing with company auditor changes under the Commonwealth Government's Corporate Law and Economic Reform Program (CLERP 9) proposals.  ASIC's policy proposal paper deals with the obligation in the [CLERP 9 Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) that companies wishing to register as company auditors must have adequate and appropriate professional indemnity insurance.   'CLERP 9 will allow companies to register as company auditors for the first time. However, before they can be registered, ASIC must be satisfied that they have adequate and appropriate professional indemnity insurance', said Mr Malcolm Rodgers, ASIC Executive Director of Policy and Markets Regulation.  'Audit companies need insurance so they can meet claims reasonably anticipated to arise from their work. At the same, we want to be confident that the insurance is reasonably available in the market place. Our proposals on the insurance required have been developed with these considerations in mind', Mr Rodgers said.  The proposed policy is available from [www.asic.gov.au/clerp9](http://www.asic.gov.au/clerp9" \t "_new) and submissions about the policy should be e-mailed to [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au). The closing date for submissions is 30 June 2004.  ASIC will apply the policy in Authorised audit companies: Insurance arrangements on an interim basis to any authorised audit company seeking registration with ASIC before this policy is finalised.  **2.4 ASIC gives 'associate' and IDPS takeover relief** The Australian Securities and Investments Commission (ASIC) on 16 June 2004 issued Class Order [CO 04/631] to clarify the scope of the 'associate' concept in section 12 of the *Corporations Act 2001*. ASIC also recently issued Class Order [CO 04/523] providing takeovers and substantial holdings relief to operators of investor-directed portfolio services (IDPS).  **(a) Associate takeover relief**  The associate concept is fundamental to takeover regulation. It treats parcels of shares held by different persons as a single block where they are cooperating to control a company. This means that they cannot avoid the 20 percent takeover prohibition.  ASIC issued the class order following comments from takeover market participants on policy proposals released in November 2003.   The class order means that parties are not associates merely because under an agreement they have a right to buy or sell shares. Such a right does not of itself suggest that the parties are cooperating to control a company. Without the class order, one party would be treated as holding all of the securities held by the other party, not just those subject to the agreement.   The class order covers agreements like share sales, options and escrows.   The class order does not cover any other provision in the same agreement or in another agreement between the parties that gives rise to an association. An example is an agreement to remove or appoint directors of the company.   ASIC issued the class order because section 53 gives a very wide meaning to the language 'affairs of a body' used in the associate concept: see regulation 1.0.18. ASIC has amended Policy Statement 171 Anomalies and issues in the takeoverprovisions to explain the class order.  **(b) Investor-directed portfolio services (IDPS) takeover relief**  Class Order [CO 04/523] modifies section 609 so that the operator of an IDPS does not have a relevant interest in securities held through the IDPS. An IDPS is a service for acquiring and holding investments that generally involves custody arrangements and consolidated reporting to investors. The service is typically marketed as a master fund or wrap account.   ASIC granted the relief because operators have powers over securities held through the IDPS so limited that they should be treated like bare trustees.  The class order only applies where the operator can rely on IDPS relief in Class Order [02/294]. The class order does not apply to IDPS-like schemes because operators of these schemes generally have wider powers over securities held through the schemes.  **2.5 ASIC releases revised fee disclosure model** The Australian Securities and Investments Commission on 16 June 2004 released a revised version of the good practice model for fee disclosure in the product disclosure statements (PDS) of investment products.  'The new model improves access by investors to clear, concise, and comprehensive information about the fees and costs they will incur for an investment product', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston, said.  'The improvements have been made following stakeholder consumer testing of the initial version of the good practice model, and a further consultation process with industry stakeholders', Mr Johnston said.  ASIC released the initial version of the good practice model in August 2003 as part of “A model for fee disclosure in product disclosure statements for investment products: An ASIC Report.” The use of a good practice model has been adopted as best practice by several industry bodies for the Product Disclosure Statements prepared by their members.  The 2003 ASIC Report noted that the improvement of fee disclosure to consumers is an ongoing exercise and highlighted several areas where industry consensus would further aid consumer understanding. The improved version of the fee model reflects developments on some of those issues, including the disclosure of fees gross of tax and the separate disclosure of administration and investment management costs.  The revised version will form the new Appendix A to the 2003 ASIC Report. The main changes are:           a single 'see at a glance' table containing a reference to all fees and costs, both direct or indirect and stated in dollars or translated to dollar terms;           simpler terminology to aid consumer comprehension; and           clarification of ASIC's expectations for use of the model, including what should be included in the Important Additional Information section following the table.  ASIC intends to consumer test the model, in consultation with stakeholders.  The here discussed model is on [the ASIC website](http://www.asic.gov.au/" \t "_new).  **2.6 Superannuation calculator for consumers**  The Australian Securities and Investments Commission on 15 June 2004 launched one of Australia's most powerful free superannuation calculators and a comprehensive user Guide on its consumer website FIDO at [www.fido.asic.gov.au/supercalc](http://www.asic.gov.au/fido/fido.nsf/byheadline/Superannuation+calculator?openDocument" \t "_new) .  The calculator lets consumers see the long-term effects of:   * the most common fees charged by various funds * making extra contributions * receiving government co-contributions, if you are eligible * breaking or reducing contributions as a result of time out of the workforce * switching your investment strategy or changing funds.   **2.7 Extension of transition for managed discretionary account service providers under Policy Statement 179**  The Australian Securities and Investments Commission on 11 June 2004 announced that the transitional period under Class Order 04/194: Managed discretionary accounts [CO 04/194], accompanying ASIC's Policy Statement 179: Policy Statement 179 Managed discretionary account services, has been extended from 11 June 2004 to 10 December 2004. This class order provides relief from Chapter 5C, Chapter 6D and Part 7.9 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  The extension applies only to persons who were operating a managed discretionary account (MDA) on 11 March 2004 and hold an Australian financial services licence authorising them to deal in any underlying financial products and, where applicable, to provide advice and custodial or depository services.   These operators now have until no later than 11 December 2004 to make a self-certification of compliance and lodge a reliance notice with ASIC. They are still required to obtain an Australian financial services licence authorisation for MDA services by 11 December 2004.  Relief between now and 11 December 2004 is only available to operators who are taking all practical steps needed to comply with the conditions in CO 04/194. A reliance notice must be lodged as soon as practicable and in any case before 11 December 2004 for relief to apply.   'We are extending the existing transition period because we recognise that many licensees have concentrated their efforts since March this year on implementing the FSR regime', Ms Pamela McAlister, ASIC Deputy Executive Director, Financial Services Regulation, said.  'ASIC has given this additional time strictly on the basis that MDA operators will take immediate steps to fully comply with the requirements of the ASIC class order and policy. Any MDA operator who believes there are any impediments to complying fully with the requirements of the class order should consider applying to ASIC for further relief', she said.  Copies of PS 179, C0 04/194 and amending Class Order 04/612: Managed discretionary accounts - amendment, and Information Release 04-08: ASIC policy statement: managed discretionary account services are available on [the ASIC website](http://www.asic.gov.au" \t "_new).  **2.8 Soft dollar benefits need clear disclosure**  The Australian Securities and Investments Commission on 10 June 2004 released a research report on soft dollar benefits in the financial planning industry. The research explores the types of benefits that are offered to financial planning firms and how they are disclosed to clients.  Soft dollar benefits are benefits other than standard commission payments.  ASIC’s report reveals that a wide range of soft dollar benefits are being offered. Benefits to individual advisers include overseas trips, share options and cash bonuses for selling particular financial products. Benefits to financial planning firms include ‘fee rebates’, potentially worth millions of dollars each year to the larger firms. The report contains examples of both good and poor practice, which will provide guidance for industry about effective disclosure.  ‘If advisers accept benefits with the potential to influence their advice, the law requires they clearly disclose these conflicts of interest to clients’, said Mr Greg Tanzer, ASIC’s Executive Director of Consumer Protection and International.  A number of firms are commended for clearly explaining soft dollar benefits in consumer-friendly language. Other firms are leaving their clients in the dark about these incentives, with disclosure that is vague or, in extreme cases, non-existent.  ‘Consumers need to know if their adviser is in a position to give impartial advice as this may affect their decision about whether to act on the advice’, said Mr Tanzer.  ASIC’s research looked at industry practice in December 2003 to March 2004 and only involved firms that had transitioned under the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (FSRA).  ASIC will be requesting the firms where disclosure may have been inadequate to review their documents and make the necessary changes.  ASIC will also be considering a formal surveillance next financial year to ensure firms are fully disclosing soft dollar benefits.  On a parallel development, ASIC supports proposals by industry associations to reduce conflicts of interest and ban some forms of soft dollar benefits. The Investment and Financial Services Association and the Financial Planning Association released a draft code on ‘alternative remuneration’ in December 2003.  A copy of the ASIC report can be downloaded from [the ASIC website](http://www.asic.gov.au" \t "_new).  **2.9 ASIC releases new policy on foreign collective investment schemes**  The Australian Securities and Investments Commission on 31 May 2004 released Policy Statement 178: Foreign Collective Investment Schemes [PS 178], which replaces Policy Statement 65, ASIC's 1993 policy on Foreign Collective Investment Schemes.  The policy provides relief for both:           operators of collective investment schemes that are authorised in other jurisdictions (FCISs) and want to operate in Australia, and           responsible entities of Australian-registered schemes that want to invest scheme property in unregistered FCISs overseas.  The major differences between ASIC’s new policy and Policy Statement 65 that it replaces include:  1. ASIC’s process of approving foreign collective investment schemes making offers in Australia has been revised in light of ASIC's Principles for Cross Border Regulation (issued on 18 November 2002). ASIC applies these principles in recognising overseas regulatory regimes for foreign product issuers and service providers wishing to operate in Australia; and  2. ASIC’s relief for Australian registered schemes investing in certain foreign collective investment schemes has been continued without any 'sunset date'; and  3. Further guidance has been provided about how Australian registered schemes can invest in foreign collective schemes from other jurisdictions not currently recognised in ASIC’s class orders.  Policy Statement 175 is available on [the ASIC website](http://www.asic.gov.au/" \t "_new).  **2.10 Financial reports held to account**  The Australian Securities and Investments Commission announced on 26 May 2004 the focus of its 2004–05 financial reporting surveillance program into the level of compliance with accounting standards in financial reports.  **(a) Financial reports**  ASIC will continue to review the financial report of each publicly listed entity at least once every four years. In 2004–05, the second year of this systematic program, ASIC will review the financial reports of another 440 entities for compliance with accounting standards.  Of these, more than 300 entities will be chosen on a random basis as part of ASIC's four-year cycle of review, and about 100 will be selected for review based of a range of risk factors.  **(b) Qualified audit reports**  In addition, ASIC will review any entity that receives a qualified audit report because the independent auditor believes that the financial report does not fully comply with all accounting standards.  **(c) International accounting standards**  ASIC will also review the financial reports of all publicly listed companies for compliance with Australian Accounting Standard AASB 1047 'Disclosing the Impact of Adopting Australian Equivalents to International Financial Reporting Standards'.  For the 30 June 2004 reporting period, AASB 1047 requires the financial report to include an explanation of how the transition to international financial reporting standards is being managed and a narrative explanation of the key differences in accounting policy that will arise.  ASIC will focus particularly on companies where it believes that the introduction of international financial reporting standards will result in significant accounting policy changes and financial reporting impacts.   There are a number of issues which will be affected. For example, they include:           the recognition as an asset or liability of any surplus/deficit of a corporate-sponsored defined benefit superannuation plan           the potential write-downs of assets for companies with large identifiable intangibles, and           the requirement to use discounted cash flows in impairment testing of non-current assets.  ASIC expects that, with the disclosures under AASB 1047, key policy differences will be stated clearly and in enough detail to inform report users about the specific impact on accounting policies. For example, a list of the Standards or areas of difference by itself, without some indication of the nature of the impact of the change, (whether it will increase or decrease profit or net assets) will not be sufficient, even though quantification is not required.  **(d) Audit**  ASIC will continue with the program it implemented in 2003 and pursue audit issues that arise from the financial reporting surveillance program.   ASIC will build on this foundation and strengthen its auditor surveillance. Further details of its program will be announced in the near future.  **2.11 30 June 2004 deadline to seek extension of relief for non-transitioning managed investment schemes**  In 2000, ASIC allowed passively managed and closed managed investment schemes a longer transition period before they had to become managed investment schemes complying with Chapter 5C of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).  ASIC extended the transition period because the costs, burdens and investor protections associated with registration under Chapter 5C were not warranted for passively managed schemes (where the manager is only receiving income or undertaking other limited management activities) or for those fixed-term schemes that were closed to new investors.  This relief granted by ASIC expires on 30 June 2004 for:           non-mining primary production schemes           film schemes           other passively managed schemes           pre-1991 exempt trusts           other prescribed interest undertakings that have relief extending that regime.  If the relief is not extended before the expiry date, these schemes will be required to become registered managed investment schemes.  Applications for a further extension of the transition period, until 1 July 2010, for schemes that currently have relief must be made to ASIC before 30 June 2004.  ASIC will consider such applications on a case-by-case basis in line with ASIC Policy Statement 135: Managed investments: Transitional issues.  To qualify for a further extension, applicants must meet the following conditions:  1. Provide a written certificate from the management company (or applicant) that: (a) the relevant prescribed interest scheme is closed and:  (i) in the case of non-mining primary production schemes, film schemes and similar schemes, the scheme is still a fixed-term scheme; the approved deed for the scheme provides that the scheme is to be wound up at a time reflecting the underlying cycle of the business, and the scheme is passively managed (ii) in the case of pre-1991 exempt trusts, the scheme has less than 100 members;  (b) the prescribed interest scheme is viable on an ongoing basis, all payments have been made to investors in accordance with the prescribed interest deed, and there is no increase in business activity by the scheme since the granting of the first extension; (c) an unqualified audit report has been obtained in respect of the scheme; (d) the scheme is solvent; (e) there have been no material breaches of the approved deed; (f) the management company and/or trustee has complied with the terms and conditions of the existing interim relief; and (g) all members of the scheme have been notified in writing of the application to further extend the transition, and less than 50 holders or 10 per cent by value have objected to the extension.  2. Provide a letter from the approved trustee of the scheme, or a undertaking in support of the application, in which the trustee: (a) declares and certifies that it reasonably believes the further extension of the transition would be in the best interests of the prescribed interest holders, and is not contrary to the interests of the prescribed interest holders; (b) confirms that the scheme satisfies the criteria for an extension of the transitional period (as described above); and (c) certifies that the scheme or undertaking is solvent. | |
| **3. Recent ASX Developments** | |
| **3.1 Amendments to market rules**  A number of miscellaneous amendments to the ASX Market Rules were made effective 24 May 2004. Details are available in Circular 255/04 issued on 21 May 2004.  **3.2 Changes to responsible executive regime**  ASX is introducing changes to the responsible executive regime relating to qualification and ongoing training requirements. Details are contained in Circular 291/04 dated 10 June 2004.  **3.3 Transition to new rules**  Notifications to clients and changes to existing documentation required upon transition to ASX Market Rules, ACH Clearing Rules and ASTC Settlement Rules are set out in Circular 279/04 dated 7 June 2004.  **3.4 Disciplinary penalties**  ASX released a new guidance note explaining the process of imposing disciplinary penalties by ASX’s disciplinary tribunals. The guidance note is designed to assist market participants and their advisors to understand what factors are taken into account in imposing and setting penalties for breaches of ASX’s market rules. Details can be found in Circular 275/04 dated 3 June 2004.  **3.5 Proposed listing rule amendments - revision of JORC code**  ASX has issued an Exposure Draft outlining proposed Listing Rule amendments to be considered in conjunction with the draft revised JORC Code. The JORC Code is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves and sets out minimum standards, recommendations and guidelines for reporting on mining and exploration activities by ASX listed entities.  The rule amendments are proposed to take effect in August 2004. ASX welcomes comments on the proposed amendments, which should be submitted by Wednesday 30 June 2004. | |
| **4. Recent Takeovers Panel Developments** | |
| **4.1 Media Release: Takeovers Panel releases revised rules for proceedings**  On 18 June 2004 the Takeovers Panel issued revised Rules for Proceedings and has posted the revised Rules on its web site at [http://www.takeovers.gov.au](http://www.takeovers.gov.au/" \t "_new)  The Panel has amended the Rules by the insertion of a note in Rule 2 discussing the Panel's practice of allowing parties other than applicants to make preliminary statements to the Panel concerning whether the Panel should conduct a proceeding in response to an application.  The new Rules will apply in respect of all applications made on or after 1 July 2004 and all proceedings conducted by the Panel in relation to such applications. In relation to applications received before that date, and proceedings conducted in relation to those applications, the previous Rules will continue in force, unless the sitting Panel otherwise determines.  The original Rules for Proceedings will remain on the Panel's web site.  The public consultation draft and the accompanying explanatory statement will remain on the Panel's web site.  **4.2 Skywest Limited: Conclusion of Panel proceedings**  On 1 June 2004 the Panel announced that it has concluded the proceeding (the Proceeding) arising from the application (the Application) from Skywest Limited (Skywest) dated 7 May 2004 alleging unacceptable circumstances in relation to the off-market takeover bid by CaptiveVision Capital Limited (CVC) for all the fully paid ordinary shares in Skywest (the Bid). The Panel concluded the Proceeding without making a declaration of unacceptable circumstances or any order following the acceptance by the Panel of undertakings from CVC and its preparation of a replacement bidder’s statement.  **(a) Background**  **(i) Bid and Bidder’s Statement**  CVC sent a letter to Skywest dated 6 April 2004 advising of its intention to make a takeover bid for all the fully paid ordinary shares in Skywest. The letter was marked private and confidential and stated that CVC was finalising the precise terms of the Bid, and reserved CVC’s right not to proceed if certain conditions were not met. The letter also stated that CVC was still considering the conditions to be attached to the Bid, and set out a list of defeating conditions likely to be included in the Bid.  Following receipt of CVC’s letter, Skywest sent a letter to its shareholders dated 12 April 2004 informing them, among other things, of the receipt of a letter announcing an intention to make a takeover offer for all the issued shares in the company, and advising that the announcement was highly conditional. This letter did not name CVC or disclose the terms of the proposed bid.  On 15 April 2004, Skywest lodged a disclosure notice with ASIC and issued a media release disclosing summarised details of CVC’s letter, including the intention to make a takeover bid for all the fully paid ordinary shares in Skywest at an offer price of $0.20 cash per share and indicating that CVC was still finalising the precise terms of the Bid.  On 27 April 2004, CVC lodged a bidder’s statement with ASIC and sent a copy to Skywest (the Bidder’s Statement). The Bidder’s Statement set out the following terms of the Bid:           the consideration offered was $0.20 per fully paid ordinary share;          the bid class the subject of the Bid was 100% of the fully paid ordinary shares in Skywest on issue as at 8.00pm (Perth time) on 27 April 2004; and          several defeating conditions attaching to the Bid, including one that the identified conditions relating to CVC’s financing be satisfied.  The Bidder’s Statement also set out details regarding CVC’s source of funds for the Bid.  **(ii) Application**  Following an exchange of correspondence between Skywest and CVC regarding the Bidder’s Statement, Skywest applied to the Panel on 7 May 2004 for a declaration of unacceptable circumstances and orders in relation to the Bid. The Application alleged unacceptable circumstances arising from:           CVC’s definition of bid class securities the subject of the Bid, and sought orders that the bid class include Skywest shares issued upon conversion of convertible notes or the exercise of options during the offer period;          an alleged breach of sub-section 621(3) the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) in relation to the offer price under the Bid, and sought orders requiring CVC to increase the offer price to $0.22 per share (because it alleged that CVC had acquired convertible notes for $0.22 and exercised them within the four months prior to the Bid);          insufficient disclosure regarding the financing arrangements CVC had put in place for the Bid;          the inclusion of certain defeating conditions under the Bid on the basis that these conditions were not clearly set out in CVC’s letter of 6 April 2004;          the unclear nature of other defeating conditions under the Bid;          alleged deficiencies in the Bidder’s Statement in relation to CVC’s intentions, and its proposed course of action in relation to convertible securities previously issued by Skywest; and          CVC’s failure to register as a foreign company under Division 2 of Chapter 5B.2 of the Act.  **(iii) Discussions between the Parties**  Following receipt of the Application, the Panel decided to conduct the Proceeding and accepted an undertaking from CVC that it would not dispatch the Bidder’s Statement to Skywest shareholders without giving the Panel and Skywest two business days prior notice of its intention to do so.  The Panel encouraged the parties to continue to negotiate between themselves to resolve as many of the issues arising from the Application as possible. To assist them, the Panel issued its brief (the Brief) identifying the issues it regarded as important. The Brief allowed approximately a week for negotiations before submissions were required but allowed either party to bring that timetable forward by notice to each other and the Panel in the event that negotiations broke down.  These negotiations led to CVC offering to address some of Skywest’s concerns regarding the defeating conditions and disclosures in the Bidder’s Statement.  However, the parties were unable to resolve all of the issues under the Application. The Panel considered the unresolved issues.  **(b) The Panel’s decision**  **(i) Bid class**  The Panel concluded that CVC was entitled under the Act to limit the offer under the Bid to ordinary shares issued as at 27 April 2004, and that there was nothing in the circumstances of the Bid to fetter CVC’s right to define the bid class in the manner set out in the Bidder’s Statement.  **(ii) Offer price**  The Panel concluded that there had been no breach of sub-section 621(3) in relation to the Bid and that CVC was entitled to offer the price of $0.20 per share specified in the Bidder’s Statement.  **(iii) Financing arrangements**  Having regard to the Panel’s Guidance Note 14: Financing Arrangements, the Panel considered that the financing arrangements for the Bid as disclosed in the Bidder’s Statement were not adequate to give CVC reasonable grounds to expect that it had sufficient funding arrangements in place to satisfy full acceptance of the Bid if it became unconditional.  The Panel required CVC to take actions necessary to satisfy certain conditions still attached to its financing. The Panel also required CVC to supplement the disclosure in the Bidder’s Statement relating to the identity and the financial capacity of certain of its lenders.  **(iv) Defeating conditions and other disclosures**  The Panel accepted CVC’s offer to delete or revise a number of the defeating conditions under the Bid. The Panel required CVC to amend two of the defeating conditions in order to make their operation clearer to shareholders. The Panel required CVC to amend statements in the Bidder’s Statement relating to its intentions regarding the redemption of convertible notes issued by Skywest and the working capital requirements of Skywest.  **(v) Registration as a foreign company**  The Panel accepted CVC’s offer to include a statement in the Bidder’s Statement advising shareholders that CVC had not been registered as a foreign company under the Act.  **(c) Undertakings and supplementary bidder’s statement**  During the Proceeding, CVC sought and obtained a modification extending the statutory time limit under item 6 of sub-section 633(1) for dispatch of the Bidder’s Statement to shareholders.  The Panel accepted undertakings from CVC to finalise its financing arrangements and to prepare a supplementary bidder’s statement. CVC was required to provide the draft supplementary bidder’s statement to the Panel for its review. The Panel invited comments on the supplementary bidder’s statement from the other parties to the Proceeding.  The Panel has confirmed that CVC may lodge the supplementary bidder’s statement with ASIC and give a copy to Skywest, on the basis that it gives effect to CVC’s undertakings. In accepting the supplementary bidder’s statement as complying with CVC’s undertakings, the Panel is not endorsing it in any other way.  Following a request from the Panel, Skywest has granted its consent under ASIC Class Order 00/344 to allow CVC to dispatch a replacement bidder’s statement, incorporating all the changes set out in the supplementary bidder’s statement, to Skywest shareholders.  Given that CVC sought to address the issues raised in the Application, and on the basis of the undertakings provided by CVC and the revised disclosures made in the supplementary bidder’s statement, the Panel concluded the Proceeding on the basis that it was not necessary or appropriate to make a declaration and that no order was required. | |
| **5. Recent Corporate Law Decisions** | |
| **5.1 Taking of evidence by audiovisual facility: foreign witness** (By Sarah Turner, Mallesons Stephen Jaques)  ASIC v Rich [2004] NSWSC 467, Supreme Court of New South Wales, Austin J, 31 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc467.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc467.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  ASIC brought an application seeking orders for the taking of evidence in London, using one of two methods:           the evidence be taken by audiovisual link to counsel and Trial Judge (ASIC’s preferred method); or          the evidence be given viva voce before the Trial Judge as examiner, and counsel.  ASIC also invited the Court to issue a letter of request to a competent UK judicial authority for examination before an examiner (which if accepted would see a UK process served on the witnesses).  The Court dismissed ASIC’s application so far as it sought orders for the taking of evidence by audiovisual link and ordered the issue of a letter of request with the intended result that if the UK judicial authority responds and the two witnesses refuse to come to Australia, they will be required to attend a London examination by Australian counsel in the presence of the Trial Judge as examiner.  **(b) Facts**  ASIC bought proceedings under the civil penalty provisions (Part 9.4B of the [Corporations Act 2001 (Cwlth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)) seeking, in respect of Messrs Rich, Greaves and Silbermann (officers of the collapsed One.Tel Group):           a declaration they failed to discharge their duty of care as officers;          orders requiring them to pay some $92 million in compensation; and          orders disqualifying them from managing corporations.  The trial is expected to begin in August 2004.  Two of ASIC’s witnesses, Messrs Weston and Werner, both resident in England, have refused to attend Court in Sydney. ASIC brought the application outlined above.  The Senior Master of the Royal Courts of Justice had provisionally indicated he was prepared to appoint the Trial Judge as examiner of the English Court to enable him to compel witnesses to attend.  The defendants strenuously objected to the giving of evidence by audiovisual link.  **(c) Decision**  **(i) Evidence by Audiovisual Link**  If satisfied the audiovisual procedure would be inappropriate, the Court could either:           use its broad discretionary power to order a witness to give evidence from any place outside Australia, provided it was not “unfair to the party”; or          where there is substantial doubt as to whether the witnesses will attend at the overseas location it may be (and was in this instance) better for the Court to issue a letter of request for the examination to be before an examiner in London with directions for audiovisual transmission to the Court in Australia (the resulting transcript and record would have to be separately tendered).  The exercise of the Court’s discretion when selecting one of these alternatives is governed by the circumstances of each case. The Court took into account some judicial comments on the utility of audiovisual evidence, examining two lines of cases, one supportive and the other more cautious. The recurring themes were comparative cost, time zones, appropriateness for centrally important evidence, assessment of credit of a witness, use of documents in cross-examination, time lag asking and answering questions and the difficulties conducting lengthy cross-examinations.  The Court strongly encouraged the use of current-generation electronic aids (provided they are cost effective and their reliability adequately established) - even where the product delivered is not quite as good as the traditional alternative. However, the Court recognised exceptional cases where there are good grounds for using viva voce evidence instead.  **(ii) Letter of Request**  An order can be made to issue a letter of request to take the evidence of a witness outside Australia if it is in the interests of justice to do so.  When weighing the interests of justice the Court focused on three factors:           the willingness of the witnesses to come to Australia to give evidence;          the materiality of the evidence to any issue to be tried; and          whether justice would be better served by granting or refusing the order.  The Court agreed the letter of request should include a very precise request for the production of documents and that ASIC had to make appropriate undertakings as to expenses.  **(iii) Conclusion**  The factors in this case weighted against the use of audiovisual evidence and in favour of a letter of request.  **5.2** **Requisitioning of an extraordinary general meeting by members** (By Jon Skene, Clayton Utz, Sydney)  National Roads and Motorists' Association Limited v Parkin [2004]  NSWCA 153, 25 May, New South Wales Court of Appeal, Santow, Ipp and Bryson JJA, 25 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswca153.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswca153.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Decision**  The New South Wales Court of Appeal unanimously dismissed an appeal by National Roads and Motorists' Association Limited ("NRMA") against the judgment of Campbell J in which his Honour upheld the validity of a requisition for a general meeting signed by 4,284 members of NRMA and served on the company under section 249D of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  **(b) Facts**  An enterprise agreement covering a number of NRMA employees (patrol officers) had expired. Negotiations between NRMA and the union representing those employees (the AMWU) regarding new conditions were not successful. The AMWU and the employees concerned sought to put their case to a general meeting of the NRMA. They solicited the signatures of 4,284 members to sign a notice under section 249D of the Corporations Act calling on the directors to call a general meeting of the NRMA to consider two resolutions to insert additional objects in the constitution of the NRMA. The cost to the NRMA of calling the extraordinary general meeting was stated to be in the order of $3.75 million.  The proposed new Objects to be inserted into the constitution of the NRMA were:  "(E) To ensure that Patrol Officers employed to provide road side assistance to the membership of the NRMA, are not disadvantaged in the provision of such service having their current working conditions undermined." (F) To ensure that fair and equitable remuneration and working conditions are available to all employees, further ensuring that such a package does not discriminate against existing Option 3 Patrol Officers."  Before Campbell J, at first instance, NRMA sought a declaration that, notwithstanding the requisition, the directors of NRMA were not required to call and hold the general meeting on the following grounds:           the proposed resolutions would be void for uncertainty on the test set down in Upper Hunter County District Council v Australian Chilling and Freezing Limited (1968) 118 CLR 429;          the proposed resolutions would be ambiguous and hence void on the test set out in Cotman v Brougham [1918] AC 514;          the proposed resolutions would be in conflict with an existing object of the NRMA stated in its constitution; and          the general meeting was being requisitioned for an improper purpose.  Campbell J rejected each of these grounds, but NRMA appealed only in relation to the first and second grounds.  In relation to the fourth ground, it is noteworthy that, in considering the motive's of the AMWU and the employees concerned in requisitioning the meeting, Campbell J upheld the test of Palmer J in NRMA Limited v Scandrett (2002) 171 FLR 232 at 243, who held that:  "If the purpose for which the requisition is made is truly to have a meeting of members convened in order to consider and, if thought fit, to pass the resolution, then it does not matter that the requisitionist is motivated to pursue that purpose by ill-will or self interest."  Campbell J failed to find that the defendant had submitted the resolution without really wanting it to be put and passed. This suggests that a plaintiff will have a difficult task in seeking to have a requisition set aside on grounds that an ulterior motive of the requisitionists means that the requisition is for an improper purpose. To do so, the plaintiff would need to prove that, regardless of any ulterior motive, the requisitionist does not have a genuine desire for the resolutions to be considered by members and, if they think fit, passed.  **(c) Decision**  On appeal, NRMA's primary argument was that the objects and powers of a company must be defined in plain and unambiguous terms. NRMA sought to apply the test laid down in Cotman v Brougham that the Memorandum of Association (which was required under the legislation in force at the time to specify the objects of the company) "...must delimit and identify the objects in such a plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined."  While the Court of Appeal was prepared to accept that the proposed resolutions would insert ambiguous clauses into the constitution, it held that Cotman v Brougham had been decided at a time when the doctrine of ultra vires applied to corporations and that this was the basic reason for the approach expressed in that case. The abolition of the doctrine of ultra vires by section 125 of the Corporations Act meant that Cotman v Brougham was no longer applicable. As a result, the resolutions needed only to pass the test for uncertainty set down in Upper Hunter, namely that the clause be not "...so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention."  NRMA's second argument was that while the rule in Cotman v Brougham was expressed to specifically apply only to the objects stated in the constitution of a company, a special rule on similar terms should also be applicable to the determination of the powers of a company. It was submitted that if the powers of a company were not defined and identified with clarity and without ambiguity then there would be serious problems for directors, other officers and employees of the company who should be able to ascertain from the constitution what they can or cannot do. It was argued that the passing of the ambiguous resolutions could potentially lead to increased litigation, inconvenience and expense for the NRMA.  The Court, however, saw such a special rule as being unduly restrictive and preferred the approach that difficulties and ambiguities in the proposed resolutions should be dealt with by the members of the NRMA in general meeting by either rejecting the resolutions or altering them in an appropriate way. The need for any such rule requiring a clear specification of the powers of a company had, the Court said, fallen away as a result of section 124 (a company has the legal capacity of an individual) and section 125 (abolition of ultra vires) of the Corporations Act.  NRMA's alternative argument was that, if the correct test to be applied is that in Upper Hunter, then the proposed resolutions would not meet this test and were hence void for uncertainty. The Court of Appeal, however, upheld the decision of Campbell J that, while parts of the resolutions might be ambiguous and it would not be an easy task to identify what was meant by certain phrases, it would still be reasonably possible for a Court to determine the meaning of those phrases. As a result, the resolutions were found to be not void for uncertainty.  Two additional points of note were made in the decision.  When construing Articles of Association, evidence of surrounding circumstances is not admissible except for the limited purpose of identifying persons, places or other subject matter referred to in the articles.  Santow J noted that, if the special resolutions were passed, the Court's findings would not preclude a Court from later considering the inserted clauses in light of the circumstances applying in an actual dispute that involved those clauses, and concluding that they were indeed void for uncertainty.  **(d) Comment**  The NRMA has long been a fertile source of decisions regarding corporate governance and the rights of shareholders. This decision again highlights problems in the Corporations Act provisions on shareholder participation as applied to large public companies. With parliamentary debate on the [CLERP 9 Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) likely to include possible amendments regarding shareholder rights to propose resolutions and requisition meetings, NRMA v Parkin usefully draws attention to two relevant issues arising under the law as it currently stands.  1.      In this case the Court was required to consider arguments on the potential invalidity of proposed constitutional clauses. Such clauses were undoubtedly drafted for insertion into the constitution only because of the principle expressed in NRMA v Parker (1986) 11 ACLR 1, which held that members are prevented from passing resolutions (and hence prevented from proposing resolutions) with regards to the management of the company where the constitution vests management of the company exclusively in the hands of the board of directors (as the constitutions of NRMA and most listed public companies do). In order to take advantage of sections 249N and 249O of the Corporations Act (i.e. the right of 100 members to put and have the company consider a resolution proposed by them), members are required to attempt to express their views by means of a special resolution to amend the constitution. This is both an inappropriate approach to company constitutions and a convoluted approach to shareholder participation. 2.      The threshold for groups of members to be able to requisition an extraordinary general meeting is arguably too low, given the potential expense and disruption caused to the company. The case highlights the difficulties for a company in responding to a requisition by seeking to claim either that an extraordinary general meeting has been requisitioned for an improper purpose due to an ulterior motive on the part of the requisitionists, or that the proposed amendments to the constitution should be struck down on grounds of uncertainty.  **5.3 Do the Courts have power to overrule ASX's interpretation of its Listing Rules?** (By Brendan Groves and Soruban Rajakulendran, Clayton Utz, Melbourne)  Bateman v Newhaven Park Stud Ltd [2004] NSWSC 392, New South Wales Supreme Court, Barrett J, 7 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc392.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc392.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Court held that the obligation to comply with the Listing Rules should be seen as "an obligation to comply with such of the listing requirements as the Stock Exchange in its discretion has required the company to comply with". In relation to selective buy-backs, the Court held that lodgement under section 257E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) is only required where the buy-back agreement resulted from an offer and acceptance. The Court held that in this case the agreement to buy-back shares came about by mutual agreement and therefore lodgement under section 257E is not required.  **(b) Facts**  Newhaven Park Stud Limited ("Newhaven") is a company listed on ASX. It proposed a selective buy-back from Kelly, a shareholder and also proposed to sell a substantial asset to the same shareholder.  Approval of Newhaven shareholders was required for the transaction under ASX Listing Rule ("LR") 10.1. In the case of such approval, LR 14.11 requires that a statement be included in the notice of meeting that neither "any party to the transaction" nor an "associate" of any such person is to vote on the resolution. Newhaven did outline potential buyers and associates who were not permitted to vote, but Bateman, a shareholder, asserted that Newhaven itself (and therefore its associates) should also be precluded from voting because it is a party to the transaction.  Bateman had applied under section 793C and 1101B(1)(d) of the Corporations Act for injunctive relief against Newhaven to prevent a general meeting going ahead. Section 793C gives standing to a shareholder to apply to the Court if the company fails to comply with or enforce the ASX Listing Rules and the shareholder is aggrieved by the failure. Section 1101B(1)(d) allows the Court to make such orders as it sees fit if it appears to the Court that the company did contravene the Listing Rules, and the applicant is aggrieved by the contravention.  Bateman also complained that Newhaven had not complied with section 257E, in that it had not lodged offer documents with ASIC before the buy-back agreement was entered into. The Buy-back agreement was entered into in December 2003, but Newhaven had only lodged the agreement with ASIC in April 2004, prior to the general meeting scheduled for May.  **(c) Decision**  **(i) Listing Rule 10.1 - the company is not excluded from voting**  Barrett J viewed the contention that Newhaven should be precluded from voting because it was a party to the transaction as "an uncompromisingly literal approach" which was "at odds with the nature and intent of the listing rules". He added that, even if the literal construction were to be accepted, ASX made it clear that it would not pursue such a technical breach.  Barrett J's judgment follows Brinsden J in Harman v Energy Research Group Australia Ltd (1985) 9 ACLR 897 in holding that the obligation to comply with the Listing Rules should be seen as "an obligation to comply with such of the listing requirements as the Stock Exchange in its discretion has required the company to comply with". As ASX had not required Newhaven to comply with the disgruntled shareholder's interpretation of LR 14.11, Barrett J determined that there was no basis for relief.  **(ii) Selective buy-backs and lodgement**  Barrett J held that section 257E of the Corporations Act only applies where the buy-back agreement has resulted from an offer and acceptance. Barrett J said that there was no clear offer or acceptance in this case and the recitals in the agreement did not refer to anyone having made an offer to anyone else. He considered that this was a case where there was mutual agreement rather than offer and acceptance.  In obiter, he went on to state that even if a section 257E lodgement was required, the fact that Newhaven had lodged the document under section 257F meant that there was adequate disclosure to ASIC and that this would be a powerful force in relation to the balance of convenience, were it necessary for the matter to be considered.  **(iii) General**  Barrett J held that Bateman had not shown that there was a serious question to be tried on any of the matters put forward. The interlocutory injunction was not successful and the general meeting was permitted to proceed as scheduled.  **(d) Comment - the Court's reliance on ASX's interpretation of the Listing Rules**  The introduction to the ASX Listing Rules states that ASX has discretion whether to require compliance with the Listing Rules, and that in exercising its discretion, it takes into account the principles on which the Listing Rules are based. LR 19.2 provides that an entity must comply with the Listing Rules as interpreted:           in accordance with their spirit, intention and purpose;          by looking beyond form to substance; and          in a way that best promotes the principles on which the Listing Rules are based.  Many of those principles focus on access to information and protection of shareholders' interests, including ownership interests and the right to vote. In practice, ASX's discretion to enforce compliance with the Listing Rules is not absolute, but, rather, is limited by these principles.  Further, a listed entity and its shareholders have available sections 793C and 1101B as an avenue of appeal against a decision of ASX with respect to its interpretation and enforcement of the Listing Rules.  In one sense Barrett J's decision is unremarkable given his characterisation of the applicant's claim as "uncompromisingly literal". On the other hand, the implications of Barrett J's findings on the scope of the Listing Rules are potentially significant.  The judgment is predicated upon ASX's very wide discretion in the way it enforces the Listing Rules. It indicates an unwillingness to "second-guess" the exercise of that discretion.  The authorities cited in support of that position date back to the 1980s. In recent years, however, the contractual nature of the Listing Rules has been increasingly supplemented by a quasi-legislative function, through incorporation into the Corporations Act (most notably in the area of continuous disclosure). At time of writing, this process was manifesting itself in CLERP 9's proposed imposition of personal liability on individuals involved in contraventions of the continuous disclosure rules and the proposal to allow ASIC to impose "infringement notices" for such contraventions.  Given this growing legislative function, some might suggest that it is not consistent with the doctrine of the separation of powers to accord too much judicial weight to the drafter's interpretation and (more significantly) application of the Listing Rules. On this argument, the judiciary should critically evaluate and be prepared to overrule decisions of ASX as to the interpretation and enforcement of the Listing Rules.  At a more practical level, there should be an effective means by which an aggrieved shareholder can apply to a Court or another forum to appeal a decision of ASX relating to the exercise of its discretion in enforcing the Listing Rules. This process is contemplated by sections 793C and 1101B of the Corporations Act, but on Barrett J's interpretation, a decision made by ASX is definitive, arguably undermining the Corporations Act avenue of appeal.  **5.4 Enforcing a scheme of arrangement against an acquiring company** (By Carla Alviano and Niti Gupta, Blake Dawson Waldron)  Toal v Aquarius Platinum Limited [2004] FCA 550, Federal Court of Australia, French J, 4 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca550.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca550.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case deals with a peculiar situation in which a company, Aquarius Platinum (Australia) Limited ("Aquarius Australia"), had wrongly classified two of its shareholders, the Toals, as residing outside the United Kingdom in its register, thus bringing them outside the provisions of a scheme of arrangement. Under the scheme, all of the shares of Aquarius Australia were acquired by Aquarius Platinum Limited ("Aquarius Bermuda"), in consideration for each Aquarius Australia shareholder being given an equivalent number of Aquarius Bermuda shares. This did not apply to those shareholders residing outside Australia, with the exception of certain countries including the United Kingdom. As a result, the Toals missed out on their parcel of shares in Aquarius Bermuda, and received in its stead, a cheque for the proceeds of shares previously held by them in Aquarius Australia.  The Toals were unhappy with this arrangement and claimed specific performance by Aquarius Bermuda of the obligations imposed on it under two ancillary contractual documents to the scheme of arrangement, and damages to cover lost dividends. The Toals were unable to enforce the terms of the scheme of arrangement as against Aquarius Bermuda as a scheme does not of itself bind an acquiring company.  The claim for specific performance consisted of Aquarius Bermuda issuing to the Toals the 18,000 shares to which they were entitled under the scheme. The court held that specific performance was available on the basis of public policy. Given that the Toals' obligation to accept an exchange or sale of their shares only arose from a scheme of arrangement, whose approval relied on the execution of the ancillary contractual documents, an order for specific performance would serve to recognise the importance of those documents. The court held that a shareholder whose rights were subject to appropriation on conditions laid out in a scheme should not have to bear the burden of a failure of the proponents of the scheme to carry out its provisions. The Toals were also granted damages in the amount of the dividends that they would have received on the parcel of shares to which they were entitled.  **(b) Facts**  **(i) The scheme of arrangement**  Under a Scheme of Arrangement approved by the Supreme Court of Western Australia in 1999, all of the shares in Aquarius Australia were acquired by Aquarius Bermuda. The scheme provided that each Aquarius Australia shareholder was to be given one Aquarius Bermuda share for each share held in Aquarius Australia. In the case of a shareholder whose address was outside Australia in the Register of Aquarius Australia, the shares in Aquarius Bermuda to which it would have become entitled were to be issued to a nominee appointed by Aquarius Australia who would sell the shares and pay the proceeds to the foreign shareholder. This did not apply to shareholders living in certain countries, including those resident in the United Kingdom.  The scheme of arrangement also consisted of two ancillary documents:           an Implementation Agreement, evidencing the agreement of Aquarius Australia and Aquarius Bermuda, to implement the terms of the scheme; and          a Deed Poll made by Aquarius Bermuda in favour of Aquarius Australia shareholders and option-holders pursuant to which it covenanted among other things, to carry out the obligations contemplated of it by the scheme,  (collectively referred to as the "Scheme Documents").  **(ii) The Applicants' claim**  The Applicants, Michael and Gary Toal, were shareholders in Aquarius Australia who had mistakenly been listed as living in Ireland instead of Northern Island (which is part of the United Kingdom). Consequently, their parcel of 18,000 shares in Aquarius Australia was converted into 18,000 Aquarius Bermuda shares and sold by Hartley Poynton Ltd ("Nominee"). The Toals were given a cheque for $28,037.88 representing the net proceeds from the sale.  The Applicants wrote to the Nominee, requesting an explanation as to why they had not received shares in Aquarius Bermuda. A representative of the Nominee told them that, as they lived in Ireland, the foreign ownership provisions of the Scheme provided for the sale of their shares. The Toals explained that they lived in Northern Ireland, thus bringing them outside the foreign ownership provisions. Whilst this was eventually conceded by Aquarius Bermuda, correspondence between the Toals and various parties over the following months, showed that Aquarius Bermuda was reluctant to do anything to rectify the situation as they believed they were in compliance with the strict terms of the scheme of arrangement.  The Toals instituted proceedings against Aquarius Bermuda in October 2002, later joining Aquarius Australia as a respondent in 2003. Among other things, the Toals sought an order for specific performance of the obligations under the Scheme Documents through the issue of 18,000 shares and damages in lieu of dividends that would otherwise have been received by the Toals. Throughout this time, the Toals did not cash the cheque given to them by the Nominee.  **(c) Decision**  **(i) The legal effect of the scheme documents**  The statutory origin of the rights and liabilities created under an approved scheme of arrangement does not automatically bind any party other than the company approving the scheme and its members. Thus, where a merger is proposed under which shareholders are to receive shares in an acquiring company in lieu of their shares in the target company, the scheme will not of itself bind the acquiring company. This provides a rationale for the existence of the Scheme Documents, whose execution provided Aquarius Australia shareholders with enforceable rights against each of Aquarius Bermuda and Aquarius Australia.  **(ii) The breaches and the remedies**  The court held that the companies had clearly breached the terms of the scheme of arrangement by failing to issue shares to the Toals, failing to have regard to the country of residence as disclosed by them and failing to maintain the register in an accurate form. As Aquarius Bermuda had, at all times, the power to issue the shares to the Toals, its failure to issue those shares amounted to a breach by it of the Scheme Documents.  The court decided that there would be little point in directing remedies as against Aquarius Australia, as rectification of its register would not serve to rectify the breaches and an award of damages would be academic given that the company was now a wholly owned subsidiary of Aquarius Bermuda.  As the scheme of arrangement was not in itself binding as against Aquarius Bermuda, the remedies directed against it would have to arise as a consequence of its breaches of the Scheme Documents. The first claim was in respect of specific performance of these documents. Aquarius Bermuda argued that damages was a sufficient remedy as the case was analogous to that of a purchaser of shares under contract. The court distinguished this case on the basis that the Toals' obligation to accept the exchange of shares only arose as a result of the court approving a scheme of arrangement. This approval was in effect contingent upon the parties executing the Scheme Documents, as the court would have had regard to the interests of shareholders and the existence of enforceable entitlements in their favour, in determining whether to approve the scheme. In making an order for specific performance, the court felt it would be recognising and upholding the importance of the ancillary contractual obligations relied upon in securing judicial approval of the scheme. Public policy dictated that shareholders subject to appropriation of their rights under a scheme should not have to bear the burden of a failure by the scheme's proponents to properly implement its terms.  In addition to specific performance, the Toals were entitled to recover the loss suffered as a result of the failure by Aquarius Bermuda to issue them with 18,000 shares at the appropriate time. This loss was represented by the dividends they would have been entitled to receive.  **5.5 The relevance of mistake in the description of documents in a notice to produce documents to ASIC** (by Ben Nguyen, Blake Dawson Waldron)  Integrated Financial Group Pty Ltd v Australian Securities and Investments Commission [2004] WASC 75, Supreme Court of Western Australia, Roberts-Smith J, 28 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/april/2004wasc75.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/april/2004wasc75.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  ASIC issued a notice to produce a certain backup tape in the course of an investigation. The notice was issued to the recipient by mistake – the tape was believed to be a backup tape of the entity being investigated. It was in fact a back up tape of IFG. However it did contain relevant information of the entity being investigated. Roberts-Smith J held that the notice was valid despite any mistake and ASIC was entitled to retain the tape and use it in its investigations.  **(b) Background**  ASIC was conducting an investigation into Integrated Financial Group Pty Ltd ("IFG"), the Strategic Superannuation Fund (the "Fund") and related entities. A computer backup tape was handed to Deloitte Management Pty Ltd ("Deloittes") under the mistaken belief that it was a backup of the records of the Fund. It in fact was a backup tape of IFG, although it did contain some records of the Fund.  ASIC issued a notice under section 33 of the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (the "Act") to Deloittes specifically requiring "the backup tape of the records of [the Fund]" (the "Notice"). In response to the Notice, Deloittes handed the tape over to ASIC. IFG wanted the tape back and ASIC refused to give it back.  **(c) The applications**  IFG sought an interlocutory injunction, ordering ASIC to return the back up tape and all copies of it and restraining ASIC from disclosing or using the information contained on the tape. ASIC in turn sought orders that IFG's action be dismissed on the basis that ASIC has a good defence on the merits or alternatively that IFG's statement of claim disclosed no reasonable cause of action.  **(d) The principles**  Although failure to comply with a section 33 notice is an offence, that does not mean the provision is to be read restrictively. Roberts-Smith J noted that regard must be had to the objects and purpose of the legislation. Part 3 of the Act contemplates a process of making inquiries, identifying what documents are or may be available bearing upon the investigation, obtaining production of books and analysing them - investigators will not necessarily know in any detail or with great particularity, precisely what documents are available nor what the content of them is.  To be a valid notice to produce documents, the notice must identify with sufficient clarity the documents which are required to be produced and it must show the person to whom it is addressed that any document which is required is one whose production ASIC is entitled to require.  There is no reason to apply a strict or punctilious standard to a specification of documents to be produced. It is necessary to ask whether the specification is comprehensible or clear so that it can be reasonably be complied with.  **(e) The reasons**  Roberts-Smith J held that section 33 of the Act is not concerned with property rights in, nor legal entitlement to, possession of books. It does not matter that a person who has possession of a document may not have a legal right to possession.  He also noted that section 33 is not concerned with the legal relationships between the person who has possession of the book, the person with the proprietary or other legal interest in it and ASIC. The section is concerned with the ability of the person to whom the notice is addressed to produce the books when required to do so.  The backup tape was in the possession of Deloittes. That being so, it was to that extent susceptible to an order for production to ASIC. Roberts-Smith J held that it does not matter whether Deloittes' possession of it was lawful or the result of mistake.  There are two fundamental questions:           did the Notice call for the production of the backup tape; and          if the Notice did not call for the production of the tape, can ASIC nonetheless retain it and use it in the investigation.  The Notice, and the sufficiency of the requirement in it, is to be determined in light of the circumstances in which it is given. The question is whether the words are sufficiently clear to show what is required. The principle does not require the words of the description to be divorced from the circumstances in which the notice was issued. Those circumstances may include the common knowledge and understanding of ASIC and the recipient of the Notice. The requirement for clarity is not to be applied in a precious or hypercritical fashion.  In this case, it was Deloittes who described the backup tape as "the backup tape of the records of [the Fund]". They described it that way because that is what they thought it was. The Notice gave the description which Deloittes had given ASIC. Both Deloittes and ASIC knew what tape was being referred to because of the communication between them. They were both referring to the same item. A tape of that description was one, the production of which, could lawfully be required by ASIC under section 33 of the Act.  As it happened the tape was a backup tape of the records of IFG, but which included relevant records of the Fund. His Honour said that it was beyond doubt that had the Notice described the tape in that way, the tape would have been one of which ASIC could lawfully have required production. The necessary nexus or connection for that to be a valid exercise of power was the fact that the tape contained relevant financial records of the Fund; that it contained primarily records of IFG would not have taken it outside the scope of the proper exercise of the power.  Roberts-Smith J held that the production of the tape did properly respond to the Notice. Deloittes was obliged to produce the tape to ASIC and ASIC was lawfully entitled to receive and retain it and deal with it in accordance with section 37 of the Act.  His Honour rejected IFG's submission that ASIC should not be entitled to retain possession of the tape because IFG as lawful owner had not been afforded an opportunity to contest the Notice. He noted that IFG had effectively been afforded that opportunity through these proceedings and that there is nothing in the Act which requires the giving of such an opportunity.  His Honour considered that ASIC had demonstrated that it had a good and complete defence to IFG's claims and awarded summary judgment to ASIC and dismissed IFG's application for an interlocutory injunction.  **5.6 Terminating the winding up of a company subject to the execution of a deed of company arrangement** (By Sonia McMillan, Phillips Fox)  Re Nardell Coal Corporation Pty Limited [2004] NSWSC 281, Supreme Court of New South Wales, Austin J, 7 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc281.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc281.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Nardell Coal Corporation Pty Ltd (‘Nardell’) and its administrators under a deed of company arrangement, sought directions or orders from the Supreme Court of New South Wales to establish whether or not the execution of a deed of company arrangement automatically terminated the winding up of Nardell, and to clarify the liquidators duties accordingly.  The Court held that in the circumstances, whereby a liquidator in a creditors voluntary winding up under s 446A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (‘the Act’) initiates a further voluntary administration under s 436B, which leads to the execution of a deed of company arrangement, the winding up is only suspended, and not automatically terminated. While the winding up may be terminated by the Court at any time under s 482, in this case, the Court adjourned the application of the plaintiffs to terminate the winding up of Nardell, awaiting additional evidence relating to the tax implications of such an order.  **(b) The application**  The application made to the Court sought to ascertain whether the liquidation of Nardell had or ought to be terminated. The application sought the following orders, expressed in the alternative.  First, the application sought a direction under ss 447D and 479(3) of the Act that the winding up of Nardell automatically terminated when its creditors resolved that Nardell enter into a certain deed of company arrangement (‘the Deed’), or when Nardell actually entered into the Deed. Secondly, in the alternative, the application sought an order that the winding up be terminated under s 482 of the Act or (in the further alternative) that the winding up of Nardell be stayed either indefinitely or until determination of the Deed.  Finally, in the alternative to all of the other orders, the application sought directions under ss 447D and 479(3) in respect of whether, upon determination of the Deed, it compelled the administrators of the Deed to return the control of Nardell to its directors, or to retain control as the liquidators of the company.  **(c) Facts**  Nardell was a coal mining company which, prior to its liquidation, operated a coal mine at Ravensworth in the Hunter Valley. It is wholly owned by Nardell Holdings Pty Ltd (‘Nardell Holdings’), which also owns part of the assets of the mine.  In February 2003, Mr Turner and Mr Watson were appointed joint voluntary administrators of Nardell by its directors. In April 2003, the administrators circulated a report to the creditors of Nardell. This report stated that there were no substantial causes of action available in a liquidation and that a liquidation would have no sources of funding to pursue further investigation. It outlined a proposal by Nardell Holdings for a deed of company arrangement. This proposal was rejected and Nardell went into liquidation. Mr Turner and Mr Watson were appointed joint liquidators.  A revised proposal for a deed of company arrangement was presented to creditors in August 2003. The creditors supported the proposal, and on this basis Mr Turner and Mr Watson sought and were granted leave to appoint themselves voluntary administrators, so that a meeting of creditors could be convened and the deed of company arrangement entered into.  In the meantime, the board of Nardell Holdings and the receivers of Nardell agreed to sell Nardell to a company called Newpac Pty Ltd. The Minister for Mineral Resources indicated that he would provide the necessary ministerial consents to the assignment of various leases provided that a deed of company arrangement was considered by the unsecured creditors of Nardell.  In October 2003, the Deed and a related deed were entered into. The sale of Nardell to Newpac Pty Ltd was completed on 1 December 2003, at which time the directors of Nardell informed Mr Turner and Mr Watson that they did not intend the company to trade and would seek to deregister it in due course.  **(d) Submissions made by Mr Turner and Mr Watson**  It was submitted by Mr Turner and Mr Watson that once proofs of debt and distributions under the Deed are made, they will have no other functions as deed administrators. It was contended that there is no reason, in the public interest or otherwise, for not returning Nardell to its directors, given that the intention of the directors is not to trade and probably to seek deregistration of the company.  This submission was consistent with the terms of the Deed, which relevantly at clause 10.1 provides that once distributions have been made to creditors, a notice is to be issued to ASIC and ‘the execution of this notice terminates this deed and the control and stewardship of the Company returns to its directors’.  Alternatively, Mr Turner and Mr Watson submitted that if they remained liquidators of Nardell, post discharging their duties as administrators of the Deed, they would be obliged to perform unnecessary and costly duties in that office, and duties inconsistent with their roles as deed administrators.  **(e) Automatic termination of the winding up of Nardell**  Austin J held that a resolution by creditors to enter into a deed of company arrangement or actual entry into a deed of company arrangement does not of itself terminate a pre-existing voluntary winding up.  Prior to obtaining leave to appoint themselves administrators, Mr Turner and Mr Watson were in office as liquidators under a creditors' voluntary winding up. The winding up arose when the creditors rejected the first deed proposal and resolved that Nardell be wound up. Nardell was in a creditors' voluntary winding up at the time of the resolution of creditors that Nardell enter into the Deed. Austin J stated that in accordance with s 437C, the powers of a liquidator in a creditors' voluntary winding up are suspended once the liquidator has appointed an administrator under s 436B, but the liquidator remains in office. In addition, upon the termination of the deed of company arrangement, any limitation upon the pre-existing liquidator's powers imposed by the terms of the deed comes to an end, and the pre-existing liquidation then continues.  Austin J stated that the execution of a deed of company arrangement does not automatically terminate a pre-existing court-ordered winding up, and similarly, a process of voluntary administration leading to the execution of a deed of company arrangement does not automatically terminate a creditors' voluntary winding up.  His Honour further stated that the legislative policy underlying Part 5.3A of the Act does not prefer automatic termination to termination by the court under s 482. As such, while the winding up of Nardell survived the execution of the Deed, the question before the Court was whether the Court should terminate it (or order that it be stayed indefinitely) under s 482.  **(f) Court-ordered termination of winding up**  In considering making an order to terminate the winding up of Nardell, Austin J stated that relevant factors to be considered include the interests of creditors, the liquidator, contributories, and the public interest.  On the facts, Austin J stated that the Deed extinguished all debts of the existing creditors, including the residual debts of secured creditors and the inter-corporate debt owing to Nardell Holdings. As such, Austin J held that there was no obstacle to termination, except the identification of usable tax losses (if any) arising from such an order.  His Honour stated that if there are tax losses that create a value in the corporate structure of Nardell after termination of the winding up, then the resulting benefit will be enjoyed by Nardell Holdings, either because it will be able to use the tax losses on a group basis or because, if the corporate structure is sold, it will benefit from the realisation as Nardell's shareholder. Either way, his Honour held that it is relevant for the Court to know the position, and sufficiently important that the Court's decision as to termination of the winding up should be deferred until the position is established by evidence.  Austin J adjourned the application to terminate the winding up of Nardell pending additional evidence from the plaintiffs indicating whether any usable tax losses have been identified and if so, whether there is any proposal to use them.  **5.7 Legal professional privilege attaching to documents prepared by third parties** (By Lisa Bonifant, Mallesons Stephen Jaques)  Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122, Federal Court of Australia, Full Court, Finn, Merkel & Stone JJ, 12 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fcafc122.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fcafc122.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  A document prepared by a third party is protected by legal professional privilege if it is prepared for the dominant purpose of obtaining legal advice whether or not:           the third party is an agent of the (solicitor’s) client; or          litigation is on foot or contemplated; or          the document or its content is provided or communicated to the solicitor directly by the third party, or through the (solicitor’s) client.  Although it is established that a communication between a third party and a solicitor may be privileged if the third party is the agent of the client, there was still contention about whether privilege would attach if the third party was not the client’s agent. As was acknowledged by Finn J, it is surprising that doubt still surrounded such a significant issue. In recognising that legal professional privilege may apply in such circumstances, the Court acknowledged the complexity of present day commerce and the increasing necessity for clients to rely on expert advice (see Stone J at paragraph 102).  The key to bringing documents within the ambit of the principle is to establish that they were created for the client’s dominant purpose of obtaining legal advice. It is important, therefore, to ensure that experts are retained by or on behalf of the client and that the expert’s retainer clearly identifies the significance of the opinion or report in the context of the legal advice (to be) sought by the client. Clients should be cautioned that exercising discretion in providing the opinion or report to the solicitor (for example, by editing or modifying its contents) will make it more difficult to satisfy the dominant purpose test. The test will be more readily satisfied if the opinion or report is delivered directly to the solicitor.  **(b) Facts**  Pratt Holdings Pty Ltd (“Pratt”) undertook a significant corporate and financial restructuring between 1990 and 1995. Pratt sought advice from Arnold Bloch Leibler (“ABL”) in relation to the taxation consequences of significant losses incurred by an entity within the group. To that end, Pratt engaged PricewaterhouseCoopers (“PW”) to prepare a briefing paper on the facts and circumstances surrounding those losses. The briefing paper was delivered by PW to Pratt, and Pratt used it to provide instructions and information to ABL. At the time, there was no relevant litigation on foot or contemplated.  The Commissioner of Taxation of the Commonwealth of Australia sought access to the briefing paper, and various other documents associated with its preparation, pursuant to section 263(1) of the [Income Tax Assessment Act 1936](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "default) (“Assessment Act”). That section authorises the Commissioner to have “full and free access” to (amongst other things) documents for any of the purposes of the Assessment Act.  At first instance, Kenny J held that, in the absence of pending or contemplated litigation, privilege did not attach to communications between Pratt and PW because PW was not Pratt’s agent. Consequently, the documents were not privileged (in PW’s hands) even if they were created for the dominant purpose of obtaining legal advice.  Pratt and PW appealed this decision.  **(c) Decision**  Finn and Stone JJ, with whom Merkel J agreed, held that provided the documentary communications were made for the dominant purpose of obtaining legal advice, they were privileged whether or not PW was Pratt’s agent. The legal nature of the relationship between PW and Pratt did not determine whether privilege attached to the documents in question. Rather, their Honours held that it is the nature of the function performed which is relevant: if the function is to enable the client to make the communication necessary to obtain legal advice required, then the communications will be privileged (per Finn J at paragraph 41). Whether the requisite purpose existed is a question of fact.  Consistently with English caselaw, the primary judge formulated (at paragraphs 29 - 40) that:  “legal professional privilege attaches to:  (i) confidential communications passing between a client and the client’s legal adviser, for the dominant purpose of obtaining or giving legal advice (legal advice privilege); and (ii) confidential communications passing between a client, the client’s legal adviser and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation (litigation privilege).”  Thus formulated, the so called legal advice privilege applies to communications with a third party only if the third party is (legally) the agent of the client for the relevant purpose. However, their Honours did not consider there was binding Australian authority excluding legal advice privilege from applying to communications with third parties who are not agents of the client. Finn J pointed to the “patent artificiality” which would flow if, although the communication of the briefing paper between Pratt and ABL would be privileged, Pratt could not claim privilege in relation to the receipt of the briefing paper from PW (at paragraph 39).  Both Finn and Stone JJ cautioned that proving the requisite dominant purpose may be difficult. For example, Stone J at paragraph 106 noted that, “Advice as to commercially advantageous ways to structure a transaction are extremely unlikely to attract privilege because the purpose in putting the advice together will, in most cases, be quite independent of the need for legal advice.” Finn J at paragraph 47 emphasised the distinction to be drawn between the relevant dominant purpose and the client’s purpose of advising and informing itself. The more control exercised by a client over the content of documents, the more likely it will be held that the client’s dominant purpose was to advise and inform itself. In this matter, the issue was remitted to Kenny J to decide whether Pratt held the requisite purpose at the time the documents were created.  **5.8 Seeking the court’s guidance in valuing an asset of a company subject to deed of company arrangement** (By Kevin Kee, Freehills)  Pasminco Limited (subject to Deed of Company Arrangement) (No 2) [2004] FCA 656, Federal Court of Australia, Finkelstein J, 25 May 2004  The full text of this judgment is available at [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The administrator of a deed of company arrangement (DOCA) may seek the court’s guidance under section 447D(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) “in relation to matters arising in connection with the operation of, or giving effect to” the DOCA. Where the matter is in relation to the exercise of discretion involving the exercise of business judgment, the court will not give guidance except in exceptional circumstances, for example, where the administrator faces accusations of unreasonableness or impropriety. The instant case was such a case due to a conflict of interest.  The court also suggested that the conflict could have been avoided without seeking the court’s guidance by the appointment of a special purpose administrator.  The court also indicated that in an application to amend a DOCA, the applicants should be mindful to ensure that all parties to be bound by the DOCA are before the court. This may be achieved by making a representative order.  **(b) Facts**  Administrators were appointed to the Pasminco group and the administrators sought to restructure the group in a complex series of transactions which involved, in broad outline, a transfer of the some of the group’s assets to a new company, Zinifex. Zinifex was held by a subsidiary of Pasminco and the shares of companies in the Pasminco group’s core business were transferred to it. Zinifex shares were then offered to the public in a float.  The administrators of Pasminco and of most of its Australian subsidiaries sought the court’s guidance in setting the sale price of an asset (Asset) of one of the subsidiaries in the group (Subsidiary) which was to be to be transferred to Zinifex. They applied to the Court under section 447D(2). The administrators also sought an order under section 447A to amend the DOCA.  **(c) Decision**  **(i) When will the court give guidance to administrators under section 447D(2)?**  Setting a sale price for an asset is an act within the discretionary powers of the administrator and involves making a business decision. Finkelstein J emphasised that the right given to administrators (and liquidators) to seek judicial advice was intended to facilitate their work by giving them direct access to the courts and “should be interpreted as widely as possible” in light of this intention.  However, his Honour emphasised that the court’s power to give directions, though broad, does not, except in exceptional circumstances, extend to giving directions in respect of how a discretionary power in relation to a business decision ought to be exercised. Exceptional circumstances may include where administrators come to court to protect themselves from accusations of unreasonableness or impropriety.  **(ii) Was this an exceptional case?**  Aquila, who was a potential creditor of the Subsidiary, had made “veiled threats” to initiate proceedings against the administrators flowing from the administrators’ decision to sell the Asset to Zinifex. The administrators therefore had a personal interest in maximising the sale price (and thereby minimise the chance of litigation by Aquila). On the other hand, it was in the interests of Zinifex that the sale price be minimised. As a deed between some Pasminco companies and Zinifex had conferred on the administrators an “absolute discretion” in setting the sale price, His Honour was satisfied that a conflict existed.  **(iii) Was there an alternative to bringing a section 447D(2) application in this case?**  Finkelstein J was content, on the basis of the conflict, to provide guidance to the administrators. His Honour did, however, state that the administrator’s conflict of interest could have been avoided by the appointment of a special purpose administrator to set a sale price for the Asset.  **(iv) Proper means of valuing an asset**  The administrators received five valuations of the Asset, and these valuations ranged from $22 million to $140 million. The administrators proposed to take the mean of these valuations.  His Honour considered that it would be wrong to adopt this method of valuation in the circumstances. Primarily, it seems, his Honour was concerned that three of the valuations were materially different from the valuation of the Asset for the purposes of the public offer (prospectus valuation) of Zinifex shares. It was also different from the value the market had in effect placed on the Asset, measured by reference to the money raised on the public float of Zinifex.  Rather, his Honour looked at the percentage the prospectus valuation of the Asset accounted for in the prospectus valuation of all assets of Zinifex. He then applied this percentage to the money raised by the public float of Zinifex. His Honour placed particular emphasis on the fact that Zinifex had been publicly floated. Although he acknowledged that some assumptions on which his method of valuation was based were shown by the evidence not to be correct, his Honour was concerned not to allow a departure from the market’s valuation of the Asset.  **(v) Who should be a party to the proceedings to amend a DOCA?**  The administrators also sought to amend the DOCA. Finkelstein J referred to previous instances where the court had made orders ex parte, or where not all the creditors of the company were before the court.  Despite these cases, his Honour was unwilling to accept the assumption that an order to amend the DOCA may be made without the presence of all creditors and the company subject to the DOCA. However, the creditors can be bound to the order to amend by an order that one party represent the interests of all the company’s unsecured creditors. His Honour made such a representative order and proceeded to allow the amendment to the DOCA sought.  **5.9 Can the one person act as a receiver and liquidator of related bodies corporate?** (By Kevin Kee, Freehills)  Low v Performance Finance Ltd (Receiver & Manager Appointed) [2004] WASC 80, Supreme Court of Western Australia, Simmonds J, 7 May 2004  The full text of this judgment is available at [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/may/2004wasc80.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/may/2004wasc80.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Section 418(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act) provides that a person “is not qualified to be appointed, and must not act, as receiver of property of a corporation if the person:… (e) is an officer of a body corporate related to the corporation”. This does not include where the person is a receiver of the related body corporate: section 418(2). The court held that this section only precluded a person from acting where they were an officer of the related body corporate at the time of appointment.  Section 532(2) of the Act precludes a person from acting as a liquidator of a company if that person is an officer of a related body corporate, except with leave of the court. The court held that leave nunc pro tunc (now for then) is available under section 532(2) and that the circumstances were sufficiently exceptional that leave should be granted.  **(b) Facts**  Within the group of companies the subject of the application, were four related corporations. The applicant was, at the time of the application the receiver and manager of two of these corporations, a liquidator of a third and a provisional liquidator of the fourth.  The applicant sought declarations that she was not precluded from acting as a receiver and manager by section 418 of the Act. The applicant also sought leave nunc pro tunc under section 532 of the Act to act as liquidator.  **(c) Decision**  **(i) Acting as a receiver and manager**  The applicant, as a liquidator of a related body corporate, is an officer of a related body corporate within the meaning of section 418(1). (Although the applicant was also a receiver of a related body corporate, this does not attract the prohibition in section 418(1) due to the carve out in section 418(2).) However, the applicant was appointed as liquidator only after being appointed as receiver for the first two companies.  The court’s task was one of statutory construction: did section 418 preclude a person from acting as a receiver if at any time during the appointment the person became an officer of a related body corporate? Or did the section merely preclude the person from acting if that person was such an officer at the time of the appointment?  Simmonds J favoured the latter construction, taking into account the context of the words in the section, “the form of section 418A, the problems to which the readings in terms of the [former reading above] leads, and the apparent lack of assistance from the purposive approach” (at [32]). His Honour also drew comfort from the fact that section 418 was a penal provision (and therefore should be construed in favour of the subject in the case of ambiguity).  His Honour also suggested that where a receiver of one company is subsequently appointed a liquidator of a related body corporate, this situation may be controlled by the court under section 423, which allows the Court or ASIC to inquire into a matter if it appears that “the controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller’s functions” among other things.  **(ii) Acting as liquidator**  The applicant, as a receiver of a related body corporate, is an officer of a related body corporate within the meaning of section 532(2). Therefore, the applicant was required to seek leave of the court to act as liquidator or provisional liquidator of the third and fourth companies respectively. As the applicant had been acting for some time as liquidator, she sought leave to be granted nunc pro tunc.  The first question was whether section 532(2) allowed leave to be given nunc pro tunc. His Honour relied principally on the decision of Kirby J in Emanuele v Australian Securities Commission (1997) 188 CLR 114. Kirby J had stated that the question of whether leave nunc pro tunc was available turned on whether the statutory language allowed for it. Simmonds J extracted the following considerations as relevant in this interpretive exercise:          the “stringency or otherwise” of the statutory language;         whether it is meaningful to have ex post deliberation on whether leave would have been granted;         whether the requirement could be treated as a procedural matter, and non-compliance characterised as technical;         authorities on the issue; and         whether the grant of leave nunc pro tunc would allow a private party to take certain action outside prescribed time limits.  In light of these considerations, his Honour considered that leave nunc pro tunc was available under section 532(2).  Turning then to whether leave nunc pro tunc ought to be granted, his Honour stated that the usual position was that the liquidator should be independent and unobjectionable. However, there are exceptional circumstances where this principle may be departed from. In this case, his Honour identified four reasons why this case was exceptional:          the intertwining of the financial affairs of the entities in the group;         the source accounting data for the entities in the group is contained on the single computer;         the contraventions in this case were inadvertent; and         no creditor has objected or sought to appear in the proceedings.  Accordingly, the court granted leave nunc pro tunc under section 532(2) to allow the liquidator to continue to act.  **5.10** **Breach of section 606 by virtue of an understanding as to voting** (By Catherine Henderson, Mallesons Stephen Jaques)  Flinders Diamonds Ltd v Tiger International Resources Inc [2004] SASC 119, Supreme Court of South Australia (Full Court), Prior J, Debelle J and Bleby J, 23 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/april/2004sasc119.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/april/2004sasc119.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 held that an understanding reached between two shareholders to collectively vote their shares to reconstitute the board of the plaintiff company had resulted in breaches of sections 606, 672A and 672B of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act"). However, the Court of Appeal set aside the trial judge's order to divest the defendants of their shares and restrain the holding of the requisitioned meeting. It did this on the basis that the understanding had not yet been implemented so as to adversely affect any person's rights. In these circumstances, the court was not willing to go so far as to prevent the defendants from retaining any interest in, or exercising any rights in relation to, their shares.  **(b) Facts**  The defendants were shareholders in Flinders Diamonds Limited (“Flinders”), a listed Australian company engaged in diamond explorations with 58 million ordinary shares on issue.  The first defendant, Tiger International Resources Inc. ("Tiger Resources"), held 29.74% of the shares in Flinders. 6.89% of Flinders’ shares were held by Mr Patric Barry ("Barry"), a director and the president of Tiger Resources. The third defendant, Mr Anthony Campbell ("Campbell"), held 1.72% of Flinders' shares and was the sole director and shareholder of Campbell Corporation Pty and Balance Tax Pty Ltd, which were also defendants in the proceedings and held 0.39% and 0.17% shareholdings in Flinders respectively.  In mid-August 2002, Barry requisitioned a general meeting of shareholders of Flinders pursuant to section 249D of the Act. The resolutions to be put before the general meeting were resolutions to remove certain of the company's directors and replace them with Barry's own nominees. Barry's desire to spill the Flinders board arose out of his dissatisfaction with the performance of the board, which was related to the sagging market price of Flinders' shares. On 5 September 2002, the directors of Flinders convened the general meeting, which was scheduled to occur on 15 October 2002.  The proceedings instituted by Flinders in September 2002 arose out of circumstances preceding the requisitioning of the meeting. Flinders claimed that Barry and Campbell had entered into an unlawful arrangement to vote their shares, and those of the defendant companies, to achieve their objective of reconstituting the Flinders board. It sought declarations that the defendants had breached sections 606, 671B and 672B of the Act. It also sought an injunction restraining the holding of the general meeting in October on the basis that it was to be held for an improper purpose.  Flinders' claim was based on evidence that Barry had reached an understanding with Campbell under which he would give Campbell an irrevocable proxy to vote his own shares in Flinders and those held by Tiger Resources. Barry and Campbell had also approached several other Flinders shareholders seeking their support for the proposal to reconstitute the board. In approaching those other shareholders, Barry and Campbell made use of a 'position paper', which summarised their proposal and claimed that the group proposing the reconstitution already had a commitment of 43% of the shareholding.  Another main aspect of Flinders' claim concerned disclosure notices provided by Barry, Tiger Resources and Campbell in July 2002 in response to a direction served on them by Flinders under section 672A of the Act, requiring them to make section 672B disclosure. Section 672B requires, among other things, disclosure of relevant interests in shares. In response to Flinders' direction, Barry, Tiger Resources and Campbell each simply nominated their own individual shareholdings and did not disclose any relevant interests in shares.  **(c) Decision**  **(i) Sections 606 and 672B**  On the issue of whether the defendants had breached section 606 of the Act, the Court of Appeal upheld the trial judge's finding that they were in breach.  In arriving at this conclusion, the court found that:           The understanding reached between Barry and Campbell amounted to a required transaction in relation to shares. Section 64 of the Act defines "entering into a transaction" as including "entering into, or becoming party to, a relevant agreement in relation to shares" and "relevant agreement" is broadly defined in section 9 of the Act to capture informal understandings such as that reached between Barry and Campbell.          Barry and Campbell had each acquired a relevant interest in the issued voting shares of Flinders as a result of the transaction. Under sections 608(1) and 608(2)(b)(ii) of the Act, a person acquires a relevant interest in shares through a transaction if that person enters into or is party to an understanding in relation to shares by which that person has the power to exercise, or control the exercise, of a right to vote attached to the shares.          Barry and Campbell's voting power in Flinders exceeded 20%. Under section 610 of the Act, a person's voting power is the vote of that person and any associate of that person. Barry and Campbell had become associates within the meaning of section 610 by virtue of the understanding they had reached and the fact that they were acting in concert.         Section 609(5) of the Act, which states that a person does not have a relevant interest in shares merely because they have been appointed as a proxy to vote at a meeting, did not apply to the circumstances of this case as the understanding between Barry and Campbell was for an irrevocable proxy and, as such, applied more broadly than to one meeting only.  The Court of appeal also upheld the trial judge’s finding that Campbell, Barry and Tiger Resources had acted in breach of sections 671B and 672B of the Act.  **(ii) Did Barry bind Tiger Resources?**  On the issue of whether Barry had authority to bind Tiger Resources by agreeing to grant an irrevocable proxy to Campbell to vote its shares, the Court of Appeal again upheld an affirmative finding by the trial judge. The Court of Appeal found that there was ample evidence on which the trial judge could apply the indoor management rule, including a long-standing resolution of the board referred to by Barry in evidence and the fact that, over several years, all dealings between Flinders and Tiger Resources had been conducted by Barry alone.  **(iii) Remedy**  The appeal did, however, succeed in relation to the remedy awarded by the court. At first instance, the trial judge ordered that the holding of the requisitioned meeting be restrained and that Barry, Campbell, Tiger Resources and Campbell Corporation be divested of their shares in Flinders and that those shares be vested in the Australian Securities and Investments Commission ("ASIC") for sale, with the proceeds to be paid into the court pending further orders.  On appeal, the defendants claimed, among other things, that the trial judge should have done no more than require the defendants to deliver section 672B notices and that the shareholders in Flinders were entitled to seek a change in its directorship.  The Court of Appeal acknowledged that section 1325A of the Act gave the trial judge a wide discretion, but concluded that his Honour had miscarried the exercise of that discretion. The Court of Appeal regarded the trial judge's order to divest the defendants of their shares as punitive in nature (rather than remedial), in that it went beyond what was reasonably necessary to remedy the contravention. The order prevented the defendants, not only from exercising their voting rights pursuant to the impugned understanding, but from exercising any voting rights or retaining any interest in Flinders' issued voting shares. The Court of Appeal regarded this as a "serious interference with the shareholders' rights to property in their shares", which was unnecessary in the circumstances, given that the arrangement, although made, had not been implemented so as to deprive any person of shares to which they were lawfully entitled or otherwise adversely affect any person's rights.  In exercising the discretion afresh, the Court of Appeal stated that shareholders are entitled to seek a change to the composition of the board. The illegal nature of Barry and Campbell's actions related to the fact that the pair went about exercising what was a legitimate right by means of an unlawful understanding as to voting.  The Court of Appeal considered the purposes underlying Chapter 6 of the Corporations Act and stated that the provisions of Chapter 6 are not intended to render directors immune from legitimate scrutiny and control by shareholders. Rather, the policy behind the relevant provisions is to prevent shareholders who wish to reconstitute a company's board from doing so by means of secret understandings or arrangements concerning voting.  The Court of Appeal concluded that, in the present case, where an unlawful arrangement or understanding had been made but had not yet been acted upon, there was no need to further restrain the holding of the meeting or divest the defendants of their shares. Instead, the court ordered that the defendants be restrained from giving effect to the understanding. In granting this less severe remedy, the Court of Appeal pointed out that the arrangement between Barry and Campbell had been uncovered by virtue of the proceedings and that shareholders could be informed of the facts and of the court's orders. In the court’s view, this amounted to a sufficient deterrent against further unlawful action by the defendants, such that the court’s aim of upholding the objectives of Chapter 6 of the Act and preventing the implementation of the unlawful understanding had been achieved.  **5.11** **Application by liquidator to extend time** (By Rohan Bartlett, Phillips Fox)  McGrath v National Indemnity Company [2004] NSWSC 391, Supreme Court of NSW, Barrett J, 11 May 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc391.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc391.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Mr McGrath and Mr Macintosh (M), the liquidators, sought an order under section 588FF(3)(b) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (‘the Act’) extending the period within which an application under section 588FF(1) might be made against the defendant, National Indemnity Company (‘National’). The Court found that the application was filed within time, had been served in accordance with jurisdictional requirements and was sufficient as to grant the extension of time requested.  **(b) Facts**  M, the liquidators of numerous companies in the HIH group, brought the application for an extension of time for bringing an application for a voidable transaction. National is a foreign company, located in Nebraska, having no presence or business operations within Australia. The alleged voidable transaction was a reinsurance contract entered into between National and a subsidiary of HIH.  Under section 588FF(3) of the Act, an application for orders in relation to an alleged voidable transaction must be commenced within 3 years of the “relation-back day”, which in this case was 15 March 2001. Although the application had been filed before 15 March 2004, an amendment had been made and the amended application was not filed until 24 March 2004. The amendment involved the addition of National as the defendant. While there was previously no named defendant, the earlier application clearly related to National.  **(c) Decision**  **(i) Whether the application was out of time**  Barrett J reviewed the circumstances in which the amendment was made, which included the fact that his Honour had not been prepared at the initial hearing to make any orders that may prejudice National’s rights without National being given a right to be heard on the issue. His Honour held that where an identified person is clearly contemplated by an application under section 588FF(3)(b), that person should be made a defendant to the extension application. The Court stated that it is a fundamental principle of natural justice that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting their case: Cameron v Cole (1944) 68 CLR 571.  The Court then considered whether the 3 year period referred to in section 588FF(3) related to the date on which the application was required to be made, or the date by which the orders must be made by the court. Barrett J referred to BP Australia Ltd v Brown (2003) 46 ACSR 677, where the Court held that the application be initiated within the three year period. His Honour subsequently concluded that it was sufficient in this case if the application itself was made within 3 years.  The Court further stated that the amendments made by M were so minor that they should be considered to have effect from the initial filing date.  There was no change in the description of the relief sought or of the cause of action pleaded and the character of the application had remained the same.  Barrett J held that the application was not out of time.  **(ii) Procedural requirements**  Barrett J reviewed the evidence relating to service of National, and the correspondence between the parties. Part 10 rule 5 of the [Supreme Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11562" \t "default) makes service in a country outside Australia good service provided, that it is in accordance with the law of that country. His Honour was satisfied that the application had been served in accordance with the law of Nebraska.  The Court also had to be satisfied that the case fell within Part 10 rule 1A of the Supreme Court Rules, which identifies the cases in which originating process may be served outside Australia. Barrett J stated that the ‘cause of action’ as to extension of time under section 588FF(3)(b) of the Act should be taken to have the same territorial quality as the ‘cause of action’ that the extension would permit to be pursued by way of substantive claim under section 588FF(1). On this basis, the contract in question was made in the course of conducting operations of the relevant companies in New South Wales. Any proceeding to which section 588FF(1) applies, in which it is sought to redress the effects of asset depletion through that contract would, in the Court’s opinion, be proceedings ‘founded on a cause of action arising in the State’. On that basis, the Court was satisfied that the claim for an order extending time under section 588F(3)(b) was ‘a cause of action arising in the State’, as referred to in Part 10 rule 1A(1)(a).  Another procedural condition considered by the Court was the granting of leave to proceed under Part 10 rule 2. Such leave is granted if it is shown that there is a triable issue. Barrett J was satisfied that the plaintiffs had shown a triable issue in relation to the section 588FF(3)(b) extension, and that it was therefore appropriate to grant leave to proceed under the Part 10 rule.  National did not appear at the application, despite being invited to do so by the solicitors for M, but agreed not to oppose the extension of time. This was done on the basis that the defendant made no concessions whatsoever in relation to the pending section 588FF(1) claim and that the plaintiffs would not subsequently rely on this non-opposition to the defendant’s detriment. In these circumstances, Barrett J was prepared to make the extension of time without hearing from the defendant.  Barrett J made brief mention of the threefold test referred to by Austin J in Green v Chiswell Furniture Pty Ltd [1999] NSWSC 608. That test relates firstly to the explanation for delay in bringing a section 588FF(1) proceeding, secondly, to a preliminary examination of the merits of the foreshadowed section 588FF(1) claim and, thirdly, questions of prejudice to the defendant. His Honour stated that the delay had already been sufficiently explained by way of evidence corresponding with that discussed in McGrath re HIH Insurance Ltd (2004) 22 ACLC 449. The preliminary assessment of merits had been sufficiently carried out in the context of the application for leave to proceed. Finally, the matter of possible prejudice was adequately addressed by the correspondence between the parties.  **5.12 Breach of contractual obligations and fiduciary duty in joint ventures and knowing participation in a breach of fiduciary duty** (by Maria Pawelek, Corrs Chambers Westgarth)  iWave Pty Ltd v Break O’Day Business Enterprise Board Inc [2004] TASSC 43, Supreme Court of Tasmania, Slicer J, 14 May 2004  The full text of the judgment is available here: [http://cclsr.law.unimelb.edu.au/judgments/states/tas/2004/may/2004tassc43.htm](http://cclsr.law.unimelb.edu.au/judgments/states/tas/2004/may/2004tassc43.htm" \t "_new)  **(a)   Summary**  The case deals with the contractual obligations and fiduciary duties of parties in a commercial joint venture for the purpose of securing a Commonwealth grant and the exclusion by one party of another’s rights arising under an agreement. The case considers circumstances in which an agent may be found to have knowingly participated in a breach of fiduciary duty. The concept of equity interest, including the circumstances in which such interest will be awarded and the process by which a court will determine the appropriate rate, is also considered by the court in the case.  **(b)   Facts**  iWave Pty Ltd (“Plaintiff”), a company in the business of providing Internet hosting and training, and Break O’Day Business Enterprise Board Inc (“First Defendant”), an incorporated association designed to further the interest of the Break O’Day Council community, prepared and submitted a joint proposal for funding to the Commonwealth. The development of a “website” which permitted ready access to information, bookings for services and accommodation by intended users or purchases (“Project”) was central to the proposal. The Second Defendant, Mr Butterworth, was a member and office bearer of the First Defendant.  The proposal submitted by the parties included a budget which, in its final form, sought the grant of $60,000, of which $20,000 was allocated to payment for the “in kind” contribution to be made by the Plaintiff.  The proposal was successful and the Commonwealth agreed to grant the parties $60,000 in funding. The Deed of Grant named the First Defendant as grantee, as well as naming recognised representatives of the Plaintiff as members of the steering committee. The Deed included a requirement for the First Defendant to spend the funds for approved purposes only. The approved purposes were defined in the deed to include the Project budget.  Subsequent to the grant being made, there was a disagreement between the representatives of the Plaintiff and the Second Defendant as to how the grant should be allocated, largely because the Second Defendant was of the view that the board of the First Defendant was entitled to re-allocate resources outside the terms set out in the Project budget. Soon after, the Plaintiff’s representatives were removed from the Project’s steering committee and the Plaintiff ceased to have any involvement in the Project, without being allocated any resources provided by the Commonwealth.  The Plaintiff claimed that the parties had established a joint venture, commercial in nature, which on acceptance by the Commonwealth, established a trust requiring the parties to distribute the money obtained from the Commonwealth in accordance with either the terms of the venture or the principles of equity. The Plaintiff’s cause of action against the Second Defendant arose from a claimed complicity in the breach of fiduciary obligation by the First Defendant.  **(c) Decision**  **(i) Contract and fiduciary relationship**  Slicer J considered the nature of the relationship between the parties and held that in this case, the joint venture was a proposal for the performance of work and the share in proceeds provided by the Commonwealth. His Honour cited Gibbs CJ statement in United Dominion Corporation v Brian Pty Ltd (1985) 157 CLR 1 that “[t]he term ‘joint venture’ is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill”.  His Honour concluded that the obligations of the parties were such as to permit enforcement and constitute both a trust and fiduciary relationship.  His Honour held that the unilateral exclusion by the First Defendant of the Plaintiff through the First Defendant’s agent, the Second Defendant, was a breach of the term of the agreement and beyond the First Defendant’s power.  His Honour was of the view that the First Defendant’s designation as grantee was an administrative arrangement, simply reflecting the necessity to deposit the money to an incorporated body to ensure that the money was allocated in accordance with the terms of the agreement and not misappropriated.  His Honour agreed with the First Defendant that following the meeting at which the Plaintiff’s representatives were excluded from the steering committee, the Plaintiff was not precluded for submitting a tender for work to the restructured committee and chose not to do so. However, his Honour was of the view that the Plaintiff was not required to attempt to submit a tender as the Plaintiff had an existing entitlement to do the work. In his Honour’s view, permission to tender in the future was no remedy for the breach.  Slicer J held that the Plaintiff was entitled to its remedy against the First Defendant both in contract and equity.  **(ii)       Liability of Second Defendant**  The Plaintiff claimed that the actions of the Second Defendant constituted a knowing participation by the Second Defendant in the breach of the fiduciary duty of the First Defendant.  In this respect, his Honour was of the view that such liability might attach to a third party other than a trustee, even though there was no dishonest design in the transaction. Slicer J accepted that the Second Defendant had not intended to deceive the Plaintiff, however, he held that this intention was not necessary to constitute a breach of fiduciary obligation.  His Honour cited the original proposition, as set out in Barnes v Addy (1874) 9 LR Ch 244, that “strangers are not to be made constructive trustees merely because they act as agents for trustees in transactions within their legal actions, however liability might be extended in equity where such person made themselves trustees *de son tort,* or actively participate to the injury of the *cestui que* trust”.  His Honour also cited Gibbs J in Consul Development v DPC Estates Pty Ltd (1975) 132 CLR 373 at 396 in the more modern proposition that “[A] person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation”.  On the facts of the case, Slicer J concluded that the Second Defendant acted as the representative of an incorporated associated and was fully cognisant of the terms of the arrangement and the document. Further, the Second Defendant was the “decision-maker” of the First Defendant during all of the negotiations and agreements.  Based on this, his Honour held that it was the Second Defendant’s opinion concerning the effect of the deed and his stated belief that the Plaintiff was required to submit a tender which led to the breach of the agreement. Slicer J held that the Second Defendant was not the passive agent or conveyor of information from the incorporated body and that the Second Defendant’s conduct constituted knowing participation in a breach of fiduciary duty.  **(iii) Remedy**  Slicer J held that the Plaintiff was entitled to damages of $17,600 (being the Plaintiff’s profit margin at 80% applied to the $20,000 allocated to the Plaintiff in the Project budget, plus a GST component). His Honour also held that interest on that amount was recoverable as an equitable remedy.  **(iv) Interest**  His Honour noted that in addition, equity interest is awarded whenever a wrong-doer deprives a company of money that it needs for use in its business and that mere replacement of the money some years later was not adequate compensation.  In relation to the method to be used in determining an appropriate rate of interest, his Honour noted that in the absence of legislation on the issue, there remains difficulty in determining a consistent and commercial rate of interest which reflects the specific relationship and its breach, especially in cases involving joint ventures.  His Honour relied on the consideration of the issue by Kearney J in Hagen v Waterhouse (1991) 34 NSW LR 308 in reaching his conclusion that the appropriate interest award was to be 1% over the rates fixed by the Reserve Bank, calculated yearly. In reaching this conclusion, his Honour took into account that the ambitions of the parties in this case were modest. The First Defendant being a small community based organisation intended for the general enhancement of its community and the Plaintiff intended a reasonable return for the skill and labour of its members. His Honour also noted that the Second Defendant stood to gain no personal benefit. Slicer J concluded that the joint venture, although it might have grown larger, was a single proposal for the development of a program and not one with ongoing increase in profits or capital appreciation.  **5.13        Court may declare Board meetings held without quorum not invalid** (by Seeyan Lee, Corrs Chambers Westgarth)  The Chinese Cultural Club Limited [2004] NSWSC 432, 24 May 2004, New South Wales Supreme Court, Equity Division, Campbell J, 14 May 2004  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc432.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc432.htm" \t "_new)  or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Supreme Court of New South Wales declared under section 1322(4)(a) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) that a number of Board meetings which were held without quorum were not invalid. The Supreme Court, however, did not exercise its powers under section 1322(4)(c) to relieve the company from civil liability as the company was the subject of proceedings in the Licensing Court and the Supreme Court did not want to preclude the Licensing Court from making such a finding.  **(b) Relevant law**  Section 1322(4)(a) of the Corporations Act provides that a Court may declare that a procedural error or defect, including an error in relation to a quorum, is not invalid.  Section 1322(4)(c) provides that a Court may relieve a person (in whole or in part) from civil liability arising from such an error.  Before a Court makes an order pursuant to section 1322(4)(a), it must consider the matters set out in section 1322(6), being:                 whether the act was essentially of a procedural nature;                whether the persons concerned or party to the contravention/failure acted honestly;                 that it is just and equitable that the order be made; and                that no substantial injustice has been or is likely to be caused to any person.  Before a Court makes an order pursuant to section 1322(4)(c), it must consider the last two matters set out above.  **(c) Facts**  The Applicant, the Chinese Cultural Club Limited (“the Club”) is a company limited by guarantee. When the Club was incorporated, its Articles required a quorum of five for its Board meetings. Subsequently, this quorum was amended to three. In 1995, the Board meeting quorum was amended again to five to comply with certain amendments made to the [Registered Clubs Act 1976](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4200" \t "default)(“Registered Clubs Act”) at that time. The officers of the Club claimed that they did not know of this amendment until 2000.  Between 1995 and 2000, numerous Board meetings were held without the requisite quorum of five directors.  In 2000, the Director of Liquor & Gaming commenced proceedings against the Club in the Metropolitan Licensing Court (“Licensing Court”) alleging that the quorum requirement for Board meetings had been habitually infringed. The Director of Liquor & Gaming also demanded that the Club ‘show cause’ as to why its certificate of registration should not be cancelled as a result of those infringements.  Subsequently, the Club sought orders from the Supreme Court of New South Wales (Equity Division) pursuant to subsections 1322(4)(a) and (c) of the Corporations Act that the Board meetings held without quorum were not invalid and that the Club be relieved from any civil liability arising from this error.  **(d) Decision**  The Supreme Court declared that the Board meetings held without quorum were not invalid on the grounds that:                 the holding of the Board meetings without quorum was an error of an essentially procedural nature;                the mistake was honestly made by the officers of the Club;                it was ‘just and equitable’ for the order to be made to enable the proceedings in the Licensing Court to proceed on the correct legal basis; and                the Club was not aware of any person whose financial or other interests would be adversely affected if the orders sought were made.  The Supreme Court, however, was not prepared to relieve the Club from any civil liability as it did not wish to prevent the Licensing Court from imposing such liability on the Club if the Licensing Court thought it fit. |  |
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