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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Seminar - Directors' Duties and Corporate Social Responsibility: The New Environment (Sydney and Melbourne)** The Centre for Corporate Law and Securities Regulation (University of Melbourne) and the Corporations and Markets Advisory Committee are hosting two seminars on 27 July 2005 in Sydney and 18 August 2005 in Melbourne on 'Directors' Duties and Corporate Social Responsibility-The New Environment'. A major issue for company directors is the extent to which they can adopt socially responsible practices consistent with the legal duties imposed upon them by the law. An important development was the announcement on 23 June 2005 that the Parliamentary Joint Committee on Corporations and Financial Services will inquire into corporate responsibility, including whether the existing law of directors' duties encourages or discourages directors from considering the interests of stakeholders other than shareholders. Another important recent development has been the request by the federal Government for the Corporations and Markets Advisory Committee (the Government's main corporate law reform advisory body) to advise it on: * whether the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) should be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions; and
* whether the Corporations Act should be revised to require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions.

Any law reform will occur in a changing environment where directors are operating under higher expectations from investors and the broader community.The UK Government has proposed amendments to directors' duties that would require directors to consider the interests of stakeholders, other than shareholders, in certain circumstances.The seminar brings together leading speakers to discuss this important issue. Topics discussed will include: * directors' duties and corporate social responsibility - a case study from the perspective of the Chairman of James Hardie;
* the scope of the existing law of directors' duties and how directors balance the competing claims of different stakeholders, from the perspective of prominent company directors and bankers;
* arguments for and against changing the law of directors' duties; and
* the project of the Corporations and Markets Advisory Committee to examine whether the law of directors' duties needs to be changed.

SpeakersBob Baxt AO (both seminars) Partner, FreehillsBill Beerworth (Sydney seminar) Managing Director, Beerworth & PartnersLeon Davis AO (Melbourne seminar) Chairman, Westpac Meredith Hellicar (Sydney seminar) Chairman, James Hardie IndustriesHarrison Young (Melbourne seminar) Chairman, Morgan Stanley AustraliaRichard St John (both seminars) Convenor, Corporations and Markets Advisory CommitteeConvenorProfessor Ian Ramsay, Director, Centre for Corporate Law & Securities Regulation, The University of MelbourneDatesWednesday 27 July 2005 SydneyThursday 18 August 2005 MelbourneTime5.30pm - 7.15pm Refreshments will be served afterwardsVenuesSydney Seminar Melbourne Seminar Freehills FreehillsLevel 38 MLC Centre Level 42Martin Place 101 Collins Street Sydney 2000 Melbourne 3000 Cost: $90 + $9 GST = $99More details and a registration form are available at on the University of Melbourne website at: [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/%22%20%5Ct%20%22_new)**1.2 Seminar - The Takeovers Panel seminar (Brisbane)** Following the success of the recent seminar "The Takeovers Panel: Key Issues for Companies and Advisers" held in Melbourne, Sydney and Perth, we are pleased to announce that the seminar will also be held in Brisbane on 11 August 2005.The seminar is co-hosted by the Centre for Corporate Law and Securities Regulation (University of Melbourne) and the Takeovers Panel. The speakers are:Simon McKeon, President, Takeovers Panel and Executive Chairman, Macquarie Bank, MelbourneJeremy Cooper, Deputy Chairman, ASICGeorge Durbridge, Counsel, Takeovers PanelAlison Lansley, Partner, Mallesons Stephen JaquesMarie McDonald, Partner, Blake Dawson WaldronNigel Morris, Director, Takeovers PanelThis year, the Takeovers Panel celebrates its fifth anniversary as the main forum for resolving takeover disputes. In this time the Panel has delivered almost 150 decisions on a range of important matters relating to takeovers.This seminar brings together leading speakers to examine current and emerging issues for the Panel and those involved in takeovers including: * Conditions in bids - where should the line be drawn?
* Covering the "no mans land" between bids and schemes (especially trust schemes)
* Control transactions outside takeovers and schemes - selective capital reductions, rights issues and buy-backs
* Collateral benefits
* Equal access to information by competing bidders
* ASIC's relationship with the Panel and ASIC's current approach to Panel matters
* Understanding the Panel's approach and what really matters to it
* The Panel or the Courts - where to go if you have a choice?

More information about the seminar and a registration form are available at: [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/%22%20%5Ct%20%22_new)**1. 3 Parliamentary committee inquiry into corporate responsibility** On 23 June 2005, it was announced that the Parliamentary Joint Committee on Corporations and Financial Services of the Australian Parliament will conduct an inquiry into corporate responsibility.The Committee will inquire into corporate responsibility and triple-bottom-line reporting, for incorporated entities in Australia, with particular reference to:* The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community.
* The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.
* The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests of stakeholders other than shareholders, and the broader community.
* Whether revisions to the legal framework, particularly to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the Corporations Act.
* Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.
* The appropriateness of reporting requirements associated with these issues.
* Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

In inquiring into these matters, the Committee will consider both for profit and not-for-profit incorporated entities under the Corporations Act.Further information is available on the Committee's [website](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm%22%20%5Ct%20%22_new). **1.4 UK Professional Oversight Board for Accountancy publishes findings from review of audit quality at the big four firms** On 20 June 2005, the UK Professional Oversight Board for Accountancy (POBA), part of the FRC, published the Audit Inspection Unit's findings from its monitoring of the quality of the auditing function of the big four firms. **(a) Background** Following Enron and other well-publicised corporate reporting failures, the UK Government undertook a review of the regulatory regime for auditors and accountants in the UK. The report 'Review of the Regulatory Regime of the Accountancy Profession' was issued in January 2003. That report recommended enhancing the monitoring of the audits of listed and other major public interest entities through a new independent inspection unit (the AIU) reporting to a professional oversight board (the POBA) within an integrated independent regulator (the FRC). The AIU is taking over responsibility for the monitoring of the audits of all listed entities and other entities in whose financial condition there is considered to be a major public interest. By monitoring and promoting improvements in audit quality, it contributes to the FRC's overall aim of promoting confidence in UK corporate reporting and governance. The AIU's monitoring approach is intended to be more challenging for the major firms than in the past, focusing on judgments as well as audit processes.Consequently the AIU has developed and implemented an approach to audit monitoring for the major firms based on the following characteristics: * Focus on the quality of auditing, with its recommendations to firms prioritised on this basis.
* Thorough, robust and challenging approach to inspection visits.
* Wide-ranging reviews of firmwide procedures, including an assessment of how the culture within firms impacts on audit quality.
* Selection of major audits for review which is largely risk-based.
* In-depth reviews of major audits, focusing on the quality of the group audit, including critical assessment of the key audit judgments made and a detailed review of compliance with UK Auditing Standards.
* Review of the quality of reporting to the Audit Committee.

**(b) Conclusion** The AIU's reviews of individual audit engagements indicated that the key audit judgments exercised in relation to financial reporting issues appeared, in the great majority of cases, to be both appropriate and soundly based. However, as a result of insufficient documentation, it was often necessary to form a view as to the appropriateness of such judgments on the basis of oral explanations provided. Insufficient audit documentation both reduces the effectiveness of firms' own quality control processes and makes it more difficult to adopt a monitoring approach focusing on key audit judgments (rather than an approach characterised by some as "box ticking"). The AIU referred two cases to the FRC's Financial Reporting Review Panel where it considered that there was sufficient doubt as to whether the accounting treatment adopted and/or disclosures provided complied with UK GAAP (the issues concerned did not affect reported profits in either case). The AIU inspections identified no systemic weaknesses in the overall policies, procedures and systems of quality control operated by the firms and indicate that, when properly applied, those procedures and systems should provide reasonable assurance that appropriate audit opinions are issued by the firms. However, the AIU identified certain areas in which it considers that improvements to these policies, procedures and systems, and/or the application thereof, should be made, either to achieve compliance with relevant standards or to enhance audit quality. The AIU believes that the risks the above matters pose for the quality of individual audit engagements should be addressed by the firms. The AIU is in the process of making a number of recommendations to each of the firms in their private reports as to the actions it believes are appropriate to address the issues arising from its work. A copy of the full report can be obtained from the FRC [website](http://www.frc.org.uk/poba/publications/%22%20%5Ct%20%22_new). **1.5 UK FRC review endorses the Turnbull guidance on internal control** On 16 June 2005, the United Kingdom Financial Reporting Council (FRC) published the findings of its review of the continued appropriateness of the Turnbull Guidance on internal control. The review found that the Guidance had contributed to improvements in internal control in UK listed companies. It strongly endorses the principles-based approach of the Guidance, which allows companies to focus on the most significant risks facing them. It recommends only limited changes to the Guidance to bring it up to date. There will be three months consultation on the draft revised guidance. The intention is that the revised guidance will come into effect for financial years beginning on or after 1 January 2006.The main findings of the review are: 1. The Turnbull guidance has contributed to improvements in internal control in UK listed companies, and significant changes are not required. 2. The guidance should continue to cover all internal controls, and not be limited to internal controls over financial reporting. 3. No changes should be made to the guidance that would have the effect of restricting a company's ability to apply the guidance in a manner suitable to its own particular circumstances. 4. The guidance should be updated to reflect changes in the Combined Code and Listing Rules since 1999 and the proposed statement of directors' duties in the draft Company Law Reform Bill. 5. Boards should review their application of the guidance on a continuing basis. 6. It would not be appropriate to require boards to make a statement in the annual report and accounts on the effectiveness of the company's internal control system, but boards should confirm that necessary action has been or is being taken to remedy any significant failings or weaknesses identified from the reviews of the effectiveness of the internal control system. 7. Boards should look on the internal control statement in the annual report and accounts as an opportunity to communicate to their shareholders how they manage risk effectively, and include such information as is considered necessary to assist shareholders' understanding of the main features of the company's risk management processes and system of internal control. 8. There should be no need for companies that are already applying the Turnbull guidance to develop additional processes in order to comply with the requirement to identify principal risks in the Operating and Financial Review (OFR), but companies are encouraged to ensure that the OFR and the internal control statement are complementary. 9. There should be no expansion of the external auditors' responsibilities in relation to the company's internal control statement.The consultation document is available from the FRC [website](http://www.frc.org.uk/corporate/internalcontrol.cfm%22%20%5Ct%20%22_new).**1.6 Release of principles for the appointment of consumer representatives** On 15 June, 2005 the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce MP, released the final version of the document 'Principles for the Appointment of Consumer Representatives: A Process for Governments and Industry'.The document was prepared by the Commonwealth Consumer Affairs Advisory Council (CCAAC) following a request from the Australian Government. CCAAC provides independent advice to the Australian Government both on current and on new and emerging consumer issues. CCAAC has formulated six principles to assist governments and industry when appointing consumer representatives to advisory and decision-making bodies. The six principles recommended to underpin an effective appointment process are that:1. appointments must be made on merit; 2. appointees must be independent of industry or government and free of conflicts of interest; 3. consumer organisations should where possible be involved in appointments; 4. an appropriate range of candidates should be sought; 5. the appointment process must be consistent with good corporate governance and where relevant, good practice in self-regulation; and 6. the appointment process must be transparent, accountable and cost-effective. Copies are available from the Treasury [website](http://www.treasury.gov.au" \t "_new). **1.7 Australia's corporate regulators - research report** On 14 June 2005, the Australian Parliamentary Library published a research report titled "Australia's corporate regulators - the ACCC, ASIC and APRA". In the 1990s, a major development in Australian public administration was the creation of specialised statutory agencies responsible for financial regulation. Between 1995 and 1998, the Australian Consumer and Competition Commission (ACCC), the Australian Securities and Investments Commission (ASIC), and the Australian Prudential Regulation Authority (APRA) were established under their own Acts. The responsibilities, resources and public profiles of all three regulators have grown appreciably since their creation. The research report examines a specific challenge for each of the regulators, and the regulatory strategies they employ to monitor Australia's corporate sector. The research report is available at [http://www.aph.gov.au/library/pubs/rb/2004-05/05rb16.pdf](http://www.aph.gov.au/library/pubs/rb/2004-05/05rb16.pdf%22%20%5Ct%20%22_new)**1.8 New Zealand Securities Commission review of 2004 financial reports** On 10 June 2005, it was announced that 40 per cent of financial reports of issuers reviewed by the New Zealand Securities Commission (SEC) were found to have some shortcomings that need to be addressed.The Commission reviewed the audited full year financial reports of 40 companies with balance dates from 31 March to 31 July 2004. The review also covered prospectuses, substantial security holder information, and continuous disclosure notices.The review is the first cycle of the Securities Commission's ongoing financial reporting surveillance programme.The Commission has asked 15 companies to address specific shortcomings when preparing their next financial reports. One matter has been referred to the Commission's enforcement staff.Other matters found were:* the appropriateness of a prior period adjustment;
* valuation of property, plant and equipment and intangibles;
* lack of actual versus prospective financial information comparisons and explanation;
* format of the Statement of Movements in Equity;
* non-disclosure of a share-based arrangement with a product distributor;
* undated financial statements; and
* unusual differences in the dates of the annual report, shareholder information, and the audit report.

The review also identified some instances of incompleteness and poor timing of continuous disclosure notices, and incompleteness and inaccuracy of substantial security holder disclosures. The Commission will follow up these with the companies and, where applicable with the NZX.The selected 40 issuers reviewed were made up of:* 28 companies listed on the NZX;
* 8 companies listed on the NZAX; and
* 4 companies with shares traded on the unlisted securities market.

The Commission expects to publish a report on this first stage of its surveillance program.**1.9 OECD study of barriers to competition, investment and trade** Boosting market liberalisation by reducing trade, investment and competition barriers to "best practice" levels could significantly raise GDP per head in the European Union and the United States, according to a new OECD working paper dated 7 June 2005. The paper estimates that reducing such barriers could increase GDP per head over the medium term by the following amounts:* 2 to 3½ per cent in the European Union;
* 1¼ to 3 per cent in the OECD area as a whole;
* 1 to 3 per cent in the United States; and
* ½ to 1½ per cent in the OECD area outside the United States and the European Union.

These higher levels of GDP, once in place, would have a cumulative effect on earnings. The study estimates that the benefit to workers in OECD countries could amount to the equivalent of a full year's income across a working lifetime.The study establishes benchmarks of best practice against which other OECD countries can be measured. Australia, for instance, has the least restrictive level of State control of business, it says, while Denmark and Ireland impose the lightest administrative procedures for start-ups. Ireland, alongside the UK, scores well in openness to competition while Canada has the clearest business regulations.Matching the best practice benchmarks across a range of competition and trade regulations would require major reform efforts in all OECD countries. However, the need to ease competition restrictions is greater in the EU than in the US. Consequently, the economic benefits of reform would be greater in Europe, the paper adds. In most EU countries competition-restraining regulations need to be reformed in particular in the domestic air, rail and road transport and in the gas and electricity sectors. The US too needs to concentrate reform on its electricity and rail transport sectors.The paper argues that reforming regulations restraining competition, especially in services, would contribute more to raising GDP than reducing barriers to trade and foreign direct investment.The OECD working paper "The benefits of liberalising product markets and reducing barriers to international trade and investment: the case of the US and the EU" is available at: [http://www.olis.oecd.org/olis/2005doc.nsf/linkto/ECO-WKP(2005)19](http://www.olis.oecd.org/olis/2005doc.nsf/linkto/ECO-WKP%282005%2919%22%20%5Ct%20%22_new)**1.10 FSA publishes near final prospectus directive rules** On 6 June 2005, the United Kingdom Financial Services Authority (FSA) published its policy statement (PS05/7) and near final rules on the implementation of the Prospectus Directive, following the relevant implementing statutory instrument being laid before Parliament. These issues were consulted on in CP04/16 -The Listing Review and Implementation of the Prospectus Directive.The final Prospectus Rules, which also set out the regime for statutory responsibility for prospectuses, will be published, together with the Listing and Disclosure Rules, at the end of June. This means the UK is on track to implement the Prospectus Directive, along with the Market Abuse Directive and revised Listing regime, on 1 July. The new rules will apply to prospectuses for public offers of securities and admission of securities to trading on a regulated market. The key provisions of the directive are: * prospectus requirements - prescribing the contents and format of prospectuses; allowing issuers to incorporate by reference; allowing the use of three part prospectuses; setting out the exemptions from the requirement to produce prospectuses;
* approval and publication of prospectus - setting out procedures for approval or prospectuses and how and where they must be published;
* passport rights - introduces administrative measures to facilitate the passporting of prospectuses on a pan-European basis making it easier for companies to raise capital across Europe;
* third country issuers - prospectuses drawn up under a third country's law can be treated as equivalent to directive requirements. This will be determined on a case-by-case basis; and
* other provisions - requiring issuers to produce annual information updates and the establishment of a qualified investors register.

The new rules governing the listing regime will be divided into three sections which will reflect various elements of the listing process. The Listing Rules - dealing with the requirements to be met on listing; the Disclosure Rules - reflecting the requirements of the Market Abuse Directive; and the Prospectus Rules.The policy statement can be found on the FSA [website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/063.shtml%22%20%5Ct%20%22_new). **1.11 Improvements to the National Access Regime** On 2 June 2005, the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce MP, introduced into Parliament a set of reforms to enhance the effectiveness of the National Access Regime. The National Access Regime seeks to promote competition in the economy by promoting the efficient investment in, and use of, infrastructure facilities of national significance.The Regime was established in 1995 as part of the National Competition Policy Agreements between the Australian Government and state and territory governments. It provides an avenue by which firms can seek access to services provided through infrastructure facilities owned and operated by others.At the request of the Government, the Productivity Commission conducted an inquiry into the operation of the National Access Regime. The Commission's report recommended that the National Access Regime be retained, and made 33 recommendations for improvements to it. The [Trade Practices Amendment (National Access Regime) Bill 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85437" \t "Default), introduced into Parliament on 2 June 2005, implements the Government's final response to the Productivity Commission's report. The Government accepted almost all of the Commission's recommendations.The amendments to the National Access Regime are aimed at achieving four key outcomes. The reforms: * will encourage more efficient investment in and operation of infrastructure, particularly in relation to new investment in essential infrastructure;
* will provide greater certainty for access providers and access seekers about the situations in which access regulation might apply under the existing regime, and the likely outcomes;
* establish more timely and, in turn, less costly regulatory procedures. For example, target time limits will be applied to the Regime's various decision-making processes, and changes are being made to expedite the process of granting extensions of certain decisions under the Regime; and
* enhance, through a range of measures, the accountability of decision makers regarding access decisions under the Regime. This includes the introduction of merits review for decisions on proposed access undertakings by the Australian Competition and Consumer Commission, and requirements for decision makers to publish reasons for their recommendations and decisions.

The Productivity Commission's report on the review of the National Access Regime is available at: [http://www.pc.gov.au/inquiry/access/index.html](http://www.pc.gov.au/inquiry/access/index.html%22%20%5Ct%20%22_new)The Government's response to the Productivity Commission's report is available at:[http://www.treasurer.gov.au/tsr/content/publications/finalreport\_nationalaccessregime.asp](http://www.treasurer.gov.au/tsr/content/publications/finalreport_nationalaccessregime.asp%22%20%5Ct%20%22_new)**1.12 Proposed amendment of law dealing with corporate trustees** On 1 June 2005, the Australian Government introduced into Parliament the [Corporations Amendment Bill (No 1) 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85436" \t "Default).Schedule 1 to the Bill amends the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to clarify the scope of the potential personal liability of the directors of corporate trustees. The amendments will address concerns that have arisen in the light of the recent decision of the South Australian Supreme Court in Hanel v O'Neill [2003] SASC 409, namely, that directors of corporate trustees could be personally liable in any case where there are insufficient assets to discharge the liabilities of the trust. This interpretation could significantly expand the personal liabilities of the directors of all corporate trustees, from large superannuation trusts through to trading trusts running a small business. Schedule 1 will replace existing subsection 197(1) of the Corporations Act with a new subsection 197(1) that unambiguously only imposes personal liability on a director of a corporate trustee where the corporation's right of indemnity as trustee is lost through disentitling conduct on the part of the corporation (whether through breach of trust or ultra vires conduct) or through a restriction in the terms of the trust that purports to deny a right of indemnity against trust assets.The Corporations Amendment Bill (No 1) 2005 also contains a technical amendment to clarify the operation of a transitional provision in the Corporations Act. The amendment will ensure that the auditor independence provisions which applied prior to the enactment of the CLERP 9 legislation continue to apply to financial years commencing prior to 1 July 2004.The text of the Bill and the Explanatory Memorandum accompanying the Bill are available at: [http://parlinfoweb.aph.gov.au/](http://parlinfoweb.aph.gov.au/%22%20%5Ct%20%22_new)The problems created by the decision of the South Australian Supreme Court in Hanel v O'Neill are identified in an article by Jeremy Cooper. The article is available on the Centre for Corporate Law website at: [http://cclsr.law.unimelb.edu.au/Vol%2022%20No%205%20Cooper.pdf](http://cclsr.law.unimelb.edu.au/Vol%2022%20No%205%20Cooper.pdf%22%20%5Ct%20%22_new)**1.13 US Department of Labor and Securities and Exchange Commission issue guidance addressing potential conflicts of interest of pension consultants** On 1 June 2005, the US Department of Labor and the Securities and Exchange Commission (SEC) published guidelines to assist fiduciaries of employee benefit plans in reviewing conflicts of interest of pension consultants.The guidance, "Selecting and Monitoring Pension Consultants - Tips for Plan Fiduciaries," addresses questions raised by an SEC staff report on potential conflict of interest disclosures by pension consultants. The report by the SEC Office of Compliance Inspections and Examinations indicates that those potential conflicts of interest may affect the objectivity of the advice they are providing to their pension plan clients.The tips provide relevant questions plans fiduciaries should ask to encourage better disclosure and information relating to potential areas of conflicts of interest by pension consultants. The tips are available on the EBSA website at: [http://www.dol.gov/ebsa](http://www.dol.gov/ebsa%22%20%5Ct%20%22_new) or the SEC website at: [www.sec.gov/investor/pubs/sponsortips.htm](http://www.sec.gov/investor/pubs/sponsortips.htm%22%20%5Ct%20%22_new)**1.14 SEC Chairman William H Donaldson to step down on 30 June 2005** On 1 June 2005, US Securities and Exchange Commission Chairman William H Donaldson, announced that he would step down on 30 June 2005. Chairman Donaldson is the 27th Chairman of the United States Securities and Exchange Commission and was appointed by President Bush in 2003.President Bush has nominated Republican Congressman Christopher Cox to replace William Donaldson.**1.15 Corporate governance ratings** In June 2005, Institutional Shareholder Services published a report titled "FTSE ISS Corporate Governance Rating and Index Series - Measuring the Impact of Corporate Governance on Global Portfolios".According to the report, corporate governance is now established as a key component of equity risk. However, quantifying this risk within global portfolios has posed a challenge to investors. Producing a solution for the global investment community has been the main driver behind the creation of the FTSE ISS Corporate Governance Index (CGI) Series and CGI ratings.The ratings allow investors to analyse corporate governance risk on a company, country and sector basis, while the FTSE Corporate Governance Index allows investors to track the performance of those companies with good corporate governance practice.By aggregating company FTSE ISS CGI ratings data within each country, a global perspective of corporate governance practices is obtained. Examination of the individual countries' and sectors' corporate governance scores shows that:* the UK and Canada top the list of countries by corporate governance average score;
* the Oil and Gas sector is the highest scoring sector;
* when applying the ratings to a selection of local capital market indexes from around the world, the FTSE 100 has the highest corporate governance rating; and
* looking at the top vs bottom constituents of the FTSE US Index for each CGI theme demonstrates the potential relationship between corporate governance and company performance.

The report is available at [http://www.issproxy.com/pdf/CGIResearchStudy2005.pdf](http://www.issproxy.com/pdf/CGIResearchStudy2005.pdf%22%20%5Ct%20%22_new)**1.16 US Supreme Court reverses 2002 conviction of Arthur Andersen LLP** On 31 May 2005, the US Supreme Court unanimously reversed the June 2002 conviction of Arthur Andersen LLP for obstructing justice by causing documents to be destroyed as the government's Enron investigation was getting under way (Arthur Andersen v United States, 2005 WL 1262915,31 May 2005). At trial, Andersen had been convicted of violating a federal statute that makes it unlawful to "knowingly . . . corruptly persuad[e]" another person "with [the] intent to . . . cause" that person to "withhold" documents from, or to "alter" documents for use in, an "official proceeding." 18 U.S.C. §§ 1512(b)(2)(A) and (B). In reversing this conviction, the Supreme Court held that the trial court's jury instructions failed to properly convey the requisite state of mind necessary to support criminal liability.The jury had been instructed that it could convict Andersen even if the firm "honestly and sincerely believed that its conduct was lawful." Finding fault with those instructions, the Court held that "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e]'" in violation of the statute. "Indeed," said Chief Justice Rehnquist, writing for the unanimous Court, "it is striking how little culpability the [jury] instructions required." The Court also found that the jury instructions failed to require any "nexus" between the defendant's acts of persuading others to destroy documents and knowledge of a particular "official proceeding" in which those documents might be material.The conviction of Arthur Andersen was an important contributing factor to the collapse of the firm.The judgment is available from the [US Supreme Court](http://a257.g.akamaitech.net/7/257/2422/31may20051130/www.supremecourtus.gov/opinions/04pdf/04-368.pdf%22%20%5Ct%20%22_new). **1.17 US Business Roundtable issues guidelines for effective shareholder communications** On 27 May 2005, the US Business Roundtable (the association of CEOs of 160 leading US companies) issued a set of principles that urge companies to further strengthen the relationship with their shareholders by promoting enhanced responsiveness and implementing established procedures for shareholder-director communications. The principles are designed to help companies continue to incorporate into their daily business practices the recent reforms adopted by the US Congress, the US Securities and Exchange Commission (SEC) and the national securities markets, all of which the Roundtable supported. Specifically, the Roundtable recommends five principles: 1. Every publicly owned corporation should have effective procedures for shareholders to communicate with the board and for directors to respond to shareholders concerns.2. A corporation's relationship with its shareholders should be characterized by candour. All communications with shareholders should be consistent, clear and candid.3. A corporations' procedures for shareholder director communications, and its corporate governance practices generally, should be readily available to shareholders.4. The board should be notified of all proposals submitted by shareholders, and the board or its corporate governance committee should oversee the corporation's response to shareholders' proposals.5. Directors should attend the corporation's annual meeting of shareholders and should respond, or ensure that management responds, to appropriate shareholder questions concerning the corporation.The Roundtable's latest corporate governance survey of member companies reflects these principles, reporting that 90% of companies have established procedures for shareholder communications with directors, and 85% of nominating committees said they are willing to consider shareholder recommendations for board nominees.These new principles join a series of guidelines published by the Roundtable to assist companies with corporate governance practices. In 2002, the Roundtable released "Principles of Corporate Governance", which was followed by the release of "Executive Compensation: Principles and Commentary" in 2003 and "The Nominating Process and Corporate Governance Committees: Principles and Commentary" in 2004.The Guidelines for shareholder director communications are available on the Business Roundtable website at: [http://www.businessroundtable.org/publications/index.aspx](http://www.businessroundtable.org/publications/index.aspx%22%20%5Ct%20%22_new)**1.18 Revised Canadian investment fund governance rule** On 27 May 2005, the Canadian Securities Administrators (CSA) published for second comment a revised version of a proposed rule on the governance of investment funds that focuses on enhancing investor protection.The proposed rule would impose a minimum, consistent standard of governance for all publicly offered investment funds. Currently, there is no requirement that investment funds have a governance body.Under the proposal, every publicly offered investment fund must have an Independent Review Committee (IRC) to oversee a fund manager's decisions in situations where they are faced with a conflict of interest. These conflicts would include "business" or "operational" conflicts that are not specifically regulated today, as well as related-party transactions, which are currently restricted.The revised rule differs from an earlier proposal, published in 2004, in a number of significant ways, including:* it would apply to all publicly offered investment funds, not just mutual funds;
* existing rules and prohibitions on related-party and self-dealing transactions would be retained;
* the IRC would have the ability to stop a manager from proceeding with a prohibited transaction;
* investors would continue to have the right to vote on a proposed increase of management fees, change of manager, and changes to a fund's investment objective; and
* it would provide the IRC with effective methods to oversee and report on manager conflicts of interest.

The texts of the proposed instrument, National Instrument 81-107 Independent Review Committee for Investment Funds, and related amendments, are available on several CSA members' websites. **1.19 Regulatory analysis of hedge funds** On 27 May 2005, the Investment Dealers Association of Canada (IDA) released "Regulatory Analysis of Hedge Funds". The study examines hedge fund activity in Canada, focusing on the activities of IDA Member firms and their affiliates. The study includes a discussion of the characteristics and evolution of hedge funds; the Canadian hedge fund landscape in terms of participants and asset size; a review of securities laws and regulations relating to the exempt market; hedge fund investment strategies and a review of principal-protected notes; a review of IDA margin rules as they relate to hedge fund products; a discussion of regulatory and compliance issues; and recommendations.By conservative estimates, there were Can$26.6 billion in Canadian hedge fund assets as of June 2004 and worldwide, hedge funds also continue to expand with very strong investor appetite. As securities, hedge funds fall within the ambit of IDA regulations as to suitability. An important component of suitability is due diligence. In pursuing due diligence on hedge fund products, dealers must contend with the risks resulting from conflicts of interest, complex fees structures, lack of disclosure requirements, lack of controls on pricing and valuation and other issues flowing from the lack of direct regulation of highly complex products. An indication of the importance of due diligence to IDA Members is the fact that less than 3% of Portus related products were sold through IDA Member firms. The study is available on the IDA website at: [http://www.ida.ca](http://www.ida.ca" \t "_new)**1.20 Global IPO activity** On 27 May 2005, a survey on global IPO activity by Ernst & Young was published. The study found that 2004 was an important turning point for IPO activity around the world with a rise for the first time since 2000 in both the number of IPOs and the total capital raised. IPO activity roughly doubled over the previous year. The Asian-Pacific region was very strong with Japan, China and Australia all ranked in the top five countries by total capital raised in IPOs in 2004. Highlights of the survey include (figures are in US$): * 1516 deals and $124bn of capital were raised worldwide which, leaving aside the bubble years of 1999 and 2000, were figures last matched in 1997.
* In Asia there were 721 IPOs, raising $40bn, fuelled by Chinese growth. Chinese companies often partook in foreign transactions, particularly in Hong Kong, the US and Singapore.
* India saw a 638% increase in total capital raised compared to the previous year.
* Australia and New Zealand, with 185 IPOs, raising $8.4bn, accounted for 12% of global deals and 5% of the total capital raised worldwide.
* In North America $39.7 billion was raised in 286 IPOs, representing an increase of 285% in the number of deals, and 286% in the total capital raised.
* In Europe, $30bn was raised in 290 IPOs. The main centre of European IPO activity was the UK with 191 deals raising $6.8bn.
* Eastern European markets saw increased activity - Russia carried out six IPOs raising $859mn in 2004, compared with just one the year before.

**1.21 US and European investors publish plan to deal with climate change risks** Two dozen US and European institutional investors managing over US$3 trillion in assets released in May 2005 a 10 point action plan calling on US companies, Wall Street firms and the Securities and Exchange Commission to intensify efforts to provide investors with comprehensive analysis and disclosure about the financial risks presented by climate change. The group also pledged to invest US$1 billion in prudent business opportunities emerging from the drive to reduce greenhouse gas emissions. Highlighting the far reaching impacts that climate change will have on the world economy, the investors said that while an increasing number of companies, fund managers and others in the investment community are tackling the issue, many are not - and the imperative for broader action is acute. The action plan was announced at an Institutional Investor Summit on Climate Risk at the UN attended by more than 375 financial, corporate and investor world leaders. Supporters of the action plan include state treasurers, comptrollers and pension funds leaders from London, California, Illinois, New York, New York City, Connecticut and over a dozen other entities.The action plan calls for a series of specific steps by institutional investors, fund managers and financial advisors, companies, and the government. Among the investor commitments:* urge publicly held companies in the electric power, auto, and oil and gas sectors to report within a year to investors on how greenhouse gas emissions limits and other climate change scenarios will affect their businesses and steps they are taking to reduce those risks and seize new market opportunities;
* require investment managers overseeing their fund assets to describe their resources, expertise and strategies for assessing financial risks associated with climate change;
* evaluate and rank 100 of the world's largest, publicly-held companies on their actions for reducing climate change risks and share the scorecard report with investors later this year;
* Invest US$1 billion of capital in the next year in companies with clean technologies that stand to benefit as greenhouse gas limits become more widespread; and
* urge the US Securities and Exchange Commission to require companies to disclose financial risks related to climate change.

**1.22 Growth in managed funds** According to Axiss Australia, Australia's investment funds asset pool increased by 13.8 per cent to US$635 billion (A$814 billion in Australian dollar terms). These figures are based on December quarter 2004 statistics recently released by the US-based Investment Company Institute. These figures confirm that Australia has the fourth largest investment funds asset pool in the world (after the US, Luxemburg and France) and the largest pool of investment funds in the Asia-Pacific region, with a global market share of 4 per cent, up from 2.9 per cent at the end of 2000. Within the Australian market, the top ten funds managers, comprising five foreign-owned financial companies, one joint venture and four Australian companies, dominate the industry with a market share of 51 per cent. The Australian Bureau of Statistics recently released the Australian figures for the period from December 2004 to March 2005, which show the growth in Australia's total managed funds has continued, with total funds under management at A$839 billion. |
| **2. Recent ASIC Developments** |
| **2.1 ASIC seeks industry comment on proposed licensing exemption for credit rating agencies**On 9 June 2005, the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking comment on a proposal that credit rating agencies be exempt from holding an Australian financial services (AFS) licence under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). ASIC considers that credit ratings constitute financial product advice under the Act. Therefore, credit rating agencies that carry on a business of providing credit ratings in Australia are required to hold an AFS licence unless exempted. Since December 2003, Fitch Australia Pty Limited, Moody's Investor Service Pty Limited and Standard & Poor's (Australia) Pty Limited, which ASIC understands are the only entities carrying on a business of providing credit ratings in Australia, have had an interim exemption for their credit rating services under Class Order [CO 03/1093] Credit rating agencies. The interim exemption was provided to allow ASIC to finalise its regulatory position on credit rating agencies, especially in light of international developments on the regulation of credit rating agencies. ASIC has recently extended the interim exemption in [CO 03/1093] until 31 December 2005 (see Class Order [CO 05/415] Credit rating agencies amendment) to allow ASIC to consult with industry on a proposal for an ongoing exemption.ASIC's proposal for an exemption draws on the requirements of [CO 03/1093] (and, by extension, [CO 05/415]) and on the International Organisation of Securities Commissions' Principles Regarding the Activities of Credit Rating Agencies and Code of Conduct Fundamentals for Credit Rating Agencies (together the IOSCO CRA Principles and Code). The consultation paper sets out the terms of the proposed exemption, namely that exempted credit rating agencies: * comply with existing requirements under [CO 03/1093] to give certain disclosures about the nature of the service provided by credit rating agencies;
* comply with clause 4.1 of the IOSCO Code of Conduct Fundamentals for Credit Rating Agencies; and
* publish a compliance statement.

A copy of the policy proposal paper is available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by calling the ASIC Infoline on 1300 300 630.**2.2 ASIC further extends interim relief for superannuation investment strategy product disclosure** On 9 June 2005, the Australian Securities and Investments Commission (ASIC) announced it has extended current interim relief for superannuation trustees, that delays the commencement of the product disclosure requirements in s1012IA of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) from 30 June 2005 to 30 June 2006. The extension of the relief is provided under ASIC Class Order [CO 05/346] Deferral of s1012IA. Under s1012IA of the Act, a trustee of a superannuation fund is required to provide a Product Disclosure Statement (PDS) to members and prospective members about some types of underlying investments. Disclosure must be made about particular financial products which may be acquired through an investment strategy of the superannuation fund. An example of a superannuation fund that may be subject to s1012IA for some of its strategies would be a superannuation master trust.The requirements under s1012IA relate to investment strategy choice, not to choice of superannuation fund.ASIC issued a policy proposal paper (PPP) Superannuation: Delivery of product disclosure and investment choice in November 2004, and received several submissions in response. ASIC expects to release its final policy position by August 2005.A copy of Class Order [CO 05/346] Deferral of s1012IA is available from the ASIC [website](http://www.asic.gov.au" \t "_new).**2.3 ASIC facilitates removing termination date from property trust deeds** On 6 June 2005, the Australian Securities and Investments Commission (ASIC) announced that it will give relief to facilitate changes to the scheme constitutions of listed registered schemes, and certain unlisted schemes, to remove their limited lives without requiring a special resolution of members.Concerns had been raised that the 'perpetuity clause' in trust deeds and other scheme constitutions of listed property trusts, as well as other registered schemes, meant that members' funds should be treated as a liability rather than equity in financial statements prepared under new accounting standards. Registered scheme financial reports prepared under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are required to comply with Australian equivalents to the International Financial Reporting Standards (AIFRS) for reporting periods beginning on or after 1 January 2005.Under accounting standard AASB 132 'Financial Instruments: Disclosure and Presentation' members' funds may be regarded as liabilities as there is no unconditional right to avoid settling a contractual obligation to pay out the schemes' equity to members at the end of the life of the scheme.The ASIC relief will apply to listed schemes and unlisted schemes that are not subject to a mandatory redemption requirement.A perpetuity clause may require the scheme to be terminated at a particular date, within a set period (eg 80 years), or when an event such as the death of the last lineal descendent of King George V occurs.Removing any perpetuity clause will not impact on any existing ability of scheme members to sell their units on market.Relief will only be available where the responsible entity reasonably considers that the removal of the perpetuity clause does not either substantially: * change the nature of the scheme; or
* adversely affect members' interests.

In considering whether to rely on the class order to remove the perpetuity clause, responsible entities must have regard to their statutory duties to act in the best interests of members.As a condition of the relief, the responsible entity must give each scheme member a written notice that sets out the reason for, and effect of, the deed amendment.Responsible entities of listed property trusts and their auditors will need to form their own views as to whether there are any other reasons why members' funds should be treated as liabilities under the new accounting standards.The class order is expected to be issued by Wednesday, 15 June 2005.Responsible entities should be mindful that members' funds may need to be disclosed as liabilities at 30 June 2005 in any financial report for the half-year then ending if any perpetuity clause has not been removed before that date.A copy of the finalised class order will be available from the ASIC [website](http://www.asic.gov.au/co%22%20%5Ct%20%22_new). **2.4 ASIC compliance guidance on the FSR refinement proposals and fees template requirements** On 3 June 2005, the Australian Securities and Investments Commission (ASIC) provided guidance to financial service providers about its compliance response to proposed law reform refinements, and new regulations to the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).The particular proposals and regulations are: * the Federal Government's Refinements to Financial Services Regulation (FSR) proposals paper, issued on 2 May 2005 (the Refinements paper); and
* the enhanced fee disclosure regulations (the [Corporations Amendment Regulations 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "Default)) that were made on 10 March 2005, and which include the fee template requirements.

The advice issued supplements earlier releases from ASIC, including: * the Refinements paper (see ASIC Media Release 05-110: ASIC welcomes financial services refinements proposals paper issued on 2 May, and ASIC Information Release 05-22: ASIC provides details on financial services refinement projects issued on 12 May); and
* enhanced fee disclosure regulations (see ASIC Information Release 05-19: ASIC provides answers on some fees and costs questions).

**(a) Compliance during the FSR refinements implementation process**ASIC will take into account the Refinements paper proposals in determining whether licensees are complying with the financial services provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). ASIC will generally not take action for breaches of the financial services provisions that are the subject of the refinement proposals, where that conduct is more likely than not to be lawful if the refinement proposal became law. This general position is subject to circumstances where the conduct is, or is likely to: * materially harm or disadvantage consumers; and/or
* undermine the confident and informed participation of consumers in the financial market.

The current obligation on Australian financial service licensees (AFS licensees) to report significant breaches of the financial services laws to ASIC still applies to the those financial services provisions that are the subject of the Refinements paper. ASIC expects AFS licensees to continue to identify breaches, or likely breaches of these provisions, give proper consideration to whether the breach is significant, and where required, provide timely notifications to ASIC. Consistent with our general compliance approach to the Refinements paper, ASIC will give due weight to the fact certain provisions may be the subject of change.As a last point, ASIC does not intend to pre-empt any of the FSR refinements proposals in instruments of relief.**(b) Compliance with the enhanced fee disclosure regulations**Under the enhanced fee disclosure regulations, product disclosure statements (PDSs) for most superannuation products provided to retail clients on or after 1 July 2005 must include: * a standardised fees and costs template;
* an example of annual fees and costs for a balanced or similar fund; and
* a boxed consumer advisory warning.

These requirements apply to other investment linked PDSs from 1 July 2006.ASIC is aware that issuers of superannuation PDSs have had a relatively short period to update or replace their current PDSs in order to comply with the enhanced fee disclosure regulations from 1 July 2005 and that a number of technical compliance issues have arisen. For example, it may be difficult for an issuer of a superannuation PDS to contain exact fees and costs details when the calculations depend on details from underlying managed investment issuers who are not required to comply with the regulations for another 12 months.In all cases, ASIC expects issuers of superannuation PDSs to be able to demonstrate the process by which they have arrived at fees and costs figures, and may seek this information when reviewing superannuation PDSs issued after 1 July 2005.Copies of the releases are available on the ASIC [website](http://www.asic.gov.au" \t "_new).**2.5 ASIC reports on Sydney Futures Exchange** On 2 June 2005, the Australian Securities and Investments Commission (ASIC) released the findings of its assessment of the Sydney Futures Exchange (SFE).The report indicated the SFE's market operates effectively and is well supervised, and that users have confidence in the market. ASIC has suggested an ongoing review of resources available for compliance and surveillance activities, together with a review of disciplinary actions, to ensure the SFE continues to deal effectively with market conduct issues.Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC is required to conduct an annual assessment of how well the SFE is complying with its obligations to supervise the market.ASIC has concluded that the SFE has adequate arrangements for supervising the market, including arrangements for: * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way;
* monitoring the conduct of participants; and
* enforcing compliance with its rules.

The report identifies some areas where the SFE should strengthen its supervision and compliance arrangements to ensure it can continue to comply with its obligations in the future. ASIC has advised that the SFE should: * Continue to monitor the resources available to its compliance and surveillance area to undertake its supervisory functions;
* Undertake a review of the results of disciplinary actions and their effectiveness in enforcing compliance with the rules; and
* Develop practices and procedures in relation to the various stages of product development, including documentation and identification of regulatory outcomes at each stage.

These reports into the SFE relate to the first and second assessments ASIC has undertaken. The initial report was completed in October 2003.The assessment reports are available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by contacting the ASIC Infoline on 1300 300 630.**2.6 ASIC extends interim relief for some non-cash payment facilities** On 1 June 2005, the Australian Securities and Investments Commission (ASIC) announced that it had extended interim relief for providers of low value non-cash payment facilities and loyalty schemes from 30 June 2005 to 28 February 2006.ASIC's extension of interim relief is set out in ASIC Instrument [05/579], published on 1 June 2005.ASIC plans to publish a final policy statement on non-cash payment facilities by September 2005. This policy statement will deal with ASIC's general approach to the regulation of non-cash payment facilities and relief for low value non-cash payments facilities, loyalty schemes and any other products not appropriately regulated as non-cash payment facilities. It will also deal with any further transitional issues.**Background** A non-cash payment facility is a facility through which a person can make a payment or cause a payment to be made other than through the physical delivery of Australian or foreign currency.Non-cash payment facilities were introduced as a new kind of financial product to be regulated under Chapter 7 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), as amended by the [Financial Services Reform Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "Default).ASIC published guidance on non-cash payment facilities in the form of an FAQ (QFS 120) in 2003. This FAQ was revised in March 2004.ASIC also issued guidelines for interim conditional relief for loyalty schemes and low-value non-cash payment products in February 2004 (see Information Release 04-06: ASIC guidelines for interim relief for loyalty schemes and Information Release 04-07: ASIC guidelines for interim relief for low value non-cash payment facilities).ASIC issued a policy proposal paper (PPP) on 22 December 2004 which canvassed: * how ASIC plans to approach the regulation of non-cash payment facilities on an ongoing basis;
* what class order relief ASIC is considering from the licensing, conduct and disclosure obligations of the Act for low-value non-cash payment facilities and non-cash payment facilities issued under loyalty schemes; and
* how ASIC proposes that the Act applies to non-cash payment facilities not covered by the proposed relief.

ASIC has received around 30 submissions in response to its PPP from a variety of industry associations and non-cash payment facility operators, across a variety of industries. ASIC thanks those who have made submissions.The Department of the Treasury has also released its 'Refinements to Financial Services Regulation: Proposals Paper' which is available from the Treasury's [website](http://www.treasury.gov.au" \t "_new). This paper notes that ASIC will issue guidance and/or relief to exempt products, not intended to be covered, from the definition of a 'non-cash payment facility'.**2.7 ASIC seeks comment on policy for approving a purpose to access the register of members of a mutual entity** On 27 May 2005, the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking comment on its draft policy for approving a purpose that allows access to the register of members of a mutual entity such as a building society, credit union or credit society.Under regulation 12.8.06 of the [Corporations Regulations 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default), access to the register of members of a mutual entity is restricted to prevent damage that might occur from disclosing the mutual entity's customer base. Regulation 12.8.06 allows the mutual entity to refuse access to the register if it is not satisfied that access is being sought by a member who intends to call a meeting of members, or if it is not satisfied that the purpose for which the party seeks access has been approved by ASIC.ASIC is seeking comment on its draft policy by Friday 15 July 2005 and aims to finalise and publicly announce the policy by Friday 30 September 2005.In the interim, ASIC will apply the draft policy on a case-by-case basis should it receive any requests to approve a purpose. Applicants should be aware that ASIC's final policy may differ from what is set out in the consultation document.The consultation paper is available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by phoning ASIC's Infoline on 1300 300 630. |
| **3. Recent ASX Developments** |
| **3.1 ASX Guidance Note 24 on related party dealings and listing rules 10.1-10.10**On 7 June 2005, ASX issued a new Guidance Note 24 on related party dealings and the application of ASX listing rules 10.1 - 10.10.In the Guidance Note ASX looks at the quite extensive range of parties to which listing rules 10.1.1-10.1.4 may apply in the context of acquisitions or disposals by a listed entity of substantial assets from or to parties, or their associates, who are in a position to control or materially influence the listed entity.Topics covered include: * a review of the types of parties covered under listing rules 10.1.1-10.1.4 such as subsidiaries, directors, substantial holders and associates ('Controllers/Associates'),
* the transfer of substantial assets between stapled entities,
* the transfer of substantial assets between a listed trust and related/influencing parties,
* the accounts which ASX will accept when determining whether an asset is substantial,
* the role of reports from independent experts, and
* in particular, how ASX exercises its discretion under listing rule 10.1.5.

If a listed entity proposes to dispose of a substantial asset to a person coming within any of rules 10.1.1-10.1.4, then it must first seek its security holders' approval, and the person to whom 10.1.1-10.1.4 applies is not entitled to vote.In addition ASX has discretion under listing rule 10.1.5 to consider the proposed buyer or seller of substantial assets as a person whose relationship to the listed entity or its Controllers/Associates is such that the proposed transfer should be subject to securityholder approval.Although ASX's discretion under 10.1.5 is not limited, its prevailing policy is to use it in the context of the underlying purpose of the rule, and use it sparingly. As has been indicated in the new Guidance Note, ASX has only formally determined to exercise its discretion under 10.1.5 once in the past 5 years. In particular ASX is not inclined to use its discretion to effectively rewrite the terms of 10.1.1-10.1.4 or the thresholds in them. For example, it will not use the discretion to make listing rule 10.1.3 apply to a person holding 9.5% of the shares in a listed company instead of the stated 10% unless there appears to be also some other connection linking the person to the listed company in a way which together suggests material influence or control, at the level at which the decision to enter the transaction is made.ASX's guiding principle in its use of the discretion in listing rule 10.1.5 is to practically enforce listing rules 10.1.1-10.1.4, even in situations where they do not strictly apply because an acquisition or disposal or a relationship has been structured in such a way, whether deliberately or not, that the terms of 10.1.1-10.1.4 do not technically apply.ASX considered it necessary to clarify its position on the use of its discretion under listing rule 10.1.5 because of what it considered to be misconceptions in the press coverage regarding whether Westfield should have been allowed to have its vote counted towards a resolution put to unitholders in GPT. That resolution concerned a transaction which included internalization of GPT's management and the sale of assets by GPT to Westfield (the Transaction) which met the 5% threshold in listing rule 10.2.In this case, it was clear that Westfield was not one of the persons referred to in 10.1.1 to 10.1.4 inclusive. Westfield's percentage shareholding at the time was 6.5%. That was well short of the threshold. There were no grounds for ASX to form the opinion that Westfield's relationship with GPT was one of influence or control at the level at which the decision was made to undertake the Transaction. There were no common directors on the boards of GPT and Westfield. Furthermore, there was nothing to suggest that influence was brought to bear on GPT (to make the decision relating to the Transaction) as a consequence of Westfield's relationship with one of the persons mentioned in 10.1.1 to 10.1.4 inclusive. In fact, ASX considered it a clear case where there were insufficient grounds to exercise the discretion under listing rule 10.1.5.**3.2 ASX consultation document - warrant issuer obligations and market making** ASX has released a Market Rules Consultation Document "ASX Warrant Rules - Issuer Obligations and Market Making" dated May 2005. ASX is seeking comment on possible changes to the Warrant Rules relating primarily to:* the approval criteria for issuers and their on-going obligations; and
* market making obligations.

The document discusses issues in relation to each of the possible changes and provides indicative rule changes. In particular, it outlines a number of possible future approaches to market making in the warrant market.Submissions need to be sent to ASX by 14 July 2005. The consultation document is accessible at the ASX website at: [http://www.asx.com.au/supervision/rules/changes/index.htm](http://www.asx.com.au/supervision/rules/changes/index.htm%22%20%5Ct%20%22_new) |
| **4. Recent Corporate Law Decisions** |
| **4.1 Agency in corporate structures - intentions and profits are fundamental**(By Annie Mould, Freehills)ACN 007 528 207 Pty Ltd (In Liq) v Bird Cameron (Reg) [2005] SASC 204, Supreme Court of South Australia, Besanko J, 8 June 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/june/2005sasc204.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/june/2005sasc204.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Bird Cameron Partners ("BCP" or "the firm") was an accountancy partnership that performed statutory audit, insolvency and other "general practice" work. Its service company, BPM Pty Ltd ("BPM") took on the general practice work from January 1989 until November 1995 and traded under the name Bird Cameron. The legal nature of the relationship is central to this case. The plaintiff (ACN 007 528 207 Pty Ltd) instituted proceedings against the firm and BPM for negligence relating to two transactions. The plaintiff was a client of the firm for a number of years and became a client of BPM. As a preliminary matter, the plaintiff asked the Court to determine whether BPM conducted the general practice as an agent of the firm. The finding of agency was critical as, at the time of trial, BPM had few or no assets. If an agency relationship existed, the plaintiff could seek to recover loss from the firm as principal. The plaintiff argued that, by words and conduct (there were no documents appointing BPM as agent), an actual agency existed between the firm and BPM in relation to the general practice between 1989 and 1995.The firm argued that it was not agency, but a licence arrangement.No agency relationship was held to exist between the firm and BPM despite the commonality of personnel in the two entities and the level of control apparently exercised by partners of the firm over BPM's practice. The critical factors which led to this conclusion included: * no intention by either the firm and BPM for an agency relationship in the period leading up to BPM taking on the general practice;
* the arrangement served a good commercial purpose which would not be served if an agency relationship existed;
* the relationship was better characterised as a licence arrangement;
* control alone does not create an agency relationship; and
* at the conclusion of the relationship, when the firm engaged a new company to perform the general practice work, the new agreements referred to the terminated "licence" of business assets to BPM.

**(b) Facts** Before January 1989, the firm undertook statutory audit, insolvency and other "general practice" work under the name Bird Cameron. BPM employed all of its staff, hired and leased plant, equipment and property to the firm. During 1987, the partners of the firm discussed transferring the general practice work to the service company (BPM). There were commercial reasons for this which included greater flexibility in the payment of bonuses, ability to pay franked dividends, preventing any challenges from the Australian Taxation Office to employee superannuation payments, and to provide the benefits of limited liability. None of these aims would be furthered by an agency relationship. The management and control of BPM mirrored that of the firm. That is, the people who comprised the firm's executive committee formed the executive of BPM, and all partners became BPM shareholders. While BPM carried on the business, it received revenue and profits from the practice, and did not pass these on to the firm.The assets of an accounting practice typically include premises, plant and equipment, a business name, client files, work in progress and goodwill. No written agreement transferred any such assets to BPM. As BPM was the service company prior to the restructure, it already held the premises, plant and equipment. The firm licensed the right for BPM to use and register the business name "Bird Cameron". The firm, through its partnership rules and reflected in its accounts did not recognise any goodwill associated with the practice apart from goodwill in accounting practices acquired by the firm. The court held that the goodwill that did exist was licensed to BPM. BPM took over the exiting client files, but there was no transfer of work in progress - the firm was paid for work done prior to January 1989 and BPM was paid for all subsequent work. It was held that there was no transfer of the client files, but these were part of the licensed goodwill. On or about 30 November 1995, BPM ceased operating the general practice and the firm entered into a new arrangement with Birdanco Nominees Pty Ltd ("BN"). The firm and BPM executed a document containing the various recitals including: * the firm conducted its practice as chartered accountants as to part in its own name and as to the balance it had permitted BPM to conduct the same under licence;
* the licence gave BPM the right to use certain assets, client files, the business name and the goodwill associated with the name;
* the licence was terminated with effect from 30 November 1995.

BPM and the firm also executed a release which purported to terminate the licence arrangement regarding client files, the business name and the associated goodwill. Until late 1990, the BPM executive committee had not been formally created and decisions of both BPM and the firm were dealt with at the executive partners' meeting. The plaintiff argued that at least during that time (the dates being important to at least one of the main actions) the affairs of BPM were controlled by the firm, not by BPM. The plaintiff argued that an absence of a resolution to form the executive committee of BPM resulted in no such committee being formed. The firm argued that not all decisions were made via resolution; some were made by 'general consensus'. Over the entire period from 1989 to 1995, the plaintiff submitted that BPM was also controlled by the firm because the same people sat on both executives, and the partners were shareholders. Further, there were instances where BPM matters were referred to the firm for decision. The plaintiff argued that this supported a concept of a 'unified practice' which controlled the actions of BPM. It argued that control equates to agency. **(c) Decision** On the central issue of whether there was a relationship of agency between the firm and BPM, the Court held that such a relationship did not exist at any point. This was based on three limbs: * the intention of the parties;
* the transaction whereby BPM commenced to carry on the general practice; and
* how the parties operated in fact between 1989 and 1995.

**(i) Important legal principles*** Agency is determined as a question of fact, and whilst helpful, express labelling of the relationship is not decisive.
* There is no uniformly agreed definition of agency, but commonly cited definitions impose a necessity for express or implied consent to the control or fiduciary relationship.
* Control, whilst relevant, is not determinative in finding agency, particularly in corporate structures - rather, retention of profits by the controller and an absence of resources provided by the controller are more important indicators.

**(ii) Intention of the parties**There was no intention to create agency, and conduct including the transfer of various banking facilities to BPM also tended against an agency relationship. Further, Besanko J held that, in accordance with Pioneer Concrete Services Ltd v Yelnah (1986) 5 NSWLR 254, "a good commercial purpose for the company carrying out a particular function" was relevant. Here, there were a number of "good commercial purposes" for the arrangement, which would not be furthered by a finding of agency. **(iii) The transaction leading to BPM operating the general practice** There was no transfer of goodwill in the firm (from the acquired practices) to BPM, but this was instead licensed to BPM. Even though the client files were not transferred, which the plaintiff argued resulted in agency, the Court held that these too were licensed as part of the goodwill of the firm. BPM did not operate those files for the firm's benefit but retained the revenue and profits. **(iv) Operating of the business 1989-1995**As has been mentioned, the retention of profits by BPM was important in finding against agency. During 1989 and 1990, with no formal formation of a BPM executive committee, it was argued that the firm effectively controlled BPM. It was held that the absence of dissent in relation to the proposal to form the BPM executive at the meetings during 1988 was sufficient to indicate the agreement of the partners to establish the committee. Whilst a resolution is a better indication of intention, a resolution is not always necessary. After that date, although the same people managed both the firm and BPM, and although on occasions issues were referred to the partners, Besanko J held that this was insufficient for agency. Control alone is insufficient. None of the other factors were present to make this an agency relationship.**(v) Conclusion** As a result of factors such as: (1) the "good commercial purposes" leading to BPM conducting the general practice where those purposes could not be achieved by agency; (ii) BPM's retention of profits and; (iii) the characterisation of the arrangement as a licence, Besanko J held that BPM was not an agent for the firm during the entire period from 1989 to 1995. **4.2 Schemes of arrangement/capital reductions - Late lodgement of documents with ASIC** (By Jeremy Horwood, Clayton Utz)Capel Finance Ltd [2005] NSWSC 522, New South Wales Supreme Court, Barrett J, 31 May 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc522.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc522.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Capel Finance Ltd (CFL) sought Court approval for a scheme of arrangement pursuant to section 411 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). The scheme involved a reduction of capital. CFL was late in lodging with ASIC the explanatory statement for the scheme and the notice of meeting relating to the reduction of capital. Although CFL had not complied with the procedural timing rules, the Court approved the scheme of arrangement.**(b) Facts** CFL held the appropriate meetings and obtained the requisite member approvals. However CFL had sent the required explanatory statement relating to the scheme to its members several hours before it had lodged it with ASIC. Section 412(6) of the Act says that an explanatory statement must not be sent to members unless it has been registered by ASIC. Further, in relation to the proposed reduction of capital, CFL had sent the notice of meeting and accompanying documents to its members before lodging them with ASIC. The documents were lodged with ASIC the day after posting. Under section 256C(5) of the Act, a copy of the notice and any accompanying document must be lodged with ASIC before the notice of meeting is sent to members. CFL then sought a "no action letter" from ASIC, in accordance with ASIC Policy Statements 108 and 51, regarding these two instances of non-compliance. ASIC refused to make a decision in relation to this application given the upcoming Court hearing for approval of the scheme and the Court's powers in relation to procedural irregularities. ASIC noted that the "no action letter" was an enforcement matter for ASIC which was irrelevant to the validity or otherwise of the scheme. At the Court hearing for approval of the scheme, CFL argued that the two matters of timing non-compliance caused no prejudice and were merely procedural irregularities that fell within the ambit of section 1322(2) of the Act. Neither ASIC nor any other interested person appeared at the hearing to oppose this argument. **(c) Decision** The court approved the scheme. The court agreed that the two instances of timing non-compliance were procedural irregularities within section 1322(2) of the Act which did not affect the validity of the scheme. There was no need for any express validation of those matters. The Court noted that in this case the relevant documents were in ASIC's hands within a very short time after the missed deadline.With respect to the timing of lodgement of documents relating to the capital reduction the Court applied the decision in Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2001) 166 FLR 144 in which the NSW Court of Appeal stated that the effect of section 256D of the Act is that a reduction of capital is valid despite non-compliance with the procedural rules. Finally, because section 256C(3) of the Act requires 14 days to elapse between lodgement of selective capital reduction resolutions and the capital reduction being effected, the Court directed that the orders of the Court were not to take effect for 14 days.**4.3 Pooling of company assets in insolvency - requirements and limitations** (Michael J Makridakis, Clayton Utz)Tayeh and De Vries re The Black Stump Enterprises Pty Ltd [2005] NSWSC 475, Supreme Court of New South Wales, Barrett J, 20 May 2005 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc475.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc475.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Liquidators under a creditors' voluntary winding up of a group of companies whose affairs are intermingled and who wish to pool or consolidate the assets of the companies and distribute dividends to creditors from the assets so pooled must obtain the unanimous assent of creditors before the court will consider sanctioning the pooling of the assets under section 511(1)(a).**(b) Facts** The plaintiffs were the liquidators under creditors' voluntary windings up arising in consequence of the voluntary administration of nine companies sharing largely the same directors and shareholders. The plaintiffs applied under sections 477(1)(c), 506(1)(b) and 511(1) and (2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for orders to pool the assets of each of the nine companies and for orders that the payments of dividends to creditors of the companies be paid from the pooled assets without regard to which company was indebted to which particular creditor.Notably, the plaintiffs did not attempt to invoke the provisions in the Corporations Act 2001 under which a majority of creditors can bind the minority (for example section 510).**(c) Decision** Barrett J had to consider whether the sections of the Corporations Act 2001 relied upon by the plaintiffs as providing the legal basis for the making of pooling orders would indeed support the making of such orders. If the court was satisfied that the sections relied upon by the plaintiffs did enable the making of pooling orders, it then had to decide, on the facts of the case, whether such orders ought to be made and what form the orders might take.**(i) Sections 477(1)(c) and 506(1)(b) - the power of a liquidator to make a compromise or arrangement with creditors**Barrett J found that the plaintiffs could resort to the section 477(1)(c) power (via section 506(1)(b)), to make a compromise or arrangement with the creditors of the nine companies to pool the assets of the companies and for the payment of dividends to creditors from the pooled assets. No court approval was required because sections 477(1)(c) and 506(1)(b) do not confer jurisdiction on the court to make orders with respect to compromises or arrangements entered into by creditors and liquidators. Accordingly, the court did not have jurisdiction to make the pooling orders sought via sections 477(1)(c) and 506(1)(b).At this juncture Barrett J also observed that section 477(1)(c) does no more than allow a liquidator to enter into a consensual compromise or arrangement with such, if any, of the creditors as are minded to become a party to the compromise or arrangement. Section 477(1)(c) is not a provision that can cause a compromise or arrangement to be binding on anyone who does not actively assent to it. The provision does not entail any ability for a majority to bind a minority. Thus, unanimous creditor consent is imperative before a liquidator pools assets under section 477(1)(c).**(ii) Section 511(1)(a) - application to court to determine any question arising in the winding up of a company**The plaintiffs submitted that section 511(1)(a) is a source of jurisdiction for the making of orders varying and affecting the rights of creditors and thus empowered the court to make the pooling orders sought. It was submitted that the section may be invoked in such a way as to sanction departure by a liquidator from the scheme of application of assets and recognition of debts and claims laid down by the Corporations Act 2001. The observations of Young J in Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 42 NSWLR 209 and Re Charter Travel Co Ltd (1997) 25 ACSR 337 were relied upon in support of the plaintiffs' submission.In Soluble Solution Young J held that a court could allow a liquidator to consolidate debts, but it would be unlikely that the court would do so unless every creditor agreed or a regime was put in place for creditors to object.In Charter Travel, Young J held that administration of 2 companies conjointly is something that can only occur in exceptional cases; that is, if no creditor objects, it is impractical to keep the assets and liabilities of different companies separate and the consolidation is for the benefit of creditors generally.In the present case Barrett J regarded the observations of Young J in Soluble Solution and Charter Travel as representing no more than a recognition that a version of the "unanimous assent" principle which can, at shareholder level, override the need for particular procedures, is also capable of operating at creditor level in a winding up. His Honor found that central to the possibility of consolidation of administrations referred to by Young J is unanimous assent, express or implied.If the requirements of unanimous assent, the impracticability of keeping assets and liabilities separate and the benefit to creditors were met, then in Barrett J's view, it may be appropriate for assets to be pooled and section 511(1)(a) would potentially be of relevance in order to assure the liquidator that the creditors had effectively modified their rights. However, his Honour stressed that section 511(1)(a) is not and can never be a source of jurisdiction for the court to alter the incidence of statutory provisions or the rights of creditors in a winding up.His Honour then outlined what he considered are the 5 procedural possibilities for giving effect to pooling orders:* a scheme of arrangement between each company and its creditors under Part 5.1;
* a compromise under section 477(1)(c) which is made applicable to voluntary winding up by section 506(1)(b);
* an arrangement under section 510 between a company in the course of winding up and its creditors;
* resort to the extensive jurisdiction created by section 447A, where applicable; and
* a deed of company arrangement under Division 10 of Part 5.3A where a Part 5.3A administration is in progress.

**(ii) Application of the law to the facts in this case**In this case the creditors were initially notified of the liquidators' intention to apply to the court for pooling orders in a report to creditors and then at a meeting of creditors. On these occasions the creditors were directed to contact the liquidators if they had any queries. In a further letter to creditors, the liquidators notified creditors of their intention to apply to the court for pooling orders and requested that any creditor opposed to the pooling application indicate their opposition in writing to the liquidators.Barrett J found that the steps taken by the liquidators were insufficient to demonstrate the requisite unanimous assent of creditors to the pooling of the assets of the companies. In particular, his Honour pointed out that in none of the communications to creditors about pooling did the liquidators inform the creditors about the need for their unanimous consent. Rather, his Honour found that the impression created was merely that the court had some form of power to allow pooling and might do so upon application made by the plaintiffs. In Barrett J's view, the creditors were never given a clear opportunity to make a positive expression of their views. The creditors were not informed of the basis on which the court might make pooling orders or the considerations that might influence its decision.In contrast, his Honour pointed to the Charter Travel liquidation, where Young J ordered that the liquidators would be justified in convening a combined meeting of creditors of the subject companies in order to establish a forum for the opinions and wishes of creditors to be positively ventilated and presumably, to facilitate the passing of a resolution in relation to the specifically identified pooling proposal. Barrett J stated that a lack of objection in that context would be quite different to that involved in the present case.In concluding, his Honour again noted that there was no attempt by the plaintiffs to engage any of the statutory provisions under which rights in a winding up may be varied (e.g. where a majority of creditors can bind the minority). In the absence of such attempt and in the absence of demonstrating any unanimous assent of creditors, Barrett J held that there was no question arising in the windings up to be determined by the court. Accordingly, no orders for the pooling of assets were made under section 511(1)(a) or otherwise. **4.4 Litigation funding: restriction on use of shareholder register information** (By Lindsey Cregan, Mallesons Stephen Jaques)IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed) [2005] FCAFC 75, Full Federal Court, Moore, North and Emmett JJ, 12 May 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/may/2005fcafc75.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/may/2005fcafc75.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**As a consequence of this decision, litigation funders may be significantly constrained in their ability to contact potential claimants where an action against a company by certain of its shareholders is contemplated. However, it is important to note that this constraint may arise due to the type of claim contemplated, rather than as a result of the commercial reasons that drive litigation funders' desire to make such contact. The most logical method for litigation funders to acquire information with which to contact potential claimants is to use information obtained from the company's public shareholder register. However, section 177(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") prohibits such information from being used to contact or send material to shareholders. Whilst section 177(1A) limits the scope of this prohibition, this decision gives the operation of section 177(1A) a relatively narrow field. Section 177(1A)(a) relevantly provides that section 177(1) will not apply if the use of the information obtained from the register is either relevant to the holding of the interests recorded in the register ("the first limb") or the exercise of the rights attaching to them ("the second limb").In this case, the litigation funder had identified a potential claim against the company which related to the circumstances in which shareholders had acquired shares. By majority (Moore and Emmett JJ, North J dissenting), the Court found that the purpose of section 177 was to protect shareholder privacy, and so construed section 177(1A)(a) narrowly. The majority decided that the acquisition of shares was not encompassed by the holding of shares nor the exercise of the rights attaching to them. This meant that the litigation funder could not use information obtained from a shareholder register to contact shareholders in relation to the proposed claim. **(b) Facts**Sons of Gwalia Ltd ("SOG"), a gold and tantalum mining company, was placed into administration on 29 August 2004. IMF provides, among other things, funding for legal claims. Following an approach from about twenty SOG shareholders, IMF conducted an investigation and concluded that SOG had, after about 22 July 2004, failed to disclose market sensitive information about the level of its gold reserves. Consequently, from that date to the date SOG's administration commenced, approximately fifty million shares at prices ranging between approximately $1.25 and $2.00 were purchased by shareholders who may not have possessed relevant information. Each shareholder was likely to be entitled to a small amount, of which it was possible only a portion would be recovered (given SOG's administration and the potential for a subsequent liquidation). It would therefore only be worthwhile for IMF to fund such an action if a large number of shareholders were involved.IMF acquired a copy of the relevant parts of SOG's shareholder register, at which time the administrators drew IMF's attention to section 177. Pursuant to section 177(1A)(b), IMF sought the administrators' consent to contact the relevant SOG shareholders in order to provide them with information about a potential claim against SOG. The administrators ultimately decided that it would not be appropriate to approve IMF's proposed use of the information obtained from the register. IMF then applied for leave to commence the action under section 440D of the Act and a declaration that the conduct in which it proposed to engage would not contravene section 177(1). Justice French granted leave to proceed but dismissed IMF's application for a declaration, from which IMF appealed.**(c) Decision** **(i) The legislative purpose of section 177**Justices Moore and Emmett both referred to the second reading speech for the [First Corporate Law Simplification Act 1995 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7519" \t "Default) (which introduced the predecessor to section 177) and the Explanatory Memorandum to the Bill in ascertaining the purpose of section 177, within which context the words of section 177 should be read. The second reading speech revealed that the provision was first enacted "in response to concerns about the use of information from registers to invade the privacy of securities holders", and was designed to prohibit the "misuse of information" contained on such registers. Justice Emmett noted that the Explanatory Memorandum recorded that the purpose of the provision was to prohibit the compilation of "commercial mailing lists", except where the use was relevant to the shareholding. As to this prohibition, Emmett J drew further support from the note to this effect following section 177(1), which by virtue of sections 13(3) and 15AB(2)(a) of the [Acts Interpretation Act 1901 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default), could be used to interpret the Act. Justice Moore also referred to this note (although with reference to the predecessor of section 177).Additionally, Emmett J noted that an object of the Act is to create rights for compensation for shareholders and other persons who suffer damage as a result of breaches of the Act. Given this purpose, section 177(1) could not inhibit use of information to communicate with shareholders concerning their potential rights to bring or join in an action against a company for relief against oppression or to bring or intervene in a statutory derivative action (as it is necessary for shares to be held to participate in such proceedings - see below).Justice North derived no particular assistance from these materials. Instead, his Honour placed emphasis on the fact that section 173(1) of the Act required that companies keep registers that are open to the public. In limiting the scope of the section 177(1) prohibition, section 177(1A) is based on the policy in favour of public access to information on the register. His Honour thus accepted IMF's submission that sections 177(1) and (1A) were part of a wider legislative context that sought a balance between the right of the public to know about, and use, information from the register, and the policy that shareholders should be free from undue intrusion from the use of such information.**(ii) Justices Moore & Emmett: IMF's proposed use did not fall within either limb**Justice Moore undertook an analysis of the meaning of the words and expressions found in section 177(1A). In doing so, he rejected French J's reasoning at first instance that resolution of the issue at hand turned on the definition of "relevant". Rather, the scope of the limbs was important.In giving primacy to the object of protecting shareholder privacy, Moore J concluded that the conduct proposed by IMF had no bearing, even indirectly, on whether the shareholders "will or will not hold" shares in SOG. The conclusion that the acquisition of shares was not relevant to the act of "holding" shares reflects his Honour's strict literal approach to the construction of section 177(1A)(a). In relation to the second limb, Moore J stated that although participation in IMF's proposed litigation may depend on a person being a SOG shareholder and the rights may be exercised because the shares are held, the relevant right did not have a necessary or direct connection with the shareholding. Again, the conclusion reflects Moore J's literal approach, as his Honour had earlier explained that the expression "the rights attaching to" suggested a right that is a necessary incident of holding the interest. In other words, the right to make a claim such as that proposed by IMF did not automatically arise because the shares were held.Justice Emmett undertook a combined analysis of the limbs of section 177(1A)(a), but arrived at the same conclusions as Moore J. His Honour reasoned that a communication about the circumstances in which a person agreed to acquire shares in, or to become a member of, a company could not be characterised as being connected with the fact that that person holds the shares, or with the exercise of rights attaching to such shares. Whilst becoming the holder of shares in SOG was an essential step in the cause of action (that IMF had identified), it was the acquisition of shares that gave rise to the potential claims. The right to pursue such a claim could exist even if the shares had since been sold (that is, were no longer held). Thus, an invitation to commence and prosecute a proceeding in relation to that acquisition was not relevant to the holding of, or the exercise of rights attaching to, the shares.In conclusion, Emmett J stated that his construction of section 177(1A) was not restrictive, particularly when coupled with the possibility that the primary object of section 177 may be to prohibit the information obtained from a register being used for marketing activities.**(iii) Justice North: IMF's proposed use fell within the first limb**Due to his view that section 177 was part of a wider statutory context than that acknowledged by Moore and Emmett JJ (and French J at first instance), North J held that IMF's proposed use fell within the first limb. Justice North did not consider the application of the second limb to the situation.Justice North's starting point was, in light of the wider statutory context he had identified, to reject French J's restrictive definition of the word "relevant" as requiring some narrower legal connection to the ownership of the shares and the enjoyment of those rights.His Honour considered that IMF's proposed use of the information was relevant (in the wider, ordinary sense) to the holding of shares because the right to sue for losses resided only with the owner of the shares. The sole reason IMF wished to approach the shareholders was because they held shares in SOG, and the services related to loss those persons suffered as holders of those shares. IMF's commercial interest in using the information obtained from the registry was accommodated by the Act allowing the public open access to the register. The conflicting policy of protecting shareholder privacy was not unduly compromised because the information which IMF wished to send to the shareholders concerned their interests as shareholders.**4.5 Breach of fiduciary duty arising from proposed joint venture** (By James Ogilvy, Blake Dawson Waldron)G M & A M Pearce & Co Pty Ltd v Australian Tallow Producers and Barry Palmer and Mary Palmer [2005] VSCA 113, Supreme Court of Victoria, Court of Appeal, Warren C J, Chernov, J A and Dodds-Streeton A J A, 11 May 2005 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/may/2005vsca113.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/may/2005vsca113.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The Victorian Supreme Court unanimously dismissed the appellant's (Pearce Co) appeal, against declarations and orders made in favour of the respondent, Australian Tallow Producers Pty Ltd (ATP) and Barry and Mary Palmer. Fiduciary duties based on a relationship of mutual trust and confidence were found to exist in relation to a proposed joint venture. The respondents breached their fiduciary duty. However, the appellant's earlier election of equitable compensation for the breach precluded them from changing to seeking an account of profits as an alternative. The calculation of loss of opportunity and equitable compensation, even despite errors in the trial judge's arithmetic, was a negative amount. Moreover, the court rejected the appellant's claim for indemnification by the respondent for foreign exchange losses incurred as the appellant had used the contracts for its own potential commercial benefit. **(b) Facts** Anita and Graham Pearce were co-directors of Pearce Co, a meat exporting business. Barry and Mary Palmer were directors and co-secretaries of ATP, a meat-exporting and tallow-producing business. The couples had known each other professionally previously when in October 1999 Graham Pearce suggested a new joint business venture to Barry Palmer for the direct export of meat and bone products to a company called "Platte River" in the USA. Graham Pearce passed himself off as Barry Palmer when making contracts with Platte River, which the respondents acquiesced to soon after initial contact was made. Four contracts in ATP's name were made. A new company was incorporated in December 1999 called "Australian ByProducts Pty Ltd" (ABP) with Graham Pearce as the only director and shareholder. The intention was that he, Barry and Mary would each hold one-third of the shares. Requests were then made to Platte River to change the contracts over to ABP's name. Graham Pearce set up a bank account in ABP's name, with the Palmers becoming authorised signatories to the account. In early 2000, legal advice was sought by both parties in preparation for the joint venture. Graham Pearce and Barry Palmer agreed that Graham Pearce should set up a forward foreign exchange contract for the USA orders. ANZ Bank rejected the application in the name of ABP, however it accepted an application for US$1,000,000 with Pearce Co, an existing client, with a date of maturity on or before 30 June 2000. Graham Pearce pledged his house as security to obtain the loan. The contract was utilised against two shipments under the Platte River contracts on 15 and 23 February 2000.In early 2000, joint venture negotiations broke down. On 11 March 2000, Graham Pearce told Barry Palmer that the deal was off and the parties would go their separate ways, though evidence on a "freedom to compete" understanding was unclear. With the knowledge of Mary, Barry Palmer obtained the existing Platte River contracts for ATP, but no new orders were received. Nonetheless, Platte River made a further three orders with US$1,140,000 with ABP. Platte River went out of business after November 2000 after ATP had shipped US$2,500,000 of a projected US$3,000,000 in product. In February 2002, Pearce Co paid out $416,588.41 owing to ANZ Bank under the forex contract. The trial judge found that: * Barry and Mary Palmer breached their fiduciary duty to Pearce Co by allowing ATP to take the benefit of the Platte River contracts. However, the plaintiff failed to establish that Pearce Co was entitled to any amount of equitable compensation for loss of opportunity because the amount owed fell substantially into the negative; and
* the respondents did not owe any compensation in relation to the forex contract because Graham Pearce's actions on behalf of Pearce Co had severed the nexus of liability due to the contract being used for a purpose other than for the proposed joint venture.

**(c) Decision** **(i) Breach of fiduciary duty** * The court found that a fiduciary relationship existed between the parties based on mutual trust and confidence, even though no formal agreement was executed. Although additional care will be taken to recognise a fiduciary duty in a commercial transaction, this does not of itself preclude such a finding. In this case, the character of the relationship of mutual trust and confidence was evidenced from a strong factual basis, including: the coordination of business arrangements; communications between the parties regarding a joint venture; legal advice regarding the venture; share and profit arrangements; the incorporation of ABP for the joint venture; and the ABP bank account with all three key parties as signatories. Moreover, that each party was "vulnerable to abuse" by the other (especially the appellant) highlighted the existence of a fiduciary duty, and provided a heavier weight of duty for the Palmers (Hospital Products Ltd v United States Surgical Corporation).
* The court dismissed the respondents' claim that Mary Palmer was not accessorily liable as it found that she "doubtless knew…that Barry Palmer had changed the contracts from ABP to ATP", thus satisfying the "actual" knowledge requirements of the second limb of the Barnes v Addy principle.
* The freedom to compete agreement, if it existed, did not extend to the existing purchase orders in the name of ABP, and the respondents had no right to plead ignorance to that fact.
* Therefore, estoppel was not made out and a breach of fiduciary duty was found.

**(ii) The forex contract** The Supreme Court found that Pearce Co's conduct to effectively use the forex contract for its "own purposes" severed any claim that it could have in relation to liability on the forex contract. The appellant had rolled over the forex contract and used it for its own commercial purposes. Warren CJ found that regardless of whether Pearce Co made a loss or gain, the consequences from extending the contract must be worn by it. **(iii) Choice of remedy - equitable compensation or account of profits**Pearce Co was entitled to obtain relief as a fiduciary in breach of its duty cannot be allowed to retain its profit or benefit. Mason J in Hospital Products determined that relief will depend upon the facts and circumstances of the case, and one or more of either constructive trust, an account of profits, or equitable compensation will be applied. The appellant had dismissed the constructive trust as a remedy. The court confirmed the rule that "the plaintiff, where faced with a choice between account of profits or equitable compensation, must make a decision as to which one it will pursue." Although the option is open for the court to order discovery or further information for the plaintiff to determine the best course, Pearce Co and ABP were silent on this matter. Trial statements by counsel as well as Pearce Co's final submissions highlighted that "the remedy of account of profits had been abandoned", and confirmed the trial judge's presumption that equitable compensation had been elected by the appellant. Despite the timing of the election being unclear, it was certain that before the date of judgement, election had been made, and once a choice is made, it is final. Moreover, once judgment is made for either remedy, the right to elect the alternative is "forever lost". **(iv) Equitable compensation - utilising the benefit of hindsight** Quoting McLachlin J in Canson Enterprises Ltd v Boughton & Co, Warren CJ emphasised that damages will be based on the trial date "having regard to what actually happened" and not with respect to the foreseeable value at the time of the breach of fiduciary duty. Further, the court is entitled "with the full benefit of hindsight, not to speculate against the interests of the plaintiff" or to make assumptions against the defendant on the issue of causation. It can be assumed by the court that the plaintiff would have sought to develop the joint venture business in the most profitable way possible and orders would have been obtained had the venture gone ahead. The loss of orders would not have occurred but for the Palmers' breach. It was found on the question of proportion that Pearce Co was entitled to one-third of the prospective joint venture contracts, in line with the negotiated shareholding of the venture: to find otherwise would give the appellant an unjust enrichment or "windfall."Although the value of the "lost opportunity" was only $1,808.99, the appeal ground contending that compensation was owed was not made out. Such an amount would have been "substantially negative".**4.6 Determining the terms of a constructive trust** (By Farayi Chipungu, Mallesons Stephen Jaques)Tasmanian Seafoods Pty Ltd v MacQueen [2005] TASSC 36, Supreme Court of Tasmania, Underwood CJ, Evans and Tennent JJ, 11 May 2005 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/tas/2005/may/2005tassc36.htm](http://cclsr.law.unimelb.edu.au/judgments/states/tas/2005/may/2005tassc36.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html%22%20%5Ct%20%22_new)**(a) Summary**The terms of a constructive trust will be determined by reference to the particular circumstances of each case. Any antecedent contractual arrangements between the parties will lay the foundation for the basic rights and liabilities in relation to the trust. A plaintiff who so elects is entitled to an account of profits and can elect between such an account and equitable remedies. In exercising its jurisdiction to award interest on damages in a commercial context, compound interest will usually be awarded. The interest will be calculated at intervals to be determined in accordance with the circumstances of the case, not necessarily being yearly intervals. **(b) Facts**In 1988, Tasmanian Seafoods Pty Ltd ("TS"), a processor of abalone, Mr MacQueen ("MacQueen"), an abalone diver, and his wife agreed to jointly purchase a commercial abalone licence. The cost of the licence was $610,000 and the parties agreed to each contribute $305,000 towards the cost. The licence was one of 5 issued pursuant to the Sea Fisheries Regulations 1962 and was subject to a number of conditions including that the holder could only fish in the waters around the Furneaux Group of islands and could take no more than 20 units (a unit representing a weight) of abalone. All the other Tasmanian commercial abalone licences were allowed a quota of 28 units. The licence was purchased in MacQueen's name and pursuant to a written agreement between the parties ("the 1988 deed"), MacQueen undertook to hold the licence as trustee for the other two parties. The profit-sharing arrangement and the terms of the trust were laid out in the deed. Between 1989 and 1991 the laws governing abalone fishing in Tasmania changed in two significant ways. From 1991, the geographical restriction on fishing around the Furneaux islands was removed opening the waters up to all commercial abalone divers entitled to fish there. In order to compensate the Furneaux divers for losing their exclusive fishing rights, the divers were each issued 8 additional units ('the Furneaux units') with the following restrictions:* only the diver to whom they were issued could catch the quota;
* the units were not transferable; and
* the units had to be surrendered when the diver ceased to be a commercial abalone diver.

In 1991, the licence system was restructured, separating the entitlement to dive for abalone from the entitlement to hold quota units. There were created abalone diver's licences ("diver's licences") and abalone quota licences ("quota licences"). The diver's licences entitled holders to take abalone, but only under authorisation of the holder of an abalone quota licence. The quota licence holders in turn, could not take abalone unless they were also the holders of a diver's licence. As a result of these amendments and his position as trustee, MacQueen became the holder of an abalone diver's licence and an abalone quota licence for 28 units, 8 of which were restricted as laid out above. The two licences replaced the original licence that was the subject of the express trust.Dealings in relation to the twenty quota units continued as usual but in relation to the Furneaux units, the parties fell into an arrangement ("the Furneaux arrangement") where one-third of the proceeds would go to the MacQueen's to cover labour, fees, diving costs etc. and then one-third each to TS and the MacQueens as a return on their capital investment. In 1994, the parties executed a deed of partition to divide the 20 quota units but could not reach an agreement with respect to the Furneaux units. The disagreement led to a situation where the MacQueen's were still paying TS one-third of the average price in relation to the four Furneaux units that they 'owned' but were selling their catch elsewhere and had ceased supply to TS. TS brought proceedings against the MacQueens seeking amongst other things, a declaration that MacQueen held the diver's licence and the Furneaux units in trust on its behalf to the extent of one-half, and an order that MacQueen account for the income generated from the two licences plus interest. **(c) Decision at first instance**At first instance, the trial judge found that the Furneaux units attached to the quota licence but that as the units lacked assignability and permanency and were personal to MacQueen, they were incapable of constituting trust property, with the result that TS could not declare an interest in the quota right. Rather, his Honour found that it was the proceeds resulting from the units that were subject to a trust, the apportionment of which was one-third: TS to two-thirds: MacQueen, for the life of the Furneaux units. The judge did not consider the obligation to supply as a condition of the new trust and did not make a declaration in relation to the diver's licence. TS appealed against this decision arguing amongst other things, that the trial judge had erred in applying various of the terms of the 1988 deed and that the trust should be declared to reflect the initial 50/50 injection of capital. **(d) Decision on appeal**On appeal the Full Court of the Supreme Court of Tasmania accepted, and both parties conceded, that the diver's licence was held upon trust for TS. In relation to the Furneaux units, the Court accepted the trial judge's conclusion that the units were not trust property. Underwood CJ, with whom Evans and Tennent JJ agreed, held that the trust was one of entitlement to not only the proceeds from the units but also to the fish caught pursuant to them as to one-half interest, reflective of the initial 50/50 investment. The Court also found that the units were subject to a fiduciary obligation on the part of MacQueen because his opportunity to own those units arose by reason of the previous trust. Consequently, MacQueen owed certain fiduciary duties to the beneficiaries, including a duty to account for any benefits gained by reason of his position as a fiduciary or arising in circumstances where there was a conflict or possible conflict with that duty. In relation to any profits that MacQueen had failed to account for, he was a constructive trustee for TS. The key issue was for the Court to determine the terms of the constructive trust. **(i) Terms of the constructive trust**Underwood CJ found that the 1988 deed did not apply to the Furneaux units as it had been frustrated by the regulatory changes. His Honour then considered what "practical equity" would require in determining the terms applicable to those units. He noted that "the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" and that "regard should be had to the nature of the trust property, whether earnings from that property had been derived by the labour and skill of the trustee and any antecedent arrangements for profit sharing." On this basis, he concluded (1) that the Furneaux arrangement that the parties had used following the initial issue of the shares should apply i.e. that post-expenses the fruit of the entitlements be divided on a 50/50 basis; and (2) that the MacQueens were obliged to continue supply to TS in relation to those units, (although he reserved final judgment on this matter pending further submissions from counsel in relation to practicality of supply). **(ii) Account of profits**The court then considered whether TS was entitled to an account of the amount due from the MacQueens for income and profits earned from the trust. Underwood CJ found that the trial judge had erred in declining to make an order of account and that "the basic principle remains that a principal who so elects is entitled to an account of profit" subject to considerations of disabling conduct on their part. An order was made for the Master of the Court to assess both the account to be taken and the equitable compensation to which TS was entitled with a view to TS being able to elect between the two remedies. **(iii) Interest**In discussing the question of damages, Underwood CJ examined how interest should be calculated in order to adequately compensate a company for the money it is deprived of by a trustee's failure to disgorge the profits stemming from a trust. His Honour referred to a series of cases and suggested that compound rather than simple interest should be awarded based on the presumption that the company, had it not been deprived of the money, would have made the most beneficial use of it and the assumption that the wrongdoer has themselves made the most beneficial use the money. In determining the intervals at which interest should be calculated, his Honour observed that although Lord Denning in Wallersteiner v Moir (No 2) [1975] 1 All ER 849 referred to yearly intervals; there is no rule of law or equity that requires such. In this case, since TS operated on 90 day bills, Underwood CJ suggested that the interest should be calculated on 90 day intervals as well. **4.7 Statutory demand set aside** (By Simon Martin, Phillips Fox)Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd [2005] ACTSC 39, Supreme Court of the ACT, Higgins CJ, 10 May 2005The full text of this judgement is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/act/2005/may/2005actsc39.htm](http://cclsr.law.unimelb.edu.au/judgments/states/act/2005/may/2005actsc39.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html%22%20%5Ct%20%22_new)**(a) Summary**An application was brought by Chadmar Enterprises Pty Ltd (plaintiff) against IGA Distribution Pty Ltd (defendant) seeking to set aside a statutory demand notice issued by the defendant on the basis that the demand was defective and not validly supported. The demand notice was issued on 7 September 2004 while the affidavit purporting to support the demand was dated 2 September 2004. His Honour Chief Justice Higgins found that the affidavit issued by the defendant was in form and substance ineffective to verify the demand notice as it could not depose to the existence and truth of the statement made in the demand notice that was brought into existence five days later. His Honour further found that the plaintiff had also verified a "genuine dispute" or "offsetting claim" in respect of the sum demanded and so set aside the demand notice in accordance with section 459J(1)(b) of the [Corporations Act (2001) (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act').**(b) Facts****(i) Background**The defendant alleged that it was owed $1,275,425.66 by the plaintiff. On 7 September 2004, pursuant to section 459E of the Act the defendant issued a statutory demand notice to the plaintiff seeking to recoup this debt. In an affidavit dated 2 September 2004 supporting the demand notice, a Mr Michael Laird had deposed: 4.1 the debt of $1,275,424.66 mentioned in the statutory demand is due and payable by the debtor company, Chadmar Enterprises Pty Limited (the Company); and4.2 the debt is payable to IGA as payment for goods supplied to the Company.On 1 October 2001 the plaintiff applied to have the statutory demand notice issued by the defendant set aside.**(ii) Submission of the plaintiff**The plaintiff submitted that an affidavit in support of a demand notice should depose to the existence of the debt and the lack of any genuine dispute concerning it as at the date of the demand. The plaintiff argued that the affidavit dated 2 September 2004, being 5 days prior to the demand notice on 7 September 2004, could not depose to the existence of such a debt and was therefore defective, not validly supported and so should be set aside.**(iii) Submission of the defendant**The defendant made three main submissions to support the contention that the demand notice should not be set aside: * The demand notice purportedly verified on 2 September 2004 was in the same form as the demand notice that was executed and delivered on 7 September 2004.
* Any defect that existed was in the affidavit and not in the demand itself.
* If the court was satisfied that by virtue of section 459J of the Act there was a defect in the demand, the application to set it aside due to that defect should still fail unless some substantial injustice would otherwise be caused. The defendant submitted that to consider whether there was any substantial injustice involved a decision of whether there was any "genuine dispute" as to the claimed debt with the dispute to be set aside only if a genuine dispute existed. The defendant contended that there was no such genuine dispute.

**(c) Decision**His Honour noted that it was necessary to determine whether the demand complied with section 459E(3) of the Act, which provides that:"Unless the debt, or each of the debts, is a judgment debt, the demand must be accompanied by an affidavit that:(a) verifies that the debt, or the total amounts of the debts, is due and payable by the company; and(b) complies with the rules."In relation to section 459E(3)(a) his Honour noted that an affidavit that verifies a previously formulated drafted notice of demand could rationally verify the debt mentioned therein as at the date of that subsequent affidavit. At the time the affidavit in question was sworn, it could only be presumed that the debt it referred to as due and owing was the same debt referred to as that demanded by the statutory demand notice five days later. However, due to the possibility of intervening events occurring between 2 September 2004 and 7 September 2004 (eg the partial or full payment of the debt) his Honour held the affidavit could not verify the debt as being due at the date of delivery of the demand notice.In relation to section 459E(3)(b) his Honour concluded that while there was some minor discrepancies, the affidavit complied with the rules. His Honour also considered the issue of whether in the absence of some substantial injustice to the debtor an affidavit predating a demand notice it purports to verify can leave the demand notice standing or whether a predated affidavit is in itself a fatal flaw.His Honour considered the relevant case law in the area, particularly the decision in Wildtown Holdings Pty Ltd v Rural Traders Company Ltd (2002) 172 FLR 35. In that case, the Full Court of the Supreme Court of Western Australia held that a demand purportedly verified by an affidavit sworn two days before the notice of demand should be set aside on the application of the alleged debtor because the affidavit could not verify that demand. His Honour followed the decision in Wildtown and held that the predated affidavit of 2 September 2004 was itself a flaw as it did not verify the notice of demand at the time the demand was made on 7 September 2004.His Honour also considered the plaintiff's alternative claim that the demand notice should be set aside because there was a "genuine dispute" or "off-setting claim" between the parties in relation to the debt owing. His Honour ultimately held that the circumstances of the case as evident by the correspondence between the parties was enough to verify that there was a "genuine dispute" or "off-setting claim" and therefore the demand notice should also be set aside on this basis.His Honour therefore upheld the plaintiff's application and pursuant to section 459J(1)(b) of the Act set aside the demand notice.**4.8 What amounts to carrying on business in Australia?** (By Dora Guslitser, Blake Dawson Waldron)Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd; Application of Campbell [2005] NSWSC 544, New South Wales Supreme Court, Barrett J, 9 June 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc544.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc544.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html%22%20%5Ct%20%22_new)**(a) Summary**Applications for winding up orders in relation to LifeWealth 8 Limited ("LifeWealth") and Signatory Investments Pty Limited ("Signatory") were made by Gebo Investments (Labuan) Limited, Christopher Paul Levick and Botany Holdings Limited ("the plaintiffs"). In earlier proceedings, the court appointed a provisional liquidator of LifeWealth (a Malaysian company) and Signatory (an Australian company). Certain shareholders of LifeWealth and Signatory ("the Applicants") claimed that the court had no jurisdiction under s 538 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") to appoint a provisional liquidator nor hear a winding up application because LifeWealth was never a "Part 5.7 body". In determining the court's jurisdiction under s 538, Barrett J followed the findings in Australian Securities and Investments Commission v International Unity Insurance (General) Ltd [2004] FCA 1060 ("Unity Insurance") and Australian Securities and Investments Commission v Edwards (2004) 22 ACLC 1469 ("Edwards"), holding that a court has jurisdiction to appoint a provisional liquidator and make winding up orders under s 583 if a Part 5.7 body has at any time carried on business in Australia.**(b) Facts**LifeWealth is a Labuan online network marketing company which was incorporated under the Offshore Companies Act 1990 ("Offshore Act") of Malaysia on 8 November 2002. On 9 December 2004, the New South Wales Supreme Court ordered that Mr John Vouris be appointed the provisional liquidator of LifeWealth and Signatory. The Applicants filed interlocutory processes seeking this order be set aside or Mr Vouris' appointment be terminated, and if a winding up order in respect of LifeWealth and/or Signatory was made, a liquidator other than Mr Vouris be appointed. Barrett J heard these interlocutory applications on 5 and 6 April 2005, but at the hearing, the Applicants no longer sought their orders in relation to Signatory. The Applicants argued that LifeWealth is not and never was a "Part 5.7 body" that triggered the jurisdiction under s 538 of the Corporations Act. However, the plaintiffs argued that LifeWealth was a Part 5.7 body because LifeWealth was, in terms of paragraph (b) of the definition of "Part 5.7 body", a "registrable body that is a foreign company and is not registered under [Division 2 of Part 5B.2] but carries on business in Australia". The "business" which the plaintiffs claimed LifeWealth carried on was an internet share market game business known as "LifeWealth 8". However, the Applicants claimed that LifeWealth never conducted the LifeWealth 8 business because it was merely a holding company. In determining the court's jurisdiction under s 538, Barrett J made findings on the broader issues of whether:* an unregistered foreign company that previously carried on business in Australia is a Part 5.7 body and so remains subject to a winding up order under s 538; and
* "carrying on business in Australia" covers physical acts occurring outside Australia that results in business communications with persons in Australia (such as solicitation over the internet).

**(c) Decision** **(i) Section 583 jurisdiction and "Part 5.7 body"**Section 583 of the Corporations Act empowers the court to wind up a Part 5.7 body. That is, a body which is, inter alia, a registrable body that is an unregistered foreign company that carries on business in Australia. Barrett J held that LifeWealth is a registrable body that is an unregistered foreign company because it was incorporated outside of Australia by the Offshore Act, was not registered under Division 2 of Part 5B.2 of the Corporations Act and by being a foreign company is therefore a registrable body. The critical issue was whether LifeWealth "carries on business in Australia" so as to render it a Part 5.7 body that gives the court jurisdiction to wind it up and appoint a provisional liquidator.**(ii) Section 583 jurisdiction and "carries on business in Australia"** Barrett J disagreed with the Applicants' argument that if an unregistered foreign company ceases to carry on business in Australia before the s 583 jurisdiction is invoked, it is no longer a "Part 5.7 body" and therefore cannot be wound up under s 583. Rather, Barrett J affirmed the decisions of Unity Insurance and Edwards which held that an unregistered foreign company which ceases to carry on business in Australia but once did so, remains a Part 5.7 body for the purposes of winding up under s 583. To further support his findings, Barrett J considered the effect of s 582(3) on the jurisdiction under s 583. Section 582(3) explicitly provides that a Part 5.7 body which has been dissolved or deregistered in its place of incorporation may still be wound up under s 583. Since such a body is incapable of carrying on business anywhere, s 582(3) makes it clear that carrying on of business in Australia at the time of making a winding up order under s 583 is not an essential component of the jurisdiction under that section. Furthermore, Barrett J held that in light of s 601CL(14), the effect of s 582(3) extends to both registered and unregistered foreign companies.Accordingly, Barrett J held that LifeWealth may become the subject of a winding up order under s 583 and a provisional liquidator may be appointed if LifeWealth has at any time carried on business in Australia. Consequently, the court's powers to make such orders do not evaporate if at the time of making its orders, LifeWealth was not carrying on business in Australia.**(iii) What amounts to carrying on business in Australia?**Barrett J discussed the statutory and general law framework of what amounts to carrying on business in Australia, including:* the non-exhaustive circumstances of carrying on business under s 21 of the Corporations Act. Barrett J highlighted the somewhat uncertain effect of the exemptions in s 21(3) given that a company undertaking several of the activities listed in s 21(3) does not necessarily mean that it is or is not carrying on business;
* that carrying on a business involves conducting some form of commercial enterprise, systematically and regularly with a view to profit;
* a company may be carrying on a business ""in" a particular geographic area even though the bulk of its business is conducted elsewhere"; and
* the territorial aspect of carrying on business requires some physical activity in Australia through human instrumentalities that form part of the transactions that make up or support the business.

With these principles in mind, Barrett J held that the evidence of Australian internet related activities in relation to the LifeWealth 8 business (such as uploading and downloading materials) was insufficient on its own to conclude that LifeWealth carried on business in Australia. As a result, Barrett J considered other documentary and oral evidence relating to LifeWealth (such as company searches, shareholder agreements, emails between LifeWealth's operators, controllers and contractors) to determine whether it carried on business in Australia. Upon analysing this evidence, Barrett J held that LifeWealth was not a mere holding company. Rather, LifeWealth was an operating company that "carries on business and has at all material times carried on business in relation to the sale over the internet of games, personal development products and other products, including telecommunications services" in Australia from at least February 2003 until at least August 2004.**(iv) Overall conclusion**Barrett J was satisfied that the evidence showed LifeWealth to be a Part 5.7 body under s 583. Therefore, Barrett J held that the court had jurisdiction on 9 December 2004 to order the appointment of Mr Vouris as the provisional liquidator of LifeWealth. However, Barrett J postponed making orders about the Applicants' submission that a provisional liquidator other than Mr Vouris be appointed until 20 June 2005, so that this issue could be further clarified.**4.9 Whether section 556(1A) of the Corporations Act 2001 operates in relation to a debt for unpaid superannuation guarantee charge payable to the Commissioner of Taxation** (by Justin Fox and Campbell Unsworth, Corrs Chambers Westgarth)DP Excavation & Haulage Pty Limited v Commissioner of Taxation [2005] NSWSC 533, Supreme Court of New South Wales, Barrett J, 3 June 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc533.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/june/2005nswsc533.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The plaintiffs were a company wound up in accordance with section 446A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and its liquidators. The company had become liable to the Commissioner of Taxation for a superannuation guarantee charge for failing to provide minimum levels of superannuation support for its employees.The plaintiffs sought declarations that the priority afforded to the Commissioner in a winding up by section 556(1)(e) of the Corporations Act 2001 (Cth) and section 52 of the [Superannuation Guarantee (Administration) Act 1992 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8235" \t "Default) is subject to section 556(1A) and thus that the amount of the superannuation guarantee charge payable is limited to $2,000 by operation of section 556(1A).Barrett J held that the contractual obligation of an employer to make superannuation contributions and liability for the unpaid superannuation guarantee charge are not the same debts. Section 556(1A) operates only in relation to wages payable to employees and superannuation contributions payable to a fund, and does not affect the priority created by section 52 for an unpaid superannuation guarantee charge, which is a debt payable to the Commissioner.**(b) Decision**The decision of the court turned on the construction and interpretation of sections 556(1)(e) and 556(1A) of the Corporations Act 2001 (Cth) as they apply in light of section 52 of the Superannuation Guarantee (Administration) Act 1992 (Cth).In the event of the winding up of a company, section 556(1) specifies the order of priority in which various specified debts and claims are to be paid in priority to all other unsecured debts and claims to other creditors. At section 556(1)(e) is listed "wages and superannuation contributions payable by the company in respect of services rendered to the company by employees before the relevant date". Section 556(1)(e) is "subject to subsection (1A)" which limits the amount of superannuation contributions to be paid under section 556(1)(e) "to, or in respect of, an excluded employee" to $2,000. Section 52 states that: "in the winding up of a company, any superannuation guarantee charge payable by the company is, for the purposes of payment, to have a priority equal to that of a debt of the company of the kind referred to in…[section 556(1)(e)]". Barrett J was of the opinion that the words "for the purposes of payment" did no more than provide a link between the requirement under section 556(1) that the debts listed "must be paid" in priority to all other unsecured debts and claims. Barrett J agreed with the Commissioner's contention that the payment of a superannuation guarantee charge is not a payment of wages to an employee, but found that the superannuation guarantee charge system casts the Commissioner in the role of a "collecting and paying authority or clearing house" through which sums are paid "in respect of" employees. Whilst paid "in respect of" employees, Barrett J accepted that the particular contractual obligation of an employer to make superannuation contributions and liability for the unpaid superannuation guarantee charge are not the same debts: Deputy Commission of Taxation v Rathner (2004) 211 ALR 316. Payment of a superannuation guarantee charge is not a "contribution by the company to a fund" as defined in section 556(2), rather it is a debt payable to the Commissioner, imposed because of a failure to make a contribution to a "fund" of the kind referred to in section 556(2). A payment of a superannuation guarantee charge made to rank equally with a payment under section 556(1)(e) is not itself an amount "paid under section 556(1)(e)", even though it can be said to be a payment "in respect of" certain employees. Therefore, the qualification imposed by section 556(1A) does not operate in relation to a debt for an unpaid superannuation guarantee charge.**4.10 Liquidator's letter amending a proof of debt was not defective** (by Sabrina Ng and Martin Squires, Corrs Chambers Westgarth)Mine & Quarry Equipment International Ltd v McIntosh (as liquidator of) Mine & Quarry Equipment Pty Ltd (in liq) [2005] QCA 186, Supreme Court of Queensland, McPherson JA, Atkinson and Mullins JJ, 3 June 2005The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qca186.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qca186.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**A company, whose proof of debt had been admitted by a liquidator, sought a declaration that the liquidator was not entitled to amend the proof of debt because the form of the letter conveying the liquidator's decision to amend the proof of debt did not comply with the [Corporations Regulations 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default). The Court of Appeal rejected the challenge, in particular the company's "excessively literal and narrow interpretation" of the regulations, and found that the letter did comply with the statutory requirements.**(b) Facts** Mine & Quarry Equipment Pty Ltd (MQE) was ordered to be wound up on 10 July 2000. In the winding up, Mine & Quarry Equipment International Ltd (International) lodged a claim for $1,262,930. The liquidator admitted to proof the amount of $627,954.46 on 8 March 2001. International appealed against the rejection of the balance of the claim. The appeal was dismissed on 31 October 2001.On 3 June 2002, the liquidator wrote to International advising that International owed MQE $85,989.62. That amount was made up of costs orders in respect of the earlier appeal and various unpaid invoices. The letter further advised that the amount would be set off against International's dividend and that International's claim would be assessed for a dividend on the reduced amount of $541,964.84.International applied to the Supreme Court for a declaration that the liquidator was not entitled to set off the amount of $85,989.62 against its claim admitted to proof in the sum of $627,954.46. International submitted:* that, having admitted the proof of debt, the liquidator was not at liberty to change his mind and later assert a set-off;
* that the liquidator was estopped from raising a set-off which should have been pursued at the appeal against the liquidator's rejection of the full claim; and
* that the liquidator failed to comply with the necessary procedure for asserting the set-off.

The application was dismissed by Wilson J on 8 November 2004. International appealed against this decision, relying solely on the third submission.**(c) Decision** The Court of Appeal dismissed the appeal. McPherson JA (with whom Atkinson and Mullins JJ agreed) outlined the procedure set out in the Corporations Regulations for dealing with proofs of debts or claims. Regulation 5.6.55 provides that where a liquidator considers that a proof of debt or claim has been wrongly admitted, the liquidator may either revoke the decision to admit the proof and reject all of it, or amend the decision to admit the proof by increasing or reducing the amount of the admitted debt or claim. In doing so, the liquidator must in writing inform the creditor by whom it was lodged of his or her grounds for the revocation or amendment.International argued that the liquidator failed to comply with this procedure. This was because the letter did not, in the terms of the regulation:* state that the liquidator considered International's proof of debt had been wrongly admitted;
* state that his decision to admit it was being amended; or
* inform International of the grounds for the amendment.

McPherson JA considered that International's argument involved an excessively literal and narrow interpretation of regulation 5.6.55.His Honour stated that the liquidator's letter indicated the liquidator proposed to set off the amounts owed by International to MQE against International's dividend and that the dividend would be assessed on the reduced amount of $541,964.84. Although the letter did not specifically state that the liquidator considered the proof of debt to have been wrongly admitted and that he intended to amend the proof by reducing the amount of the admitted debt, that was clearly the effect of the letter. His Honour further noted that the liquidator, in his letter, identified each debt, explained that each of the items identified was being set off and specified the reasons why the entitlement to do so arose in each case. This, his Honour said, amounted to the liquidator in writing informing International of the grounds for the amendment, as required by the regulation. McPherson J noted that the letter did not refer specifically to regulation 5.6.55. However, his Honour noted that there was no requirement to do so. Finally, McPherson J said that that the letter made it sufficiently clear that the liquidator had decided to set off the amounts claimed against International and reduce the amount of the admitted proof accordingly. Subsequent correspondence from International challenging the liquidator's power to take this course of action indicated that International had been effectively informed of this decision.McPherson J found that there was no defect in the form or efficacy of the letter and no basis for the Court to declare the liquidator was not entitled to set off the debt against the claim admitted to proof.**4.11 Court-imposed fine not provable under deed of company arrangement** (By James Burchnall, Freehills)Australian Winch & Haulage Co Pty Ltd v State Debt Recovery Office [2005] NSWSC 423, New South Wales Supreme Court, Palmer J, 29 April 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/april/2005nswsc423.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/april/2005nswsc423.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Australian Winch & Haulage Co Pty Ltd ("the Plaintiff") entered into a Deed of Company Arrangement with its creditors. The Plaintiff paid all that was required into the Deed Fund, such that all debts provable under the Deed would be extinguished and the Deed would be wholly effectuated. The Plaintiff then sought an order restraining the State Debt Recovery Office ("the SDRO") from recovering a substantial fine, which had been imposed on the Plaintiff by the Industrial Relations Commission of New South Wales, except by way of proof of debt under the Deed of Company Arrangement. Under section 553B of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), penalties and fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company. Both parties agreed that the fine imposed by the Industrial Relations Commission was "imposed by a court in respect of an offence against a law". The Plaintiff contended that if a Deed of Company Arrangement has the effect of making an insolvent company solvent, then a fine that otherwise comes within the ambit of section 553B becomes provable and is liable to be extinguished upon the receipt of the dividend payable to creditors under the Deed. It was further submitted by the Plaintiff that this construction of section 553B accords with the policy of Part 5.3A of the Act, which is that a company should be free to start again with a clean slate after entering into a Deed of Company Arrangement.Palmer J rejected these arguments and dismissed the Summons.**(b) Facts** In 1999, the WorkCover Authority of New South Wales commenced a prosecution against the Plaintiff in the Industrial Relations Commission of New South Wales. The matter was heard on 14 August 2001 and judgment was reserved. On 9 September 2002, while judgment was still reserved, an administrator was appointed to the Plaintiff under Part 5.3A of the Act. The Plaintiff entered into a Deed of Company Arrangement on 12 November 2002. On 31 December 2003, the Industrial Relations Commission delivered judgment, imposing a fine of $150,000 on the Plaintiff. On 5 July 2004, the Deed administrator wrote to the SDRO informing it that the Plaintiff had paid all that was required into the Deed Fund. The Deed administrator stated its belief that the SDRO was now entitled to participate in the Deed, given that the Plaintiff was now solvent. Attached to the letter was a Formal Proof of Debt to be completed by the SDRO and returned to the Deed administrator. **(c) Decision** Palmer J rejected the arguments advanced by the Plaintiff that the SDRO was entitled to participate in the Deed and that the fine was liable to be extinguished upon receipt of the dividend payable to creditors under the Deed. His Honour referred to the rationale of section 553B of the Act, as set out in the [Corporate Law Reform Bill 1992](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12036" \t "Default) at paragraph 854. This rationale is that court-imposed fines are by their nature generally intended to be a deterrent and that allowing such fines to be proven as debts in a corporate insolvency would penalise creditors for a wrong committed by the company. Palmer J also cited a passage to the same effect in the judgment of the Full Court of the Federal Court of Australia in Victoria v Mansfield (2003) 130 FCR 376, at 386. His Honour considered that to accept the Plaintiff's argument would be to defeat the rationale of section 553B entirely, as the burden of the fine imposed by the Industrial Relations Commission would be borne by the Plaintiff's creditors, whose dividend from the Deed Fund would be diminished substantially.Furthermore, Palmer J found that the Plaintiff's arguments were untenable due to the provisions of the Deed itself. Under the Deed, an entity could only be eligible to be a "Deed Creditor" if it could claim a debt as at the "Appointed Date". The Appointed Date was 9 September 2002, which was approximately two months prior to the date when the Deed of Company Arrangement was entered into. At the Appointed Date, the Plaintiff was still insolvent and the SDRO was unable prove the fine under section 553B of the Act. Clause 14.1 of the Deed provided that section 553B of the Act applied to all claims made under the Deed. Accordingly, the SDRO was not and never could be a Deed Creditor.The Summons was dismissed and the Plaintiff was ordered to pay the SDRO's costs of the Summons.**4.12 Director bears the costs of challenged winding-up grounds** (Christy Addlem, Freehills)Cassegrain v CTK Engineering Pty Ltd [2005] NSWSC 495, New South Wales Supreme Court, White J, 26 May 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc495.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/may/2005nswsc495.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**A director and shareholder (the second defendant) of CTK Engineering (CTK) conducted the affairs of CTK oppressively by concealing related party transactions and business ventures from certain non-voting shareholders (the plaintiffs). The plaintiffs sought an order that the company be wound up on either the 'just and equitable' grounds or on the basis that the affairs of the company were being conducted oppressively. The second defendant initially opposed any winding-up order. Although the second defendant did later consent to the winding-up of CTK on just and equitable grounds, he continued to oppose the appointment of a provisional liquidator. Justice White held that he was liable for the costs of CTK, the plaintiff non-voting shareholders and himself because of the oppressive conduct which he had caused the company to undertake.**(b) Facts**This case is another chapter in the history of litigation between members of the Cassegrain family. A closely held family company, CTK Engineering's (CTK) original business was as a landholder, but an agreement had been reached that the company's landholdings would be sold, CTK wound up and its assets distributed to shareholders.At the time of the current litigation, each of the plaintiffs held B class non-voting shares in CTK. The second defendant held both B class shares and an A class share in CTK, which carried voting rights. Although CTK had other directors at certain times, the second defendant effectively had the principal role of managing the company.Under the management of the second defendant, CTK entered into various transactions which indirectly benefited the second defendant. Most of these transactions centred around the funds which CTK had obtained from the sale of its land. Instead of following the previous plan and winding up the company, the funds from the sale were actually used to pay off a loan which the second defendant had guaranteed, to cause CTK to enter into a tea-tree farming business with a company of which the second defendant was a director and to make a loan to the second defendant's wife. The details of these transactions were concealed from the plaintiff shareholders and none were specifically disclosed in the company's financial reports for the relevant year. Additionally, the second defendant and the other A class shareholders voted to replace the constitution of CTK to allow the company to operate with a single director and remove the requirements of holding annual general meetings and providing financial statements. In response to a perceived lack of information regarding the activities of the company, the B class shareholders (the plaintiffs) made two requests for information, both of which went unanswered. Following the receipt of legal advice the plaintiffs commenced legal proceedings in August 2004.The plaintiffs sought an order that a liquidator be appointed and CTK wound up on the grounds that either:* CTK's affairs were being conducted in a manner which was oppressive to, or unfairly prejudicial to, or unfairly discriminatory against, the plaintiffs as members, or contrary to the interests of the members as a whole (section 233(1)(a) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)); or
* it was just and equitable that CTK be wound up (sections 461(e), (f), (g) or (k) of the Corporations Act).

Although the second defendant initially opposed any winding-up order, around September 2004, the second defendant received advice that it was inevitable that the court would order the company be wound up on the just and equitable grounds. However, he was also advised that the court would not appoint a provisional liquidator in the circumstances. As CTK had, through the second defendant, invested substantially in the tea-tree farming business (which the second defendant claimed anticipated profits of around $192,000 over the next two years), the second defendant decided that while CTK should not defend a winding-up order, it should oppose the appointment of the provisional liquidator.In December 2004 the provisional liquidator advised the second defendant of his decision that CTK should cease trading. The second defendant consented to the liquidation of the company on the basis that "it [was] now not possible to trade out of the current situation, which [had] been brought about by the appointment of … the provisional liquidator", but advised that he would oppose a costs order being made against him.CTK paid all of the costs of the defence of the proceedings up to the appointment of the provisional liquidator, both of itself and the second defendant. These amounted to approximately $124,000. A substantial part of these fees was paid to prepare evidence after the second defendant had accepted the advice that it was inevitable that CTK would be wound up.The plaintiffs sought orders that the second defendant pay CTK's costs and indemnify CTK for the plaintiffs' costs under two separate legislative provisions. The first was section 76 of the [Supreme Court Act 1970 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3748" \t "Default) under which the court has full discretion to determine by whom and to what extent costs should be paid. The second was section 233 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), under which the plaintiffs sought an order that the second defendant pay all of CTK's costs incurred in the proceeding. The plaintiffs also sought an order under this provision that the second defendant indemnify CTK for any costs which CTK owed the plaintiffs.**(c) Decision** Justice White found that even had the second defendant not consented to the eventual winding up of the company and the case had been fully tried, the winding up order would have been made regardless. The second defendant had acted unreasonably in causing CTK to challenge the winding-up request as clear grounds existed for winding up the company (not only on the just and equitable ground), and the company's affairs had been conducted in a way that was contrary to the interests of the members as a whole, and oppressive or unfairly prejudicial to the B class (non-voting) shareholders. In accordance with the principle in Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692 at 704, the affairs of the company were clearly being conducted in a way which, when considered objectively by a commercial bystander, was unfair.The key elements of unfairness were:* the deliberate concealment from the B class shareholders of the investment of the proceeds of the sale of the company's land with persons or a company associated with the second defendant; and
* the deliberate concealment of the fact that the company had embarked on a new and hazardous tea-tree farming venture with a company which the second defendant controlled.

The second defendant had also taken steps to reduce the amount of information provided to the B class shareholders, particularly by causing the constitution to be replaced (removing the need for annual general meetings) and failing to respond to requests for information about the company's accounts. He had also failed to comply with the company's constitution and have the accounts audited.In determining the award of costs, Justice White noted that CTK did not oppose a winding up order or participate in the proceedings after the provisional liquidator was appointed. Therefore CTK was ordered to pay the plaintiffs' costs up to the appointment of the provisional liquidator. Justice White found that because the litigation was essentially a dispute between shareholders the second defendant should indemnify CTK for the plaintiffs' costs of proceedings, not limited to those incurred before the appointment of the provisional liquidator.Justice White agreed with the second defendant that relief was only available under section 233 where the defence of the proceedings was itself oppressive conduct, as opposed to the conduct of the company's affairs which gave rise to the proceedings. However, he disagreed with the second defendant's submission that it was reasonable for him to spend the company's money in defending the proceedings as he genuinely believed it not to be in the company's interests that it be wound up because the tea-tree farming venture was likely to be profitable. He felt that although the submissions had some merit, they did not justify the defendant's actions in light of the advice received that it was inevitable that the company would be wound up. In defending the proceedings the second defendant had conducted the affairs of CTK in a way that was oppressive and unfairly prejudicial to the B class shareholders, and therefore the second defendant should indemnify CTK for the expenses the second defendant incurred in defending the proceedings up to the appointment of the provisional liquidator.In summary, costs were awarded as follows:* The plaintiffs were entitled to their costs from CTK.
* CTK was entitled to be indemnified by the second defendant, both in respect of those costs payable to the plaintiffs and those incurred in defending the proceedings.

**4.13 Application in respect of schemes of arrangement facilitating a merger** (By Chris Skordas, Phillips Fox)Re Crown Diamonds NL [2005] WASC 93, Supreme Court of Western Australia (in chambers), Commissioner McKerracher QC, 20 April 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/april/2005wasc93.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/april/2005wasc93.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The applicant, Crown Diamonds NL ("Crown"), is a diamond mining and exploration company currently listed on the ASX. The company applied to the Court by way of originating process, seeking orders in respect of schemes of arrangement proposed to facilitate a merger of Crown with Petra Diamonds Ltd ("Petra"), a company incorporated in Bermuda. Commissioner McKerracher approved the applicant's draft explanatory statement, required under section 412(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") to accompany the notices of the meetings of the members and creditors of Crown. Accordingly, Commissioner McKerracher gave the necessary leave for the applicant to convene a meeting of its members and note holders for the purpose of voting on the schemes of arrangement proposed by the directors. The Commissioner noted that the application was the first-stage of a three-stage process in accordance with Part 5.1 of the Act, the second stage being the holding of the meetings and the third stage being an application for court approval of the schemes of arrangement as approved by the members and note holders of Crown. **(b) Facts**The stated objective of the proposed schemes of arrangement was to effect the merger of the assets and business of Crown and Petra, while at the same time keeping alive the rights pertaining to convertible notes issued by Crown. Although Crown is admitted to the official list of the ASX, each of its three current diamond-producing assets is situated in South Africa. Petra, a company currently listed on the London Stock Exchange's Alternative Investments Market, is the parent company of a mining group focused on the exploration and mining of diamonds in South Africa, with its primary operations in Angola. Pursuant to the proposed schemes of arrangement:(a) the issued capital held by each member of Crown would be transferred to Petra in exchange for shares in Petra; and(b) the terms of issue of convertible notes issued by Crown would be varied and the obligations of Crown in respect of the convertible notes would be assumed by Petra. Crown sought the following orders from the court:* an order pursuant to section 411(1) of the Act that Crown may convene a meeting of the members and a meeting of the convertible note holders for the purpose of considering the schemes; and
* an order that the applicant's draft explanatory statement be approved under section 411(1) of the Act.

**(c) Decision**Commissioner McKerracher referred to the judgment of Santo J in Re NRMA (No 1) (2000) 156 FLR 349 where the following matters were expressed as conditions to which the court must be satisfied before giving its approval under section 411(1) of the Act:(a) whether there has been "proper disclosure";(b) whether each of the schemes can be properly described as an arrangement or a compromise for the purpose of section 411(1);(c) whether the applicant is a Part 5.1 body for the purposes of section 411(1);(d) whether the schemes are properly proposed for the purposes of section 411; and(e) whether ASIC has had a reasonable opportunity to examine the terms of the scheme and make any submissions to the court. Commissioner McKerracher held that there had been proper disclosure by Crown, including summaries of the businesses and capital structure of Crown and Petra, risk factors and tax implications, financial information of Crown and Petra and an independent expert's report giving a detailed analysis of the proposed schemes and its effect on shareholders and note holders. The Commissioner also commented that in the case of a scheme which results in a takeover, "proper disclosure" requires at least the same level of disclosure as is required for a conventional takeover. In regards to the question of whether the schemes were properly proposed, Commissioner McKerracher noted that unless something improper emerges at the outset, the bona fides of those proposing the scheme is not generally a matter for the court at the approval stage, but rather falls for consideration at the third stage - namely the approval of the scheme of arrangement as approved by the members and note holders of the Company. The Commissioner held that there was nothing at this stage which raised any doubts about the bona fides of the directors of Crown in proposing the schemes. Commissioner McKerracher considered the disclosure requirements regarding explanatory statements and, in particular, the need for an explanatory statement to set out the "prescribed information" required by Regulation 5.1.01 of the Corporations Regulations 2001 (Cth). The Court held that the explanatory statement prepared by Crown for the most part set out the prescribed information. The Commissioner noted that ASIC had waived certain requirements set out in Regulation 5.1.01. Commissioner McKerracher ultimately held that the information disclosed in the explanatory statement was information that would permit the shareholders, note holders and their professional advisers to make an informed assessment of the rights and liabilities attaching to Petra's shares or to the scheme convertible notes, and the assets and liabilities, financial position and performance, profits and losses and prospects of Petra. Finally, the Commissioner held that there was no evidence or inference that could be drawn that the schemes had been proposed for any purpose of enabling any person to avoid the operation of Chapter 6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (dealing with takeovers). Accordingly, Commissioner McKerracher gave the necessary leave for the applicant to convene a meeting of its members and note holders for the purpose of voting on the schemes of arrangement proposed by the directors. |
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