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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 OECD risk management tool for investors in weak governance zones**  The OECD Investment Committee is developing a risk management tool to assist companies in responsibly managing their investments in weak governance zones according to an OECD press release dated 23 November 2005. After consultation in the early stages of development, the draft Risk Management Tool for Investors in Weak Governance Zones was made available for public comment through an online consultation which took place between 26 October 2005 and 23 November 2005.  A weak governance zone is an investment environment where the government is not working – public officials are unable or unwilling to assume their roles in protecting rights, providing basic public services and ensuring that public sector management is efficient and effective. These "government failures" lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development.  Corporate responsibility goes hand-in-hand with government responsibility. This is a recurrent theme of the OECD Investment Committee’s work on the OECD Guidelines for Multinational Enterprises ("the Guidelines") – a government-backed, voluntary code of conduct for international business. As companies themselves often note, weak governance zones pose many ethics issues and represent some of the most difficult investment environments in the world. Through the development of a risk management tool, the Investment Committee seeks to assist companies in responsibly managing their investments in weak governance zones. This work is also part of its implementation of the OECD Guidelines for Multinational Enterprises and furthers the Committee's broader mission of promoting prosperity and stability by harnessing the benefits of investment. The tool is non-prescriptive and consistent with the objectives and principles of the Guidelines.  Drawing on the OECD Guidelines for Multinational Enterprises and the recognised strengths of the OECD in the integrity area, the draft risk management tool focuses on those issues about which the OECD integrity instruments shed light. In addition to the Guidelines, these instruments include the Convention and Recommendations on Combating Bribery of Foreign Public Officials and the Guidelines for Managing Conflict of Interest in the Public Sector.  The draft management tool is available on the [OECD website](http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html" \t "_new).  **1.2 Corporate social responsibility: CAMAC discussion paper**  There is a wave of interest in corporate social responsibility, including calls by community groups and others for companies to give greater attention to the environmental and social impacts of their activities and to report more fully on their performance.  The Australian Government has asked the Corporations and Markets Advisory Committee (CAMAC) to consider a series of questions related to responsible corporate conduct, including aspects of corporate decision-making, corporate reporting and whether further measures are needed to encourage socially and environmentally responsible business practices.  In furtherance of its consideration of the Government's request, on 16 November 2005, the Advisory Committee released a discussion paper that calls for public submissions on the questions that have been raised.  The paper:   * provides information and analysis, including relevant historical background, international codes and guidelines, key concepts (such as stakeholders, sustainability and triple bottom line reporting) and the legal framework for corporate decision-making and environmental and social reporting; and * raises a series of questions that respondents may wish to consider in developing their submissions.   The Advisory Committee has called for submissions by 24 February 2006. The Committee will then prepare its final report, taking into account these submissions.  Copies of the discussion papers are available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf" \t "_new).  **1.3 Report on 2005 US proxy season**  On 15 November 2005, Institutional Shareholder Services (ISS), released its final report highlighting key issues and voting statistics from the 2005 US proxy season. ISS publishes its Post-Season Report annually in an effort to assist both institutional investors and corporate issuers prepare for the upcoming season. ISS reports that the 2005 season was far less contentious than previous years and companies again chose a path of constructive dialogue with shareholders.  There were 17 proxy contests this year compared to 19 in 2004 and 30 in 2003.  This proxy season also marked the first time ever the number of management proposals to declassify boards outstripped those submitted by shareholders. Additionally, a growing number of companies are agreeing to drop supermajority-voting requirements on change-in-control matters in favour of a simple majority standard. As a result, 576 shareholder proposals made it to the ballot in 2005 versus 703 in 2004 and 693 in 2003.  Support for a majority vote standard grew significantly this proxy season. At more than 55 company meetings, the average level of support for majority vote shareholder proposals increased to 44%, compared to 12% at 12 meetings last year when the issue emerged.  In 2005 hedge fund managers emerged as major players on the governance scene. Hedge funds shook up numerous boardrooms via hostile offers, proxy contests for board seats and "just vote no" withhold campaigns.  There has also been a steady rise in high-profile merger and acquisition activity this season. So far there have been shareholder votes on 340 transactions, as compared with 403 in all of 2004.  The full report is available on the [ISS website](http://www.issproxy.com/index.jsp" \t "_new).  **1.4 Auditors' liability: new European forum on limitation of liability**  On 15 November 2005, the European Commission has set up a European Forum to gather market players' views on limiting financial liability for auditors. The Forum will consider market-led solutions to mitigate litigation risks. The Forum comprises twenty market experts from various professional backgrounds (such as auditors, bankers, investors, companies, insurers and academics) with particular experience and knowledge of the subject.  As part of the 8th Company Law Directive on statutory audit, the Commission intends to issue before the end of 2006 a report which will examine the impact of liability rules for carrying out statutory audits on European capital markets and insurance conditions. If appropriate, it will be followed by recommendations to Member States. As a first step, early in 2006 the Commission will launch a study on the economic impact of alternative liability regimes, competition in the market and availability of insurance. The forum will provide data for this study and will give feedback on new developments.  The results of this study will be available in autumn 2006.  Further information is available on the [EU website](http://www.europa.eu.int/" \t "_new).  **1.5 Myners' second progress report to the shareholder voting working group**  On 14 November 2005, Paul Myners issued his second progress report to the Shareholder Voting Working Group (SVWG) on his review of the impediments to voting UK shares.  Myners' original report in 2004 outlined an action plan to address concerns that the system for voting UK shares was not operating as it should be in that votes were being "lost". The 14 November paper looks at the progress made in the eighteen months since that report. The voting process is getting better. As the process improves so does confidence in it, which in turn has helped increase voting levels from around 50% in 2003 to 61%.  One of Myners' main recommendations was that electronic voting is key to improving the process and it is apparent that electronic voting is increasingly being used. In the six months to 30 June 2005, 42% of the FTSE 100’s issued share capital was voted electronically compared to 22% for the previous year. Only two companies in the FTSE 100 did not allow electronic voting and both intend to in 2006. Similarly the number of meeting announcements made electronically has increased from 273 companies in the FTSE All Share for 2004 to 372 in the eight months to 31 August 2005.  Myners also reiterates the argument for taking votes at meetings by a poll rather than a show of hands. Although some have reservations about this, he considers the recently issued UK Company Law Reform Bill, which grants a reserve power to make regulations to require institutional investors to disclose how they exercised their votes, gives further weight to the arguments for polls in that it is not clear whether submitting a proxy would mean that the vote is exercised.  The report notes that the progress achieved to date needs to continue and that, as the landscape is changing, other issues now need attention. Going forward, Myners will focus on transactions such as American Depository Receipts, Contracts For Difference and hedge funds, and their effect on voting. The intention is to ensure that share ownership and voting rights are aligned.  The Myners report is available at: [http://www.investmentuk.org/press/2005/20051114-01.pdf](http://www.investmentuk.org/press/2005/20051114-01.pdf" \t "_new)  **1.6 Lack of disclosure of directors' share trading**  Sixty per cent of Australia's largest 200 listed companies have failed to meet disclosure rules on directors' share trading. A report released on 11 November 2005 by institutional investors also shows directors at 10 per cent of companies traded during the 'blackout' period between the end of a company's reporting period and the announcement of results, and directors at 23 companies traded shortly before the announcement of an earnings upgrade or takeover bid.  Compiled by the BT Governance Advisory Service on behalf of the PSS/CSS and five other superannuation funds, the research examined the governance procedures for S&P/ASX200 companies in relation to director and executive share trading and reviewed all trades by directors of top 200 companies in 2004.  The findings are:   * Directors at 60 per cent of top 200 companies did not meet the ASX listing rules requirement to notify any change of interest within five business days. * 47 per cent of companies did not confine directors and executives to nominated trading 'windows'. * Late lodgement of directors' change of interest information occurred in 15 per cent of the 2936 notifications, ranging from a few days to more than four years late. * Directors at 20 of Australia's largest companies traded during the period between the end of a company's reporting period and the announcement of results when directors and executives are likely to be privy to unreleased information regarding a company's performance. * Directors at 11 companies breached their company's stated trading policy. * Shares were purchased shortly before the announcement of an earnings upgrade or takeover bid by directors at 10 per cent of companies. * 10 companies where a director sold shares worth more than one per cent of the company market capitalisation did not disclose relevant information to the market within one business day. * Three companies did not have a share trading policy.   The full report is available on the [PSS website](http://www.pss.gov.au/" \t "_new).  **1.7 Senate passes director liability Bill**  On 10 November 2005, the Australian Senate passed without amendment the [Corporations Amendment Bill (No 1) 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85436" \t "Default).  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, said the Hon Chris Pearce MP, Parliamentary Secretary to the Treasurer.  The amendment addresses concerns that have arisen in light of the decision of the South Australian Supreme Court in the case of Hanel v O'Neill, that directors of corporate trustees could be personally liable in any case where there are insufficient assets to discharge the liabilities of the trust. Mr Pearce said that it was important to clarify the extent of personal liability faced by directors.  "As a result of Hanel, these directors were effectively treated as guarantors of any liability entered into on behalf of a trust. This was never the intention of the relevant provision. The Bill will improve certainty for the directors of all corporate trustees, from large superannuation trusts through to trading trusts running a small business," he said.  The Bill also contains a technical amendment to clarify the operation of a transitional provision in the Corporations Act. The amendment will ensure the auditor independence provisions that applied prior to the enactment of the CLERP 9 legislation continue to apply to financial years commencing prior to 1 July 2004.  **1.8 The cost of regulation**  On 9 November 2005, the Australian Chamber of Commerce and Industry (ACCI) launched a position paper 'Holding Back the Red Tape Avalanche', which outlines a plan to reduce the impact of the escalating volume of what the ACCI refers to as "anti-business regulation'.  Based on international economic research, ACCI estimates regulation costs the Australian economy approximately $86.0 billion per year or 10.2 per cent of GDP. Amongst the biggest losers from anti-business regulation are consumers who are forced to pay higher prices as compliance costs get passed through to end products and services.  ACCI's model for regulatory reform specifically deals with initiatives that should be carried out by the Australian Government. However the principles can and should be adopted at all levels of government according to the ACCI.  The specific features of the ACCI approach are as follows:  1) The Prime Minister will table in Parliament an annual regulatory budget that provides a cost and benefit analysis of all business-related regulations. Measuring the cost of regulation is the first step in controlling its growth; 2) All regulatory budgets delivered by the Prime Minister must be placed on a centralised website. This will help to inform the public of the amount of regulation being created and the amount of regulation it is required to comply with; 3) The Office of Regulatory Review will be moved from the Productivity Commission to the Department of the Prime Minister and Cabinet. The new body, to be known as the Prime Minister's Regulatory Reform Unit (PMRRU), will be headed by a Chief Executive chosen from the business community; 4) A modelling unit located in the Productivity Commission will be created to develop a standardised costing tool to be applied to all new regulatory proposals. Line departments will be required to apply this costing tool to objectively measure the compliance costs of their regulatory bids; and 5) Regulation that does not pass the Regulatory Impact Statement (RIS) process as determined by the PMRRU will not be allowed to proceed.  Holding Back the Red Tape Avalanche is available on the [ACCI website](http://www.acci.asn.au/" \t "_new).  **1.9 Investors' views on corporate risk management**  Nearly two-thirds of global investors will apply a penalty towards a potential investment target if they consider risk management to be insufficient, while almost half have de-invested for this reason, according to a new survey released on 8 November 2005 by Ernst & Young.  The survey, based on interviews with over 130 major global investors representing organizations which manage funds running into trillions of dollars, found investors are demanding that companies be more transparent regarding their approach to risk management. 82 per cent of investors are willing to pay a premium if they see evidence of good risk management, but many admit that they are currently making decisions based on incomplete risk information.  The survey identifies the key principles that underpin good risk management as effective systems and controls, transparency, communication, accountability and ownership of risk issues at a senior level within the company. Nearly half of investors want to see CEOs and the wider board taking ownership of risk management, compared to just 16 per cent who consider it the responsibility of a specialized risk function, and 15 per cent who believe the CFO is ultimately responsible. Significantly, investors also pointed to the need for risk to be understood right across the organization.  Key findings from the survey include:   * 61% of investors identified instances where they have not made an investment because they considered a company's risk management to be insufficient; * 48% revealed they had de-invested in companies where risk management performance was insufficient; * 82% of major investors would pay a premium for a company that successfully demonstrates good risk management; * 69% of investors rank transparency as the top priority when making investment decisions, ahead of the business model and track record of the company; * Investors believe reliable risk management results in fewer negative surprises, greater financial stability and opportunity for profitability; * Board level ownership, understanding and communication of risk issues are considered the keys to risk management success; and * Investors say compliance risk is the top priority, ahead of competitive, regulatory and reputation risk.   The report is available on the [EY website](http://www.ey.com/" \t "_new).  **1.10 European Commission presents analysis of obstacles to cross-border mergers and acquisitions**  On 8 November 2005, the European Commission presented to the Council of Economic and Finance Ministers (ECOFIN) its preliminary analysis of why there has been little cross-border consolidation so far in the EU financial sector.  In order to provide an explanation for the lack of cross-border consolidation, the Commission carried out a survey of market participants (IP/05/444). An overwhelming majority of respondents identified the lack of cross-border cost synergies as the major obstacle. Reasons put forward to explain this are threefold:   * a lack of integration of the internal market for retail financial products; * the implications of diverging supervisory rules and practices for large cross-border financial groups; and * impediments to corporate reorganisation on a pan-European basis.   Respondents also pointed at an unfavourable, and even disabling, environment for conducting cross-border transactions in the financial sector. They also mentioned individual reluctance, from consumers and employees, towards non-domestic EU entities, which may discourage potential buyers.  Among the obstacles identified, market participants pointed at the supervisory approval process for the acquisition of qualifying shareholdings in banks (article 16 of the EU Banking Directive 2000/12/EC). The Commission has already started to work on possible improvements and streamlining of the current provisions, which were mandated by Economic and Finance Ministers in September 2004. In order to ensure cross-sectoral consistency, similar provisions in the insurance and securities sectors will also be examined.  The issue of low cross-border consolidation in the financial sector was discussed at the informal meeting of Economics and Finance Ministers held in Scheveningen on 10-11 September 2004. Ministers asked the Commission to study possible obstacles to cross-border mergers and acquisitions in the financial sector, arising not only from differing supervisory practices but also from other, broader factors (MEMO/04/214).  A detailed analysis of the results is available on the [Europa website](http://www.europa.eu.int/comm/internal_market/finances/index_en.htm" \t "_new).  **1.11 Corporate governance in Asian banks**  On 4 November 2005, Deloitte released a report that identifies corporate governance as a key issue for investors in Asian banks.  The Deloitte research, 'Enhancing shareholder value: corporate governance as a competitive differentiator among Asian banks', pinpoints five key areas of concern to the sector:   * Board responsibilities and director independence * Role of the audit committee * Risk management * Shareholder rights * Whistleblower protection   The survey reveals the most important issues for Asian banks are board responsibilities and director independence, and the role of the audit committee. At the operational level, risk management is also of great concern as banks hope to curtail fraud and poor lending practices in order to lower the risk profile of the entire bank.  As Asia Pacific countries seek to improve their respective banking sectors, governments have taken steps to implement risk management and capitalisation requirements based on international standards.  While this 'one size fits all' approach is not optimal, many Asian banking regulators are using the Basel II framework to drive the largest banks toward adoption of globally recognised practices in the areas of risk measurement, risk management and capital allocation.  Although adoption by jurisdiction will vary, the Basel II framework provides for a range of approaches of increasing sophistication in measurement systems and practices, with the more sophisticated approaches associated with incentives in the form of reduced minimum capital adequacy ratios.  If Asian banks are able to adequately address risk, governments may reduce capital adequacy ratios to allow banks to deploy additional capital.  Greater shareholder activism and increased foreign investment has led to shareholder rights becoming one of the top five major corporate governance themes. In addition whistleblower protection has begun to gather interest and initiate reform, providing an alternative route to bringing corporate issues to the surface.  Whistleblower protection involves the implementation of processes, systems, and oversight, in order to adequately handle whistleblower issues. Regulatory requirements, such as the US Sarbanes-Oxley Act and Australia's CLERP 9, require that companies be held responsible for adequately protecting the whistleblowers' rights and anonymity while barring any reprisals from communicating information about the company.  A copy of the report is available on the [Deloitte website](http://www.deloitte.com/dtt/home/0%2C1044%2Csid%25253D1000%2C00.html" \t "_new).  **1.12 Alternative performance measures to ensure best practice by companies in the information prepared for investors**  On 3 November 2005, following consultation, the Committee of European Securities Regulators (CESR) published its final Recommendations on the use by listed firms of Alternative Performance Measures (ref CESR/05-178B) and a feedback statement (ref CESR/05- 548) which indicates how the points raised by the respondents during the consultation were handled.  European listed companies used widely differing alternative performance measures. Alternative performance measures can provide investors with appropriate additional information. Properly used and presented, these measures can assist investors in gaining a better understanding of a company's financial performance. The objective of this recommendation is therefore intended as guidance for listed companies to ensure that the information they provide investors is not misleading. The recommendation draws heavily on the experience of CESR members in the supervision and enforcement of financial reporting on financial markets and seeks to address in a forward looking manner, the likelihood that the adoption of International Financial Reporting Standards (IFRS) in Europe is likely to increase the use of Alternative Performance Measures in the future.  Alternative Performance Measures can either be derived from the audited financial statements or stem from other sources and may draw on alternative methodologies to conventional accounting. Examples of Alternative Performance Measures broadly fall into two types of category. The first category could be described as including for example "operating earnings", "cash earnings", "earnings before one-time charges", "EBITDA - earnings before interest, taxes, depreciation, and amortization" and similar terms denoting adjustments to line items of income statement, balance sheet or cash flow statement. The second category, for example, might include additional performance indicators reflecting business activity (e.g. production or activity levels), projection of future cash flows (e.g. the European Embedded Value in insurance sector) or forward-looking indicators. It should be noted however that these are merely illustrative examples as CESR does not determine in this Recommendation a list of 'accepted alternative performance measures' for use in the EU.  CESR began a three-month consultation on these recommendations on 11 May 2005. The 29 responses to the consultation (all available on CESR's website under consultations) were very supportive of the CESR initiative to issue a recommendation (of a level 3 nature) in this area and of the recommendations themselves. Responses however, highlighted a number of issues which are therefore clarified in the final version of CESR's published recommendation.  In particular, in relation to definition of Alternative Performance Measures, the final recommendation has been amended to clarify that Alternative Performance Measures are non-GAAP measures, i.e. financial data that are not included in audited financial statements in view of providing a true and fair view.  Some concerns were expressed in relation to specific principles contained in the recommendation, e.g. on combined presentation of defined measures and Alternative Performance Measures; on prominence of presentation of Alternative Performance Measures vs. defined measures; and on auditor's involvement. CESR took account of these concerns for redrafting and clarifying these principles of the recommendation.  The main recommendations put forward by CESR include the following:   * In the preparation of alternative performance measures, companies should respect the IFRS principles for financial statements for all types of financial information, i.e. comprehensibility, relevance, reliability and comparability. * Issuers should define the terminology used and the basis of calculation adopted (i.e. defining the components included in an alternative performance measure). In particular, CESR notes that disclosure is especially important if market practice or academic theory is divided about the components of that measure. Where applicable, the disclosure of the basis of calculation should include indications on hypothesis or assumptions used. * Where possible issuers should present alternative performance measures only in combination with defined GAAP measures. Furthermore, issuers should explain the differences between both measures; this might be through a reconciliation of figures to provide investors with enough information to fully understand the results and financial position of the company. * If the company chooses to present alternative performance measures, it should provide comparable information for other periods as well and the same performance measures should be used consistently over time. * Issuers tend to present alternative performance measures with remarkable prominence, sometimes even more prominently than the defined measures directly stemming from financial statements. To ensure that investors are not mislead, CESR recommends that issuers highlight the defined performance measures with greater prominence than alternative performance measures derived from audited financial statements and which resemble defined performance but do actually not have the characteristics of the defined measures (to be audited, based on an identified reporting framework, consistent and comparable with performance measures of other enterprises). In other cases of Alternative Performance Measures, defined measures and alternative measures will be presented according to their usefulness to portray the entity's performance, considering that alternative measure should not be presented with greater prominence. * Issuers may internally use alternative performance measures for measuring and controlling the company's output. CESR recommends that issuers give an explanation of the internal use of alternative performance measures in order to make investors understand the relevance of this information. * The issuer should disclose whether the alternative performance measures have been subject to separate auditor's review and, if so, indicate the nature of such a review and its conclusion. CESR believes that the management of the reporting entity should always inform its auditors about its use of alternative performance measures, and thereby enable the auditor to consider the requirements of applicable audit standards.   Further information is available on the [CESR website](http://www.cesr-eu.org/" \t "_new).  **1.13 US Business Roundtable issues updated "best practices" in corporate governance**  The Business Roundtable, representing CEOs of 160 of the largest corporations in America, released on 3 November 2005 the updated Principles of Corporate Governance, outlining core guidelines to help American public companies meet their corporate governance responsibilities more effectively. The Roundtable's first Principles were released in May 2002.  Major changes reflected in the updated guidelines released are:   * Corporate governance laws and regulations: The updated principles reflect new legal and regulatory requirements resulting from the Sarbanes-Oxley Act of 2002 and strengthened securities market listing standards. * Board leadership: The principles emphasize the critical importance of independent board leadership and, in recognition of the fact that no one leadership structure is right for every corporation, outline various methods for providing independent leadership, from an independent chairman to a lead or presiding director that performs a range of functions. The Roundtable's May 2005 survey showed that nearly 82% of member companies' boards are at least 80% independent. * Executive sessions: The principles recommend placing time for an executive session of independent or non-management directors on the agenda for every regular board meeting, and follow-up with senior management at the conclusion of each executive session in order to maximize the effectiveness of these sessions. * Compliance: The principles include an expanded discussion of compliance that addresses the board's role in compliance oversight and emphasizes the responsibility of the board and senior management for setting a "tone at the top" that establishes a culture of legal compliance and integrity. * Director-shareholder relations: The principles state that the board is responsible for responding to communications from shareholders and addressing issues of concern to shareholders, and contains an expanded set of best practice recommendations for boards in carrying out these responsibilities. In the May survey, 90% of Business Roundtable companies reported that they have established procedures for shareholder communications with directors.   The Business Roundtable's 2002 Principles of Corporate Governance called on companies to adopt a number of best practices in corporate governance, among them: requiring a substantial majority of independent directors; requiring entirely independent audit, corporate governance and compensation committees; requiring shareholder approval of stock options; providing employees with ways to alert management to potential misconduct; establishing a management compensation structure that links the interests of management to the long-term interests of shareholders; and requiring the audit committee to recommend outside auditors and set policies with regard to outside auditors.  A recent survey of Business Roundtable members (May 2005) showed that America's largest companies have improved corporate accountability by increasing transparency, improving board independence and enhancing communication with shareholders.  The updated guidelines build on other work the Business Roundtable has done on corporate governance issues. The group has also published Executive Compensation: Principles and Commentary (2003), and best practices for board committee processes in The Nominating Process and Corporate Governance Committees: Principles and Commentary (2004).  The Business Roundtable's 2005 Principles of Corporate Governance are available on the [Business Roundtable website](http://www.businessroundtable.org/" \t "_new).  **1.14 Major overhaul of UK company law**  Major changes to simplify and improve UK company law were unveiled in the Company Law Reform Bill, published on 3 November 2005.  According to the UK government, it is estimated that business benefits from these proposals are likely to total around £250m a year. This includes an annual £100m benefits for small companies from:   * restructuring those parts of company law most relevant to small businesses making it easier for them to understand what they need to do; * simpler rules for forming a company; * abolition of the need for a company secretary; * making AGM opt in rather than opt out; and * new model articles.   There will be benefits from a range of measures for all businesses including:   * greater clarity on directors' duties, including making clear that they have to act in the interests of shareholders, but need to pay regard to the longer term, the interests of employees, suppliers, consumers and the environment; * greater use of e-communications and removing the need for hard copy share certificates; and * an option for all directors to file a service address on the public record rather than a private address.   Shareholder engagement will also be promoted through enhancing the powers of proxies and making it easier for indirect investors to be informed and exercise governance rights in the company.  The Bill also contains proposals relating to auditors including:   * allowing shareholders to agree to limit the auditors' liability to the company, so the financial liability of the auditor relates to the auditors' responsibility for the loss; * greater rights for shareholders to question auditors and named partners for audit reports; and * audit reports to give the name of the individual lead auditor, as well as the audit firm (although provision is made for confidentiality in exceptional cases).   The Bill also includes a new offence for recklessly or knowingly including misleading, false or deceptive matters in an audit report.  The Bill is also used to implement the EU Takeover Directive, placing the work of the Takeover Panel on a statutory footing. It will implement the company law aspects of the European Transparency Directive (relating to disclosure of shareholdings), and the Bill makes the Financial Services Authority (FSA) the competent authority for the rules which will be broadly similar to the current rules under part 6 of the 1985 Act. It also implements aspects of the EU Audit Directive.  A power is provided to require institutional investors to disclose how they have used their votes. The Bill also paves the way for the Financial Reporting Council to undertake regulation of the actuarial profession, following the Penrose report into Equitable Life.  The Bill includes a company law reform power to allow faster updating and amendment of company law in future, subject to consultation and Parliamentary scrutiny requirements.  The Bill is available on the [DTI website](http://www.dti.gov.uk/cld/facts/clr.htm" \t "_new).  **1.15 CEBS publishes guidelines on supervisory disclosure**  On 1 November 2005, the Committee of European Banking Supervisors (CEBS) published its guidelines for supervisory authorities on increased transparency and public disclosure. The CEBS guidelines are required by the Capital Requirements Directive, the now passed EU Legislation for a new capital adequacy framework for credit institutions and investment firms.  The framework will allow easy access to qualitative information on the laws and rules adopted at the national level and on the ways in which Member States have exercised the options and national discretions, as well as to statistical data on the implementation of the Directive.  CEBS believes this first set of guidelines is a major step towards a consistent implementation of EU legislation. Public disclosure by supervisory authorities will ensure proper accountability, which in turn helps to promote sound governance practices on the part of the supervisors themselves. It could also enhance convergence of supervisory practices across the EU.  A demonstration of the supervisory disclosure framework is available on the [CEBS website](http://www.c-ebs.org/SD/SDTF.htm" \t "_new).  **1.16 Long-tail personal injury claims against companies: reform proposal**  On 27 October 2005, the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce MP, asked the Corporations and Markets Advisory Committee to review a proposal to strengthen protection for future unascertained personal injury claimants where the solvency of the responsible company may be in question.  The request refers to the report of the Special Commission of Inquiry into James Hardie in 2004, in which David Jackson QC said that:  current laws do not make adequate provision for commercial insolvency where there are substantial long-tail liabilities, that is, liabilities that arise many years after the events or transactions that give rise to them.  The Committee has been asked to consider and advise on a proposal, referred to in the request that in certain circumstances would place people with future personal injury claims on the same footing as current creditors of the company. The request refers to the need to balance competing policy considerations, namely, protecting potential personal injury claimants on the one hand, and on the other, providing current creditors and others with business certainty.  The Advisory Committee is calling for submissions on the proposal to assist in its consideration of whether the proposal would protect the interests of these claimants without compromising unduly current corporate law and insolvency principles.  **(a) Eligible future claimants**  The proposal would apply to future claimants where the following tests are satisfied:   * there is a strong likelihood of numerous future claims against a company that has itself experienced an unusually high number of personal injury claims or is in an industry where those claims have already arisen and; * the circumstances giving rise to the claims and the class of persons who will bring the claims can be identified; and * the extent of the company's liability can be reasonably estimated.   **(b) Extension of creditor protection provisions**  Eligible future claimants would be treated as creditors for the purpose of:   * certain corporate transactions affecting share capital (for instance, share capital reductions or buy-backs); and * deferring payments to shareholders until all creditors have been paid in full.   **(c) External administration**  There would also be procedures for taking into account the claims of these future claimants in administrations and liquidations.  **(d) Anti-avoidance provisions**  There would be provisions imposing criminal and civil sanctions on anyone attempting to defeat the rights of eligible future claimants.  **(e) Further details**  The terms of reference and the proposal are available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf" \t "_new).  The Advisory Committee has requested submissions by Friday 17 February 2006. Submissions should be sent to: [john.kluver@camac.gov.au](mailto:john.kluver@camac.gov.au).  **1.17 APRA releases additional discussion paper for General Insurance Reform Stage 2**  On 27 October 2005, the Australian Prudential Regulation Authority (APRA) issued a discussion paper and draft prudential standards outlining a proposed strengthening of the prudential supervision of general insurance in the areas of capital adequacy, assets in Australia and custodian requirements.  APRA's discussion paper and the draft prudential standards are available on the [APRA website](http://www.apra.gov.au/" \t "_new).  **1.18 CESR publishes its final advice of a possible amendment to the Prospectus Regulation regarding the treatment of complex financial information**  The European Union Prospectus Regulation came into effect on 1 July 2005 and contains requirements relating to how issuer's historical financial information should be presented in a prospectus. Shortly after the legislation's implementation, it became clear that more detail in the level two implementing measures might be helpful if the treatment of issuers having a complex financial history was to be handled in a consistent manner across Europe. The Committee of European Securities Regulators (CESR) was therefore asked by the European Commission to provide some advice by 31 October 2005, on how this might be altered. On 27 October 2005, the CESR final advice was published for the Commission’s consideration.  The prospectus must include historical financial information on the issuer. This is intended to provide investors with a full picture of the financial position of an issuer, informing them on the issuer's business as a whole, which may include significant acquisitions or disposals, throughout the period required by the Regulation (usually the last 3 years). However, there are certain circumstances that arise, mainly in relation to public offers or admission to trading of shares, where the historical financial information required by the issuer to be included in the prospectus might not sufficiently reflect the issuer's whole business throughout the required period (these types of issuers are therefore considered to have a "complex financial history"). For example, such circumstances can arise when: the issuer has a newly incorporated holding company inserted over an established business; the issuer seeking admission to trading or making an offer consists of companies that were under common control or ownership but which never formed a legal group; the issuer has made a significant acquisition (representing more than 25% of the group) during the three year historical record or subsequent to the last audited consolidated financial information on the issuer, including specific reference to cases where the acquired target has different accounting policies; the issuer has disposed of a significant part of its business since the last audited accounts; or, the issuer has changed its accounting reference date during the three year period.  The main themes of the advice are highlighted below:   * CESR proposes that the amendment to the Regulation should be more in the form of guidelines. In line with responses to the consultation, CESR advice proposes that the amendment to the Regulation should not consist of a detailed set of requirements, given that the specific characteristics of complex financial histories do not, by their very nature, follow a standard pattern. As such, the regulatory approach should allow competent authorities to continue with their current flexibility when assessing these situations.   Concerning the actual requirements that would be imposed on issuers with a complex financial histories, CESR's advice proposes a limited amendment to the Regulation that would enable competent authorities to require these issuers to provide in their prospectus, historical financial information for the significant businesses or subsidiaries, taking into account some principles set out in the advice. This principle based approach was strongly encouraged by respondents to the consultation paper.  This principle based approach might best be complimented by level 3 guidance from CESR which is more flexible in nature than a legislative solution but should still promote convergence of the practices of its members and ensure adequate legal certainty for cross border activities in the single market. CESR will therefore assess what level 3 work is needed in respect of the requirements relating to complex financial histories.   * CESR clarifies in its advice the interaction between the requirements of Annex II of the Regulation on Pro forma information and the historical financial information. In its advice, CESR also clarifies the interaction between the requirements of Annex II of the Regulation on Pro forma information and the historical financial information to which the CESR's advice refers. As such, taking the example of an issuer that has a newly incorporated holding company inserted over an established business, CESR's advice explains that requirements related to complex financial histories are intended to provide historical financial information on the established business. Information is required to be provided for the last 3 years (or, a shorter period dependent on the time the established businesses have been in operation), subject to the principles in the advice. On the other hand, the purpose of the Pro forma information as required in Annex II is to describe how the transaction (the acquisition of the established subsidiary) might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the commencement of the period being reported on, or, at the date reported. The Pro forma information is provided for one year only, and is illustrative and a hypothetical situation since the established subsidiary was not acquired at the commencement of the period being reported on. * Defining the concept of complex financial histories. As regards the concept of complex financial histories. CESR's advice does not include a definitive list of cases of issuers with a complex financial history. In general, the advice considers that such cases would be those where the issuer has not prepared its historical financial information as a single business during the whole of the period for which the historical financial information is required under the Regulation.   Further information is available on the [CESR website](http://www.cesr-eu.org/" \t "_new).  **1.19 Corruption Perceptions Index 2005**  More than two-thirds of the 159 nations surveyed in Transparency International's 2005 Corruption Perceptions Index (CPI) scored less than 5 out of a clean score of 10, indicating serious levels of corruption in a majority of the countries. The survey was published in October 2005. The following information is extracted from the executive summary.  **(a) Overview**  Corruption continues to threaten development. The 2005 Index bears witness to the double burden of poverty and corruption borne by the world's least developed countries.  Despite progress on many fronts, including the imminent entry into force of the United Nations Convention against Corruption, seventy countries - nearly half of those included in the Index - scored less than 3 on the CPI, indicating a severe corruption problem. Among the countries included in the Index, corruption is perceived as most rampant in Chad, Bangladesh, Turkmenistan, Myanmar and Haiti – also among the poorest countries in the world.  Moreover, extensive research shows that foreign investment is lower in countries perceived to be corrupt, which further thwarts their chance to prosper. When countries improve governance and reduce corruption, they reap a "development dividend" that, according to the World Bank Institute, can include improved child mortality rates, higher per capita income and greater literacy.  Nineteen of the world's poorest countries have been granted debt service relief under the Heavily Indebted Poor Countries (HIPC) initiative, testifying to their economic reform achievements. Not one of these countries, however, scored above 4 on the CPI, indicating serious to severe levels of corruption. These countries still face the grave risk that money freed from debt payments now entering national budgets will be forfeited to greed, waste or mismanagement. The commitment and resources devoted to qualifying for HIPC must also be applied to winning the fight against corruption.  Stamping out corruption and implementing recipient-led reforms are critical to making aid more effective, and to realising the crucial human and economic development goals that have been set by the international community.  **(b) Progress has been made against corruption**  An increase in perceived corruption from 2004 to 2005 can be measured in countries such as Costa Rica, Gabon, Nepal, Papua New Guinea, Russia, Seychelles, Sri Lanka, Suriname, Trinidad & Tobago and Uruguay. Conversely, a number of countries and territories show noteworthy improvements – a decline in perceptions of corruption – over the past year, including Estonia, France, Hong Kong, Japan, Jordan, Kazakhstan, Nigeria, Qatar, Taiwan and Turkey.  The recent ratification of the United Nations Convention against Corruption established a global legal framework for sustainable progress against corruption. The Convention, which will enter into force in December 2005, will accelerate the retrieval of stolen funds, push banking centres to take action against money laundering, allow nations to pursue foreign companies and individuals that have committed corrupt acts on their soil, and prohibit bribery of foreign public officials. Low-income countries that embrace and implement the Convention will have a head start in the race for foreign investment and economic growth.  **(c) Wealth does not determine progress against corruption**  Wealth is not a prerequisite for successful control of corruption. New long-term analysis of the CPI carried out by Professor Johann Graf Lambsdorff shows that the perception of corruption has decreased significantly in lower-income countries such as Estonia, Colombia and Bulgaria over the past decade.  In the case of higher-income countries such as Canada and Ireland, however, there has been a marked increase in the perception of corruption over the past ten years, showing that even wealthy, high-scoring countries must work to maintain a climate of integrity.  The TI Corruption Perceptions Index is a composite survey, reflecting the perceptions of business people and country analysts, both resident and non-resident. It draws on 16 different polls from 10 independent institutions. For a country to be included, it must feature in at least 3 polls. As a result, a number of countries – including some which could be among the most corrupt – are missing because not enough survey data is available.  Further information is available on the [Transparency International website](http://www.transparency.org/" \t "_new).  **1.20 Less than a half of FTSE100 companies comply with combined code on corporate governance**  Following analysis of 477 annual reports, the Association of British Insurers (ABI) Institutional Voting Investment Service shows that only 46% of FTSE 100 companies state that they are fully compliant with the new Code.  Issues singled out by the ABI for clarification based on ABI research include:   * that it is not appropriate for chairmen to sit on the audit committee, but that they should not be excluded from the remuneration committee, provided they were properly independent at the time of the appointment and remain so subsequently. Currently the Code bars chairmen from both the audit and the remuneration committees; * that the provision calling on companies to disclose the proxy vote at AGMs should be strengthened; and * that there is a need for clarification of the conditions for "independence" for directors, which say that a director is not independent if he or she has had a material relationship with the company during the preceding three years.   Further information is available on the [ABI website](http://www.abi.org.uk/" \t "_new).  **1.21 Trends in Australian and New Zealand internal auditing**  Ernst & Young has published its second annual survey titled "Trends in Australian and New Zealand Internal Auditing'. It is a survey of the top 200 Australian listed companies and the top 100 New Zealand listed companies.  The key findings are:   * 39% of respondents increased the size of their Internal Audit functions over the last 12 months; * 78% of Internal Audit functions now report to either the Audit Committee Chair or the CEO. However, primary reporting lines continue to be split. Organisations putting in place mechanisms to ensure that Internal Audit objectivity and independence are preserved; * 57% of organisations state that Internal Audit is working with other assurance functions to provide a summary of key risks and assurance coverage to the Audit Committee; * 72% of Internal Audit teams prepare their Internal Audit plans in conjunction with other assurance providers, albeit in an often informal basis; * 77% of respondents have at least part of their Internal Audit delivered by an external party, mostly due to the need for specialist skills; * 32% of organisations have had an independent review of their Internal Audit function in the last two years; * Just 54% of Internal Audit staff have a financial background, suggesting that Internal Audit teams are increasingly undertaking non-financial reviews and are recruiting more commercial and other specialist skills; * Over half the organisations surveyed have changed the coverage of Internal Audit to help support Principles 4 & 7 of the ASX Principles of Good Corporate Governance. These Internal Audit teams are undertaking more detailed controls testing to support Principle 4 sign off; and increasing their focus on providing assurance around risk management frameworks to underpin Principle 7 sign off; * 76% of New Zealand private sector respondents have audit committees that satisfy the requirements of the updated New Zealand Stock Exchange Listing Rules; * 73% of respondents are using some type of automated audit tool, a significant increase from 46% last year; and * 84% of Internal Audit functions are basing their annual audit plan on the risk management principles of AS/NZS 4360:2004 Risk Management.   The full survey is available on the [EY website](http://www.ey.com/global/content.nsf/Australia/Home" \t "_new).  **1.22 Stock lending code of best practice**  In October 2005, the International Corporate Governance Network (ICGN) published a Code of Best Practice on Stock Lending. The Code sets out recommended practices for lenders and borrowers which include institutional shareholders having a clear stock lending policy, especially on voting.  It also recommends actions for issuers including the separation of record dates for dividend payments and shareholder meetings to minimise the effect that share lending for dividend swaps has on shareholder participation and share voting. It recommends that issuers should not set dividend record dates less than 30 days in advance of a shareholder meeting or record date (whichever is relevant for voting), nor less than 15 days after the shareholder meeting (or record date).  The Code is aimed primarily at ICGN members but encourages public companies, other investors and market intermediaries to take account of the Code where appropriate.  The Code is available on the [ICGN website](http://www.icgn.org/" \t "_new).  **1.23 Regulatory agency annual reports**  Annual reports of the following Australian government bodies for 2004-2005 have recently been published:  Australian Prudential Regulation Authority ([http://www.apra.gov.au/AboutAPRA/Annual-Report-2005.cfm](http://www.apra.gov.au/AboutAPRA/Annual-Report-2005.cfm" \t "_new))  Australian Securities and Investments Commission ([http://www.asic.gov.au](http://www.asic.gov.au" \t "_new))  Corporations and Markets Advisory Committee ([http://www.camac.gov.au/camac/camac.nsf/0/4873391D9063AD4ECA256B6C007FFD41?opendocument](http://www.camac.gov.au/camac/camac.nsf/0/4873391D9063AD4ECA256B6C007FFD41?opendocument" \t "_new))  Financial Reporting Council (the annual report of the FRC also contains the annual reports of the Australian Accounting Standards Board and the Auditing and Assurance Standards Board) ([http://www.frc.gov.au/reports/#Reports](http://www.frc.gov.au/reports/" \l "Reports" \t "_new))  Takeovers Panel ([http://www.takeovers.gov.au](http://www.takeovers.gov.au" \t "_new)) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC report highlights the benefits and risks of equity release products**  On 16 November 2005, the Australian Securities and Investments Commission (ASIC) released a report into equity release products following increasing interest in reverse mortgages, home reversion schemes, and shared appreciation mortgages (SAMs) from Australian consumers.  The Equity Release Products Report includes tips for consumers who may be considering equity release products. The Report includes a number of questions that consumers should ask when considering equity release products and the issues and features they should be aware of when asking these questions.  Further details regarding equity release products are also available on ASIC's consumer website [FIDO](http://www.fido.gov.au/fido/fido.nsf" \t "_new).  The three types of products currently or soon to be available in Australia and covered by the report are:   * Reverse mortgages—the consumer borrows money against the equity in his or her home and the principal and interest is not repaid until the home is sold (usually when the consumer dies or voluntarily vacates the home). * Home reversion schemes—the consumer sells part or all of his or her home to a reversion company. The home is sold for less than its market price (typically between 35% and 60%), but the consumer can remain in the property until they die or voluntarily vacate the home. There are at least two types of home reversion schemes – a sale and lease model and a sale and mortgage model. * Shared appreciation mortgages (SAMs)—the consumer gives up the right to some of the capital gain on the property in return for paying reduced or no interest on that part of his or her borrowings.   ASIC's Equity Release Products Report is available on the [ASIC website](http://www.asic.gov.au/reports" \t "_new).  **2.2 Regulation of non-cash payment facilities**  On 15 November 2005, the Australian Securities and Investments Commission (ASIC) released a new policy on the regulation of non-cash payment (NCP) facilities under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  ASIC's policy on the regulation of NCP facilities is set out in Policy Statement 185 Non-cash payment facilities [PS 185].  The release of this policy statement completes one of ASIC's eight projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation (2 May 2005).  The policy statement outlines the general approach that ASIC will take in regulating NCP facilities, including the factors that ASIC will take into account in considering applications for individual or class order relief.  The policy statement also describes the class order relief ASIC has granted to:   * low value NCP facilities [CO 05/736]; * gift vouchers or cards [CO 05/738]; * prepaid mobile phone accounts [CO 05/740]; * loyalty schemes [CO 05/737]; and * electronic road toll devices [CO 05/739].   The attachment provides further detail about ASIC's policy statement, as well as transitional issues. A copy of PS 185 can be obtained from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new) or by contacting the ASIC Infoline on 1300 300 630.  **2.3 APRA and ASIC release guide to good practice in unit pricing**  On 3 November 2005, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) jointly published Unit Pricing – Guide to good practice for the life insurance, superannuation and funds management industries.  The guide outlines a range of good practices and has been developed following a joint review by APRA and ASIC of unit pricing practice, aided by extensive industry consultation.  Both regulators have noted that serious problems can arise for investors where errors in the calculation of unit prices occur.  APRA and ASIC will continue to review aspects of unit pricing practice as a part of ongoing regulatory monitoring and expect that product providers will follow the good practices described in the guide. The regulators acknowledge that there may be circumstances in which alternative practices are appropriate. In such cases, product providers are expected to have a reasonable and well-documented justification for adopting alternative practices.  Between them APRA and ASIC have regulatory responsibilities for aspects of life insurance, superannuation and managed funds.  The finalised guide follows receipt of industry submissions on a draft consultation paper issued by [APRA](http://www.apra.gov.au/" \t "_new) and [ASIC](http://www.asic.gov.au/asic/asic.nsf" \t "_new) in December 2004.  **2.4 ASIC reports on the first year of its auditor inspection program**  On 1 November 2005, the Australian Securities and Investments Commission (ASIC) released the findings of its first year of on-site inspections of audit firms since the enactment of new regulatory requirements.  Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC has responsibility for the surveillance, investigation and enforcement of auditor independence requirements.  Australia significantly enhanced its regulatory requirements for auditors on 1 July 2004 with the enactment of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosures) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "Default) (CLERP 9).  ASIC conducted on-site inspections of Deloitte Touche Tohmatsu, Ernst & Young, KPMG and PricewaterhouseCoopers. The firms are national partnerships and together audit approximately 54% of all entities listed on the Australian Stock Exchange, and 91% by market capitalisation of the 300 largest entities.  ASIC's inspections identified that:   * All firms had documented policies in place and these were generally adequate. * While ASIC conducted a limited review of engagement files to see whether these policies were being implemented in practice, it did not seek to comprehensively test for breaches of the audit independence requirements. * No breaches of the Corporations Act were identified in the course of the inspections.   The inspection did identify some suggested improvements in the arrangements of each of the firms.  ASIC's next phase of work will include selected mid-tier firms and further inspections of the major firms.  The Financial Reporting Council (FRC) has been provided with results of the ASIC inspection as set out under the Memorandum of Understanding between the two organisations.  The report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 Amendments to the ASX operating rules formally lodged- ITS and EMR projects**  ASX has contracted OM Technology AB to supply a version of its CLICK XT software for the trading of all ASX's listed securities. This newly integrated trading system (ITS™) will replace SEATS, ASX's current platform for trading equities and warrants.  On 26 October 2005 ASX formally lodged with ASIC amendments to its Market Rules and Clearing Rules to implement the ITS™ Project. At the same time, it lodged certain amendments to the Market Rules and ACH's Clearing Rules in relation to aspects of its Equity Market Reform ("EMR") Project.  The amendments affect most pages of the Market Rules. However, a large majority of the amendments are consequential changes of defined terms or technical amendments that do not represent fundamental policy changes. Chief changes are broadly described below.  **(a) ITS amendments**  **(i) Definitional changes**  The Market Rules currently contain many references to the "SEATS" Platform and the "Derivatives Trading Platform" (or "DTP"). To reflect the integration of the platform, all of these references are to be replaced by references to the "Trading Platform".  Similarly, related terms such as "DTP Products", which covers all products traded on the DTP (i.e.; futures and warrants), and "Traded Products", covering all products traded on SEATS (i.e.; equities, warrants and interest rate products), are no longer appropriate. They will be replaced by new terms "Derivatives Market Contracts" (again, covering futures and warrants) and "Cash Market Products" (equities, warrants and interest rate products), chosen to match those used in the ACH Clearing Rules.  **(ii) Operational amendments**  Sections 16 and 21 of the Market Rules currently describe trading of the SEATS and DTP Platforms respectively as well as setting out Rules that apply specifically to Cash Market Products and Derivatives Market Contracts respectively. The Rules relating specifically to the two sets of products will remain set out in Sections 16 and 21. However, as SEATS and the DTP will no longer operate as separate platforms, the provisions applying to their operation will be removed from Sections 16 and 21. New Section 31 will instead contain provisions describing the new Trading Platform. The "Session States" under which trading is conducted at various times during the day (and which replace the old SEATS "Trading Phases") will be described in Section 31 and the Procedures to that Section.  The current Rules make provision for the trading of sets of contingent orders of products (or "Combinations"). Whereas trading is currently supported only in Combinations involving at least one derivative leg, the Rules will be amended to make provision for trading in Combinations involving Cash Market Products only (as these will be supported by the integrated system).  Amendments have also been made to reflect the introduction of Auctions into the trading mechanisms for Derivatives Market Contracts.  **(b) Equity market reform amendments**  In relation to the Equity Market Reform Project, amendments are being introduced in the Market Rules in respect of:   * the restriction of disclosure of Market Participant Identification numbers ("Broker IDs") also referred to as the Removal of Broker Identifier Initiative; and * the replacement of the old "Undisclosed Order" type with a new "Iceberg Order" that will be available for trading in Cash Market Products and Derivatives Market Contracts.   Minor amendments to the Clearing Rules will also be required in relation to the restriction of disclosure of Broker IDs.  **(i) Removal of Broker Identifier Initiative**  Broker IDs of Trading Participants whose orders are submitted into SEATS are currently available to other Trading Participants but not to investors and other stakeholders. As has been announced, as of 28 November, it is proposed that Trading Participants, like investors and other stakeholders, will cease to have access to the Broker IDs of Participants whose orders are submitted. This proposal necessitates amendment to certain Market Rules which currently presume that a Participant will be able to identify which Participants have submitted orders into the Market.  These Rules include:   * the Cancellation provisions, which require a Participant wishing to cancel or amend a trade to contact the counterparty to the trade. amendments are being introduced to permit Participants to request ASX to provide assistance in contacting an unidentifiable counterparty; and * the provisions for trading of Cash Market Products during the "Closing" and "After Hours Adjust" Trading Phases. These Rules require a Participant who wishes to trade during those periods to first contact, in order or their Price/Time Priority, potential counterparties that have submitted orders into SEATS. Those requirements will be removed as the Participant wishing to trade will no longer be able to identify those potential counterparties.   **(ii) Iceberg Order**  The current Rules for entry of "Undisclosed Orders" in Cash Market Products in Market Rule 16.8 will be deleted and replaced by new Market Rule 31.9 which will provide for the entry of "Iceberg Orders" in Cash Market Products or Derivatives Market Contracts.  The key difference between the "Undisclosed" and "Iceberg" Order types is that, whereas the initial entry of an Undisclosed Order confers both time and price priority on the disclosed and undisclosed portions of the Order, time priority will only be conferred on so much of an Iceberg Order as is disclosed from time to time.  **(c) Time of introduction of amendments**  The amendments will be brought into effect in a phased timetable. It is proposed to introduce the amendments in relation to the Removal of Broker Identifier Initiative on 28 November 2005. The migration of various product groups to the integrated trading platform will occur at various dates in accordance with the transitional provisions of new Section 32 of the Market Rules.  ASX is also introducing, at the same time as the amendments described above, changes to Market Rule 13.4 ("Prevention of Manipulative Trading"). The rule is being amended to avoid confusion and to improve consistency with the provisions of Part 7.10 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Austral Coal 02(RR) – decision on orders and reasons for decision**  On 15 November 2005, the Takeovers Panel made orders in the matter of Austral Coal 02 (RR) and released its reasons for making a declaration of unacceptable circumstances and orders in that matter. Under the orders, with one exception everyone who sold Austral Coal shares on ASX from 22 March to 4 April (inclusive) will receive a payment of about 5 cents per share, from an amount of $1.3 million to be paid by Glencore.  The matter concerns an application by Centennial Coal Company Ltd originally made on 3 June 2005 (TP05/47) for a declaration of unacceptable circumstances and orders in relation to the affairs of Austral Coal Limited. Centennial's complaint was about the failure by Glencore International AG from 22 March to 4 April 2005 to disclose that it had a position in Austral Coal comprising over 5%, increasing to 11.4% of the shares in Austral Coal, during the takeover by Centennial of Austral Coal. Glencore's interests were held partly in shares and partly in hedged cash-settled swaps written by two investment banks.  **(a) Background**  Glencore did not disclose the existence of either its direct holding or the hedged swaps until the evening of 4 April 2005, a fortnight after the aggregate number of shares comprised in Glencore's direct holdings and the hedged swaps exceeded 5%, the level at which it would have been required to disclose a direct holding under the substantial holding notice provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  During the period from the morning of 22 March 2005 until the evening of 4 April 2005 (the non-disclosure period), acceptances for Centennial's bid lifted Centennial's interest in Austral Coal from under 10% to over 35%. On 7 April 2005, Centennial announced that it had acquired majority control of Austral Coal.  **(b) Previous proceedings**  In initial proceedings on an application by Centennial, the Panel declared that Glencore's failure to disclose the existence and growth of its direct and swap interests in Austral Coal during the non-disclosure period constituted unacceptable circumstances in relation to the affairs of Austral Coal. The Panel made orders designed to remedy the effects of those circumstances.  That decision was reviewed by the Panel and largely confirmed. That decision on review was quashed by the Federal Court, because it appeared to have been made without taking into account several relevant factors.  **(c) The present decision**  On a full review of the evidence and submissions in the previous proceedings, and with the benefit of new evidence and submissions which were particularly directed to the factors found to be missing by the Federal Court, the sitting Panel varied the decision made in the Initial Proceedings by revoking the declaration of unacceptable circumstances and orders made in the Initial Proceedings and substituting a fresh declaration and orders.  The Panel found that during the bid Glencore had accumulated a substantial interest in Austral Coal comprising direct holdings and the hedged swaps without disclosure, with the following effects:   * Glencore acquired its position (comprising direct holdings and hedged swaps, with a degree of de facto control over disposal of the shares in Austral Coal the banks acquired to hedge the swaps) more cheaply or sooner than if it had disclosed its position on 22 March 2005 and progressively as its position grew. Austral Coal shareholders were unaware of the identity of a person who proposed to acquire a substantial interest in the company and Glencore acquired its position in a market which was less informed and competitive and therefore less efficient than it would have been; * Centennial's bid succeeded sooner, and in a less competitive market, than it would have done, had Glencore disclosed its position when that position first comprised more than 5% of the shares in Austral Coal and again at 1% increments. The market was accordingly less informed and competitive and therefore less efficient than it would have been. Glencore in fact intended that its 4 April announcement would check the progress of the bid, but left it too late.   The Panel did not, however, find that Glencore or the banks contravened the substantial holding provisions of the Act.  **(d) Effects on the market and investors**  Analysis of the effects of Glencore's announcement of its position on 4 April shows that, had Glencore disclosed its position when that position first comprised more than 5% of the shares in Austral Coal and again at 1% increments, the price at which the banks acquired hedge shares would have been greater by a not insignificant amount. Glencore benefited from the lower prices the banks paid, and people selling on market were correspondingly adversely affected.  For these reasons, the market in shares in Austral Coal was adversely affected by being unaware of the formation of a substantial interest and the identity of the person who proposed to acquire that substantial interest. The effects of the non-disclosure on the price of Austral Coal shares and on the progress of the Centennial bid are symptoms of the market having been less informed and competitive than it should have been, and accordingly less efficient.  During the non-disclosure period Glencore had a degree of de facto power to prevent the banks disposing of Austral Coal shares they bought to hedge the swaps, because there were at that time no satisfactory alternative hedges and the exposure was to a volatile share price, Austral Coal being a single mine coal company, financially distressed and already subject to a bid by Centennial.  That power came into existence progressively during the non-disclosure period, as the requested swap exposure was filled and the hedges were obtained:   * Because of that degree of control, Glencore's direct holding of shares in Austral Coal and the hedged swaps together constituted a substantial interest in Austral Coal. * Because the banks could in theory have found alternative hedges or chosen not to hedge, Glencore did not have absolute control over disposal of the hedge shares, and the sitting Panel was not satisfied that the degree of control that Glencore had over disposal of the hedge shares during the non-disclosure period was sufficient to amount to a relevant interest in the hedge shares. * The sitting Panel did not find that either of the two investment banks was associated with Glencore concerning Austral Coal, although each of them was aware that Glencore already held nearly 5% of the shares in Austral Coal when it asked them to provide swap exposure for approximately a further 5%.   A person of Glencore's experience and commercial sophistication knew or could reasonably have assumed that the banks had no practical alternative but to hedge the filled swap positions with Austral Coal shares, which the banks in fact did.  Glencore's failure during the non-disclosure period to disclose the existence and growth of its position had adverse effects on the market in which Glencore acquired its substantial interest in Austral Coal and in which Centennial acquired control of, and a substantial interest in, Austral Coal. The impact of those effects is sufficient, in monetary terms and on the Centennial bid, that the circumstances are unacceptable circumstances.  The Panel assessed the effect on market prices of Glencore's non-disclosure on the basis of the difference between the prices obtaining during the non-disclosure period and prices during 5, 6 and 7 April (after Glencore announced its position and until Centennial announced that it had acquired a majority of the shares in Austral Coal) at about 6.7 cents per share acquired by Glencore or one of the banks over the non-disclosure period. The amount by which Glencore benefited from the non-disclosure was $1,320,280.  **(e) Orders**  Following its declaration of unacceptable circumstances, the Panel has made orders to remedy the unacceptable circumstances that it found.  The orders require Glencore to make a cash payment in favour of people who sold on market from 22 March 2005 to 4 April 2005 (both inclusive). The payment will translate to about 5 cents for each share sold in the relevant period (more shares were sold than were bought by Glencore and the banks). One large crossing was excluded from participation, because the shares were traded below market. At present, the Panel is not aware of any other vendors who should be excluded. With that exception, every vendor who sold Austral Coal shares by a transaction on (or reported to) SEATS from 22 March to 4 April (inclusive) will be eligible to participate. It is presently proposed that payment will be made through vendors' brokers. Making an order for a cash payment allows the remedy to approximate the amount of the gain to Glencore from the non-disclosure, although it only partially compensates selling shareholders for their losses.  The orders do not require Glencore to offer to sell shares in Austral Coal to people who sold on market in the period during which Glencore failed to disclose a substantial position in Austral Coal. The Austral Coal 02RR Panel has found that such an order would be ineffective in restoring an informed market in shares in Austral Coal.  The Panel has decided to make no order affecting the outcome of Centennial's bid for Austral Coal, whether by enabling acceptances to be withdrawn, topping up the consideration received by shareholders who accepted during the non-disclosure period, or requiring Glencore or either of the banks holding hedge shares to accept the bid, possibly triggering compulsory acquisition of the remaining shares in Austral Coal. To allow acceptances to be withdrawn would unfairly prejudice Centennial and possibly accepting shareholders. To top up some shareholders and not others would be inconsistent with the equal opportunity policy of the takeovers code. While the Panel found that Glencore obtained its blocking stake more cheaply and sooner than it would have done, if it had disclosed its position, Centennial’s decision to declare its bid unconditional early in the offer period exposed it to the risk that a blocking stake might be acquired.  The reasons for the Panel's decision are available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  Glencore has appealed the decision to the Federal Court and the appeal will be heard in February 2006. The orders of the Panel have been stayed until then.  **4.2 Collateral benefits – Issues Paper for comment**  On 9 November 2005, the Takeovers Panel released an Issues Paper seeking public comment on the circumstances in which the Panel may consider whether or not unacceptable circumstances exist in relation to collateral benefits in takeovers transactions. The purpose of the Issues Paper is to facilitate discussion among, and obtain feedback from, market participants and investors who may be affected by any guidance which the Panel publishes on collateral benefits, or otherwise have an interest in such guidance.  Collateral benefits are benefits offered, given, or agreed to be given, by a bidder or its associates, to a shareholder or shareholders of a target company, which are not offered as part of the bid consideration. Where the benefits are offered or given selectively or unequally between target shareholders or to some but not others, the equality of opportunity principle set out in section 602(c) and the specific provisions set out in section 623, of the [Corporations Act (Cth) 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are likely to be infringed.  The Panel's Issues Paper sets out the issues and principles involved in considering collateral benefits in the context of sections 602(c) and 623 and whether or not a collateral benefit is likely to give rise to unacceptable circumstances.  In the Issues Paper the Panel raises the threshold issue of whether collateral benefits are, inherently and unavoidably, unacceptable.  The Panel then goes on to discuss various ways of looking at collateral benefits, and the criteria for doing so, where collateral benefits may not be unavoidably unacceptable. For example, collateral benefits that are of immaterial size are unlikely to have an effect on control or potential control of a company, or of an acquisition of a substantial interest, so are unlikely to give rise unacceptable circumstances. In other cases, substantial shareholders in a company may have pre-existing relationships or contracts with the target company, which, if a bidder were precluded from dealing with them, would, commercially, prevent any takeover bid for the target company.  The Issues Paper discusses issues relating to:   * unacceptable circumstances; * intentions of the bidder, or benefit offeror; * materiality; * selectivity; * "fair value" transactions; * pre-existing contracts and relationships; and * "necessary" collateral transactions.   The Panel will consider the responses to the Issues Paper and will determine whether it would be appropriate to publish Panel guidance on the issue. If the Panel considers it appropriate to publish guidance on the issue it will prepare a draft Guidance Note and seek public comments on the draft prior to final release.  The Issues Paper is available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  **4.3 Rights issue – draft Guidance Note for comment**  On 8 November 2005, the Takeovers Panel released a draft Guidance Note seeking public comment on the circumstances in which the Panel may consider whether or not unacceptable circumstances exist in relation to a rights issue which has the potential to have an effect on control of a company.  The purpose of the draft Guidance Note is to facilitate discussion among, and obtain feedback from, market participants and investors who may be affected by any guidance which the Panel publishes on rights issues, or otherwise have an interest in such guidance.  The draft Guidance Note follows an Issues Paper on rights issues which the Panel released for comment on in July this year (TP05/55).  The Panel noted that the submissions on the Issues Paper generally were that:   * the Panel is correct in seeking to ensure that its guidance does not inappropriately narrow the scope of the rights issue and underwriting exceptions in section 611 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default); * the majority of rights issues have very little potential effect on control, and cause no problems; * where problems arise in relation to rights issues, it is generally in the smaller capitalization end of the market; and * small cap companies frequently have greater problems raising capital than large cap companies and the Panel should be sensitive in considering rights issues in such companies.   The draft Guidance Note follows the form and content of the Issues Paper fairly closely.  There were a number of requests for the Panel to create a bright line test, or a form of safe-harbour for companies proposing rights issues. The respondents argued that the Panel's approach of setting out in its Guidance Notes the issues which it would take into account in proceedings before it did not give companies sufficient certainty that a rights issue would not constitute unacceptable circumstances. The Panel considered this, but does not consider that it could, or should, seek to define such a safe-harbour, especially given its requirement to review the circumstances of each application before it.  The Panel has decided to remove the "check-list" of issues which the Panel may consider in relation to rights issues set out in an annexure to the Issues Paper. The Panel advised that it considered that the issues are adequately discussed in the body of the draft Guidance Note. The Panel considered that it was more appropriate for companies and their advisers to read the Panel’s discussion of the issues rather than take away a bald list of the issues.  The issues which generated most comments were:   * reasons for proposing a rights issue; * related party underwriting; * pricing; and * renounceability.   The draft Guidance Note is available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 Duty of care and pure economic loss in the context of corporate groups**  (By Darren Spalding, Mallesons Stephen Jaques)  Fortuna Seafoods Pty Ltd as trustee for The Rowley Family Trust v The Ship "Eternal Wind' [2005] QCA 405, Queensland Court of Appeal, McMurdo P, Jerrard JA and Dutney J, 4 November 2005  The full text of this judgment is available at  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/november/2005qca405.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/november/2005qca405.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In a recent decision of the Queensland Court of Appeal, a majority of the Court (McMurdo P and Dutney J, Jerrard JA dissenting) dismissed an appeal against damages awarded by the Supreme Court of Queensland for pure economic loss in a negligence action.  The majority held that the ship "Eternal Wind" owed a duty of care to a related body corporate of the owner of a fishing vessel damaged by Eternal Wind. The Court found that it was within Eternal Wind's "means of knowledge" that if it acted negligently in colliding with the fishing vessel, loss would arise not only for the owner of the vessel, but also for a closely associated marketer and processor of the catch.  **(b) Facts**  In April 1998, about 48 nautical miles off Noosa Heads in Queensland, the motor bulk carrier "Eternal Wind" collided with the commercial fishing vessel "Melina T". Melina T suffered extensive damage and sank. Melina T was owned by and part of the fleet of Fortuna Fishing Pty Ltd ('Fortuna Fishing"). Eternal Wind was owned by Ganta Shipping SA ("Ganta") and was registered in Panama.  Fortuna Seafoods Pty Ltd ("Fortuna Seafoods") was part of the same group of companies as Fortuna Fishing, with the shareholders and directors of both companies all being members of the same family. Fortuna Seafoods was the trustee of a discretionary trust for a range of beneficiaries associated with the family. Fortuna Fishing was responsible for catching and supplying fish to Fortuna Seafoods which then processed and marketed the fish. Fortuna Seafoods also processed some products from suppliers other than Fortuna Fishing.  Fortuna Fishing's losses were agreed with Eternal Wind by way of compromise. However, Fortuna Seafoods brought a negligence action against Eternal Wind for the loss of profit it would have earned from processing and selling the fish it would have obtained from Fortuna Fishing, had Melina T not been sunk in the collision. In the Supreme Court of Queensland, Douglas J held that Eternal Wind was liable for the loss and ordered that it pay Fortuna Seafoods $163,256 in damages and, in a subsequent costs order, that it pay Fortuna Seafoods' costs.  Eternal Wind appealed on the basis that his Honour erred in determining that it owed a duty of care to Fortuna Seafoods. Eternal Wind argued that His Honour had wrongly concluded that Eternal Wind had the means of knowledge that Fortuna Seafoods was part of an ascertainable, determinate class of persons. Further, counsel for Eternal Wind contended that Douglas J erred in more readily drawing that inference due to the lack of evidence from Eternal Wind or Ganta as to Eternal Wind's knowledge of this issue.  **(c) Decision**  The members of the Court of Appeal each delivered a separate judgment. McMurdo P and Dutney J formed the majority and dismissed the appeal. Jerrard JA dissented, and would have allowed the appeal.  Following the principles espoused by the High Court of Australia in Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529 and Perre v Apand (1999) 198 CLR 180, McMurdo P was willing to find the existence of a duty of care if Eternal Wind's master or Ganta had the means of knowledge that Fortuna Seafoods was the member of an ascertainable class of persons who are at risk of foreseeable economic harm if Eternal Wind acted negligently in colliding with, and sinking, Melina T.  At trial, Fortuna Seafoods gave uncontested evidence that vertically integrated commercial operations, such as those of Fortuna Fishing and Fortuna Seafoods were common within the Australian fishing industry. Accordingly, her Honour held that it could be reasonably inferred that such information was within Eternal Wind's means of knowledge. Whilst Eternal Wind may not have been expected to know the exact details of the arrangements between Fortuna Seafoods and Fortuna Fishing, it was within its means of knowledge that if it acted negligently in colliding with Melina T, loss would arise not only for Melina T's owner, but also for a closely associated marketer and processor of the catch. Therefore, Eternal Wind owed a duty of care to Fortuna Seafoods.  McMurdo P rejected the argument that the trial judge’s willingness to more readily draw the inference that Eternal Wind had knowledge of vertically integrated commercial operations in Australia was an infringement of the rule in Jones v Dunkel (1959) 101 CLR 298.  Her Honour also considered whether the following factors set out in Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" and Perre v Apand warranted a finding that Eternal Wind owed a duty of care to Fortuna Seafoods:   * reasonable foresight of the likelihood of harm; * defendant's knowledge or means of knowledge of an ascertainable, determinate class of persons who are at risk of foreseeable harm; * the claimant's vulnerability or whether they are unable to protect themselves from the foreseeable harm; * whether the implication of a duty would impair the defendant's legitimate pursuit of autonomous commercial interests including the existence of any contracts between the claimant and defendant; * whether the damage flowed from the occurrence of activities within the defendant's control; * the closeness of the relationship between the parties; and * the existence of any other special circumstances justifying compensation.   On balance, McMurdo P considered that the imposition of a duty of care on Eternal Wind was justified, largely due to the close relationship between Fortuna Fishing and Fortuna Seafoods both in the nature of their work and the company structure. Further, her Honour held that the close relationship adequately answers policy concerns such as indeterminacy, commercial viability and floodgates.  Dutney J generally agreed with McMurdo P, and restricted his judgment to the issues of whether Fortuna Seafoods was the member of an ascertainable class and whether Eternal Wind had knowledge of that class.  Given the commercial integration of Fortuna Fishing's and Fortuna Seafoods' operations, his Honour held that Fortuna Seafoods was the member of a determinate and ascertainable class of related companies conducting a single integrated business of catching and marketing fish. Dutney J states that his conclusion may have been different if Fortuna Fishing sold the fish to Fortuna Seafoods, ending its interest in the activity. However, the fish are not sold to Fortuna Seafoods and Fortuna Fishing has a direct interest in what Fortuna Seafoods does as its agent.  Dutney J held that it was open for the trial judge to conclude that it was within Eternal Wind's means of knowledge that Fortuna Fishing was part of an integrated group of related companies likely to rely on Melina T for their incomes. This finding was supported by the common nature of the business structure under which Fortuna Fishing and Fortuna Seafoods functioned, and direct evidence of the integrated nature of their business in the markets in which they operated.  Jerrard J dissented, primarily on the basis that Fortuna Seafoods was not a member of a determinate and ascertainable class. His Honour found that unless liability is recognised for a class of wholesalers who suffer loss because a fishing vessel is damaged and unable to continue supplying a particular wholesaler who has a contract for any catch, then the relationship between Fortuna Fishing and Fortuna Seafoods is insufficient to create an ascertainable class of wholesaler or selling agent to which Eternal Wind is liable. Jerrard J found that the "combination of circumstances", which included Fortuna Fishing and Fortuna Seafoods having common shareholders and directors and being engaged in one "intermingled" business was not sufficient to explain liability. The liability imposed would be to an indeterminate class and too wide.  **5.2 Application to set aside statutory demand – key principles**  (By Alex Chernishev, solicitor, Clayton Utz)  Hills Motorway Ltd v UBS AG [2005] NSWSC 1086, New South Wales Supreme Court, White J, 28 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1086.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1086.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  A statutory demand which misstates the amount of a debt is defective (under section 9 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)). However, a Court will not set aside a statutory demand merely because of a defect unless a substantial injustice was caused by the defect or there is some "other reason" within the meaning of section 459J(1)(b) why the demand should be set aside.  Even though a statutory demand is for a lesser amount than is actually owed by the debtor, it does not follow that the statutory demand is not for a debt the debtor owes.  An application under section 459G to set aside a statutory demand cannot rely on grounds for disputing the debt to which the statutory demand relates if those grounds are not raised in supporting affidavits filed within the 21 days limit.  A plaintiff who relies on an offsetting claim to set aside a statutory demand under section 459G must adduce evidence showing a plausible and coherent basis for asserting a claim for such a sum. It is not enough simply to state the sum of the offset in an affidavit without supporting evidence.  **(b) Facts**  The plaintiffs, the Hills Motorway Ltd and Hills Motorway Management Ltd ("Hills"), applied under section 459G of the Corporations Act 2001 (Cth) for an order setting aside a creditor's statutory demand. Shares in Hills Motorway Ltd and units in Hills Motorway Trust were quoted as stapled securities on the Australian Stock Exchange. In January 2005, Transurban Investments Pty Ltd announced a takeover offer for all the stapled securities. Transurban offered 1.478 Transurban stapled securities for each Hills stapled security.  Hills engaged UBS AG to provide advice and assistance on its response to the takeover bid. Their agreement set out a formula for the calculation of UBS's fee:   * If the bid proceeded to completion, Hills would pay a fee to UBS comprising a base fee of $3,880,000 plus a Completion Fee calculated according to a formula. * If the bid was completed by a Transurban scrip exchange offer, UBS was to be paid an additional $380,000 for every 1% increase in the ratio of Transurban securities to Hills securities above 1.47:1. * If the bid was a cash offer, the Completion Fee would be 1.25% of the Premium Consideration. * If the bid included cash and non-cash consideration, including scrip, the Completion Fee would be 1.25% of the Premium Consideration. Hence, a fee of 1.25% of the Premium Consideration was payable if any part of the Transaction was cash consideration.   The agreement indicated that Hills and Hills Management would be jointly liable for this fee.  On 8 April 2005 UBS advised the Hills board that key institutional investors wanted Hills to negotiate a better offer from Transurban, and a cash component would strengthen the offer. Two revised offers were then put to Transurban - either (a) 1.55 Transurban securities for each Hills security or (b) 1.47 Transurban securities for each Hills security plus 50 cents in cash. At the time, offer (b) was a lower value and thus was more attractive to Transurban.  On 12 April 2005, after some negotiations, Hills recommended to its investors a Transurban offer of 1.47 Transurban securities plus 25 cents in cash for each Hills security. The effect of the inclusion of the 25 cent cash component was that the fee which would otherwise have been payable to UBS increased by $5,580,000 to $11,234,080.  On 14 April 2005 UBS forwarded separate invoices to Hills and Hills Motorway Trust for $5,617,040 each. However, the agreements indicated that Hills and Hills Management were jointly liable for the fee, rather than each being severally liable for half of the debt.  On 3 June 2005 a statutory demand was served on Hills and Hills Management. Each demand claimed that a debt of $5,617,040 was owed.  Hills and Hills Management claimed that they did not owe these debts as they did not owe several debts of $5,617,040 but rather a joint debt of $11,234,080 (leaving aside any offsetting claim).  They applied under section 459G for an order setting aside UBS's statutory demand in its entirety on the basis that they had an offsetting claim in the sum of $5,580,000. The basis of this offsetting claim was a claim that UBS had made certain representations and had been misleading and deceptive in regards to the Transurban offer. Hills claimed that UBS had effectively promoted the scrip/cash offer over a straight scrip offer in order to maximize their fees. Hills contended that UBS had been negligent, had breached its contract and had engaged in misleading and deceptive behaviour. In support of these contentions, the plaintiff filed affidavits that Transurban would have been prepared to make a straight scrip offer if it had been advised that Hills would incur additional fees if a cash component was included.  UBS argued that these affidavits did not disclose any ground to establish that there was a genuine offsetting claim. Rather, it argued that the evidence filed in support of the application to set aside the statutory demand revealed that the Hills board had been told by UBS that a scrip and cash offer would result in a substantial increase in fees due to UBS.  After the expiry of the period of 21 days following the service of the statutory demands, Hills filed further affidavits. Macquarie Bank, Transurban's advisers, deposed to have told UBS on 8 April 2005 that Transurban was indifferent to whether the increase was in cash or scrip but would go for the lower offer. A Hills director, in a later affidavit, swore that UBS had not disclosed to the directors of Hills that Macquarie had told them that Transurban were indifferent as to whether the offer was scrip only or scrip plus cash. Nor, according to Hills, did UBS disclose that they had been told or believed that Transurban would select the lowest value offer.  The plaintiffs filed an additional affidavit outside the 21 day period correcting the quantum of their offsetting claim from $5,580,080 to $5,855,080. These later affidavits were objected to on a number of grounds, including that, on the principle established in Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund (1996) 70 FCR 452, the grounds to be relied upon to set aside a statutory demand must be identified in the affidavits filed within the 21 days. UBS denied the contentions of Hills, having regard to the affidavits filed within the 21 day period, which materials, it was said, did not establish a genuine offsetting claim.  **(c) Decision**  **(i) The nature of the debt claimed in the statutory demand**  It was clear to the Court from the agreement that the debt owed to UBS was owed by Hills and Hills Management jointly, and not jointly and severally. The agreement stated that the obligations were owed to "the Company", which was defined to mean both Hills and Hills Management.  The Court held that, although the statutory demands were for only half the amount which could have been claimed against each of the plaintiffs, it did not follow that the claim was not for a debt each plaintiff owed. Moreover, a statutory demand must be in a prescribed form (section 459E(2)(e)). The prescribed form, Form 509H, does not make provision for naming two or more persons as the debtors liable to pay a joint debt.  The Court also held that there was a defect in relation to each demand as they misstated the amount of the debt (section 9 of the Corporations Act, definition of "defect" in relation to statutory demand). However, section 459J(2) provides that, except as provided in subsection (1) the Court must not set aside a statutory demand merely because of a defect. Hills did not rely on section 459J(1) as a ground for setting aside the demands.  However, the Court held that, because the debt was owed by the plaintiffs jointly, payment by either or both of the plaintiffs of the sum of $5,617,040 would discharge so much of the debt that was the subject of the statutory demand. As such, the Court held that UBS could not change the nature of the debt and demand that each plaintiff pay $5,617,040.  **(ii) Offsetting claim**  The next question the Court addressed was whether Hills had established that, on the applications made by them under section 459G, the Court was satisfied that they had an "offsetting claim" within the definition in section 459H(5).  Given that the debt owed under the agreement was $11,234,080, and the amount under the statutory demand was $5,617,040, the question addressed by the Court was whether Hills had established that they had a genuine claim against the defendant in an amount of at least $5,617,040 in order to set aside the statutory demand in its entirety.  The Court held that Hills had not established an offsetting claim. The original affidavits filed within the 21 day period asserted the offsetting claim was $5,580,080. It was only in an affidavit filed well outside the 21 day period, that Hills sought to assert that the offsetting claim was for $5,855,080.  The Court held that an application under section 459G may not rely on grounds to which the statutory demand relates if those grounds are not raised in supporting affidavits within the 21 day limit: Energy Equity Corporations Ltd v Sinedie Pty Ltd (2001) 166 FLR 179. The affidavits filed within the 21 day period must expressly or by necessary inference clearly delineate the grounds upon which the debt claimed in the statutory demand is disputed, so that within that period the area of controversy is clearly delineated, either expressly or by necessary inference: Process Machinery Australia Pty Ltd v ACN 057 260 590 Pty Ltd [2002] NSWSC 45.  First, the Court held that even if there was an offset claim it was for the sum of $5,580,080 and not $5,855,080. The affidavit in relation to the latter amount was filed outside the 21 day period and could thus not be relied upon as part of the section 459G application. The Court relied on the principle established in Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund (1996) 70 FCR 452 that the grounds relied upon to set aside a statutory demand must be identified in the affidavits filed within the 21 day period. The Court stated that it is open for a plaintiff to supplement its initial affidavits with supplementary evidence relevant to an area of controversy which was identified in the initial affidavits. However, in this case the later affidavits could not be relied upon as they identified a new ground of contending the debt was genuinely disputed or raised a genuine offsetting claim.  Second, the Court held that the affidavits filed within the 21 day period did not show that Hills had a genuine claim against the defendant for the amount of $5,580,080. This was because it was impossible to ascertain from these affidavits how the offsetting claim for this amount was calculated. The Court in coming to this conclusion relied on the principle set out in Elm Financial Services Pty Ltd v Macdougal [2004] NSWSC 560:a plaintiff who relies upon an offsetting claim to set aside a statutory demand in its entirety must adduce evidence showing a plausible and coherent basis for asserting a claim to a sum which, despite elements of uncertainty, can be seen to be greater than the amount of the debt which is the subject of the statutory demand.  Ultimately the Court found that it was unnecessary to decide whether Hills had a genuine claim for breach of contract, negligence, or misleading and deceptive conduct which could be offset against the debt of $11,234,080, on grounds which were sufficiently identified within the 21 day period. The Court held that even if Hills did have such a claim it was not shown that it was for an amount which could reduce the debt below the amount claimed in the statutory demands. Hence the Court dismissed the proceedings.  **5.3 Litigation funder entitled to receive moneys owed to it under a termination deed as deed declared not void for champerty**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Domson Pty Ltd v Zhu [2005] NSWSC 1070, Supreme Court of New South Wales Equity Division, White J, 27 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1070.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1070.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Litigation Lending Services (LLS), a litigation funding group, commenced a claim to recover its share of the recoveries from proceedings that it assisted in funding. The claim was based on a Termination Deed which had been entered into when the original Funding Agreement was terminated.  Mr Zhu, who received the financial assistance to help fund his litigation, argued that no money was owed on the grounds that the Termination Deed was void for champerty.  White J held that neither the Termination Deed nor the original Funding Agreement were void for champerty and ordered Mr Zhu to pay the amount owed to LLS under the Termination Deed.  **(b) Facts**  Mr Zhu commenced proceedings against the Sydney Organising Committee for the Olympic Games (SOCOG) for interfering with an agreement that he had entered with TOC Management Services Pty Ltd (TOC). Mr Zhu held the benefit of his cause of action against SOCOG on trust for Australian Chinese Sports Connections Pty Ltd (ACSC).  LLS, a partnership of the plaintiffs, lent money to Mr Zhu to fund the litigation on the basis that it would share in the recoveries. Due to the rules of champerty and maintenance, LLS advised that it would only provide funding in an insolvency context (the rules allow funding agreements to be entered into if a company is in administration or liquidation). Accordingly, to allow for the litigation to be funded by LLC, an administrator, Mr Condon, was appointed to ACSC and ACSC subsequently entered into a deed of company arrangement.  A Funding Agreement was entered into by LLS, ACSC, Mr Condon, and Mr Zhu whereby LLS provided $300,000 and was entitled to recover moneys up to $1,250,000.  Mr Zhu obtained an order for damages against SOCOG in the amount of $4,234,319. SOCOG appealed.  The parties to the Funding Agreement agreed to terminate the Funding Agreement on the grounds that its existence may cloud the issues on appeal and a Termination Deed was entered into. The Termination Deed specified Mr Zhu was to immediately pay LLS a small amount of the moneys already owed to it and then at a later date a percentage of the moneys recovered from the final action.  LLS sued Mr Zhu for moneys owed to it under the Termination Deed.  **(c) Decision**  Mr Zhu's main argument against the claim was that the Termination Deed and the Funding Agreement were void for champerty. He denied that the Funding Agreement provided for the assignment of any property rights to LLS and argued further that even if it did, this promise was released by the Termination Deed.  LLS argued that the Termination Deed fell within the acknowledged statutory exception for champertous agreements as it was entered into by the deed administrator in the exercise of his statutory powers.  White J determined that the Funding Agreement did not operate as an equitable assignment of the proceeds of judgment as and when received. White J based this decision on the fact that there were no words of assignment and the Funding Agreement contained no promise by Mr Condon or ACSC to keep the proceeds of the judgment separate from other assets of ACSC. It was therefore unnecessary to deal with any issues of the effect of assignment.  White J held that the Termination Deed fell within the statutory exception to champerty as an exercise of the deed administrator's power of sale.  Mr Zhu alleged that the degree of control conferred upon LLS should invalidate the Termination Deed due to its tendency and potential for abuse. This argument was based on a clause within the Deed that Mr Zhu could not settle the litigation without the prior consent of LLS. White J rejected this argument on the grounds that LLS agreed to restructure the Funding Agreement at Mr Zhu's request and that it was reasonable that LLS retain some measure of control in relation to any settlement.  White J looked to the legitimate interest that LLS had in the Termination Deed in relation to the litigation and held that because LLS had enforceable rights under the Funding Agreement prior to entering into the Termination Deed, it had a legitimate interest in obtaining the benefits to which it was entitled under the Termination Deed.  Accordingly, White J ordered Mr Zhu to pay LLS its share of the judgment amount as provided for in the Termination Deed.  **5.4 Chapter 7 of the Corporations Act and financial seminars and financial websites**  (By Jonathan Stewart, Blake Dawson Waldron)  ASIC v Online Traders Advantage Incorporated [2005] QSC 324, Queensland Supreme Court, Moynihan J, 26 October 2005  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/october/2005qsc324.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/october/2005qsc324.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Introduction**  This case concerns 18 claims by the Australian Securities and Investments Commission (ASIC) relating to the activities of Online Traders Advantage Inc (Online) in respect of seminars presented by a Mr Town on behalf of Online in Brisbane and Melbourne.  Online is a Utah incorporated company which is, ultimately, a wholly owned subsidiary of INVESTool Inc (INVESTool). INVESTool principally derives its income from a subscription website service that provides data on US listed companies. The website provides the means to organize, analyse and evaluate that data in respect of particular securities.  The free seminars run by Online were essentially directed at promoting INVESTool's website in Australia so that attendees would subscribe to the website. Following the seminars, interested individuals would subscribe to the website and would also be able to pay to attend further seminars – described as "workshops" – at which interested individuals were trained to use the website. Online has an Australian Financial Services license that authorises it to carry on a financial services business providing general financial product advice to retail clients in relation to securities.  Broadly, ASIC's claims fell into three categories. These claims related to:  1. the nature of the website; 2. the conduct of Online; and 3. alleged non-compliance with Chapter 7 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  **(b) The nature of the website**  Moynihan J considered that the operation of the website generated recommendations as to the acquisition, holding or sale of categories of securities or a class of securities based on criteria selected by clients and applied by the system. In his view, this led to better investment decisions by individuals than would otherwise be the case. Accordingly, he held that the website was a financial product as it was a facility through which a person manages financial risk (section 763A(b) and 763C). Moynihan J granted the appropriate declaration.  Moynihan J also held that the website provided financial product advice. He considered that the website went beyond the mere organisation of information as it was directed at determining whether a security should be bought, sold or held, even though the website did not provide the means to effect the sale or purchase of those securities. The recommendation that a particular course of action in relation to a particular security should be taken was, Moynihan J held, advice intended to influence a decision in relation to a particular financial product (or a class of financial products) within the terms of section 766B of the Corporations Act. Moynihan J granted the declaration that the website provided financial product advice.  Moynihan J distinguished between the manual and the website. The manual explained the functions of the website, but it did not provide financial product advice as it did not contain any recommendations or statements of opinion relating to specific financial products (or classes of financial products). Similarly, the manual could not be, by itself, a financial product as it was not a facility that could manage financial risk. Accordingly, certain of ASIC’s claims in relation to the manual failed.  **(c) Conduct of Online**  ASIC sought declarations under the Corporations Act and the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) that there had been false and misleading conduct at the seminars. These claims related to certain representations Online, through Mr Town, had made at one (at least) of the seminars about the superiority of US financial markets to Australian financial markets. ASIC was also concerned that risks such as currency fluctuations, Australian investors' lack of familiarity with the US market and the markets' different regulatory regimes were not disclosed at the seminars. Moynihan J rejected these claims on the basis that there was insufficient evidence of the seminar attendees (either direct or demographically) to determine whether the conduct was misleading and deceptive or likely to be so.  The registration document to subscribe to the website contained a disclaimer that stated that all statutory remedies were excluded from the operation of the contract. Moynihan J considered that this was deceptive and misleading conduct on the basis that due to section 12EB of the ASIC Act, the warranties implied into all contracts for the supply of financial services implied by section 12ED cannot be excluded. Accordingly, it was misleading and deceptive for the registration form to purport to exclude those rights.  **(d) Non-compliance with Chapter 7**  ASIC sought certain orders in relation to the failure of Online to provide both a Financial Services Guide (FSG) and the information required to be provided in an FSG. Moynihan J considered that there was no evidence that an FSG was required as there no evidence that the seminars involved the provision of advice in relation to specific investment decisions (or that it could be reasonably expected that they did so). However, it is unclear how the promotion of the website was not a financial service for which an FSG was required to be given.  Moynihan J also rejected ASIC's claim that Online's promotion of covered calls was financial product advice in relation to derivatives which it was not authorised, under its Australian Financial Services license, to provide. Online submitted that covered calls were securities within the section 761A definition as they gave rise to equitable interests in shares. Moynihan J noted that these issues were potentially complicated and held that there was insufficient evidence to determine the issue.  ASIC also argued that a statement by Online that clients could pay by either credit card or cheque was the provision of financial product advice in relation to a non-cash payment facility which Online was not authorised to provide. Moynihan J rejected this argument as it was a simple statement of fact (and not advice) in his view.  ASIC alleged that Online failed to give the warning required to be given to retail clients by section 949A of the Corporations Act. Moynihan J considered that the relevant representations did not amount to influencing decisions in relation to a particular financial product (or class of financial product) and, therefore, Online was not required to provide the section 949A warning.  **(e) Conclusion**  This case illustrates the breadth of the definition of financial product and financial product advice as Moynihan J held that the relevant website was both a financial product and financial product advice. Interestingly, only 5 of the 18 declarations, compliance orders and other relief that ASIC originally sought were granted.  **5.5 Statement in ASX announcement taken to waive legal professional privilege**  (By Michelle Shek, Clayton Utz)  Switchcorp Pty Ltd v Multiemedia Limited [2005] VSC 425, Supreme Court of Victoria, Whelan J, 21 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/october/2005vsc425.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/october/2005vsc425.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  By summons filed on 17 August 2005, Switchcorp Pty Ltd (Switchcorp) alleged breaches of oral, written and implied agreements against Multiemedia Limited (Multiemedia) and sought a variety of orders including damages. All matters the subject of the summons were resolved except for an application to inspect documents constituting or recording legal advice referred to in an announcement by Multiemedia to the Australian Stock Exchange (ASX) on 7 April 2005.  Switchcorp contended that Multiemedia waived privilege in relation to the legal advice which was the subject of the ASX announcement.  Whelan J held that the statement contained in the ASX announcement was "a clear and deliberate disclosure of the gist or the conclusion of legal advice" and constituted a waiver of privilege. Whelan J ordered Multiemedia to produce for inspection the document or documents constituting or recording the advice referred to in its announcement to the ASX of 7 April 2005.  **(b) Facts**  Multiemedia is a listed company. In an announcement to the ASX on 7 April 2005, Multiemedia provided a general update to the market which contained the following statement:  "The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiffs' claim will not succeed."  Switchcorp submitted that Multiemedia had waived privilege in relation to the advice the subject of the ASX announcement. It sought inspection of documents constituting or recording that advice.  **(c) Decision**  **(i) General principle**  This was a case dealing with implied or imputed waiver of privilege. Whelan J cited Mann v Carnell (1999) 201 CLR 1 as setting out the general principle to be applied in a case dealing with implied or imputed waiver. In Mann, the majority explained that implied waiver disputes generally arise from the need to decide if particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Considerations of fairness come into play to assess whether or not there is any inconsistency. However, there is "no overriding principle of fairness operating at large".  Whelan J noted that although each case (applying the general principle) must be decided on its own facts, case law suggests the following general propositions:   * a statement which reveals the contents of legal advice, even if it does so in a summary way or by reference only to a conclusion, will, or probably will, result in a waiver; * a statement which refers to legal advice, even if it associates that advice with conduct undertaken or with a belief held by the client, will not, or probably will not, result in a waiver.   **(ii) Distinction between a conclusion on a specific issue and a general conclusion**  Multiemedia submitted that there is a distinction to be drawn between revealing a conclusion reached by legal advisors on a particular specific issue and revealing a general conclusion as to the legal advisors' opinion on the ultimate outcome of litigation.  Whelan J rejected this argument. Whelan J preferred to focus on the general principle expounded in Mann and emphasised that in each case "the issue is whether, informed by considerations of fairness where necessary, the Court perceives inconsistency between the particular disclosure and maintenance of confidentiality".  **(iii) Fairness**  Multiemedia further submitted that:   * as a matter of fairness, waiver should not be found here as the statement was broad and general; * the statement was made in response to the disclosure of information on the internet of correspondence between the parties' solicitors and other conduct of Switchcorp that provoked the disclosure.   Referring again to Mann, Whelan J citing Justice Emmett's observations in Bennett's case, pointed out that "there is no room for any general operation of a principle of fairness ... [T]he issue is inconsistency." The reason why the disclosure has occurred does not matter. Fairness is relevant when considering whether any inconsistency exists between the disclosure and the maintenance of confidentiality.  **(iv) Conclusion**  In conclusion, Whelan J held that the statement in the ASX announcement of 7 April 2005 was inconsistent with the maintenance of confidentiality of the advice to which it referred and was "a clear and deliberate disclosure of the gist or the conclusion of legal advice received by Multiemedia from its lawyers about the outcome of the proceeding".  His Honour found that "the relevant unfairness arises from the inconsistency". That is, it was unfair in this case to allow Multiemedia to cast aside confidentiality of the advice in making the statement (on the basis that it was justifying its position) and then to insist upon confidentiality when inspection was sought of an otherwise discoverable document.  **(d) Comment**  This case, when read in conjunction with Nine Films & Televisions Pty Ltd v Ninox Television Ltd [2005] FCA 356 (Nine Films), highlights yet again that a great deal of care must be taken when making statements regarding legal advice. In Nine Films, Tamberlin J held that Ninox Television Ltd did not waive privilege as "the substance or content of the advice" was not disclosed with any "specificity or clarity".  To minimise the risk it should always be borne in mind that any reference (even in summary) to the contents of the legal advice is likely to result in a waiver of privilege.  **5.6 Acquisitions of relevant interests in group companies and pre-emptive rights provisions in constitutional documents**  (By Joshua Crane, Freehills)  Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd [2005] SASC 400, Supreme Court of South Australia, Full Court, Bleby, Gray and Anderson JJ, 19 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/october/2005sasc400.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/october/2005sasc400.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The case concerned whether the acquisition of 45 per cent of the voting shares in Lion Nathan Ltd ("Lion Nathan") by Kirin Brewery Company Ltd ("Kirin") amounted to a deemed acquisition of more than 40 per cent of the voting shares in the respondent, Lion Nathan Australia Pty Ltd ("LNA").  The Memorandum of Association of the appellant, Coopers Brewery Ltd ("Coopers"), provided that the consent of LNA was required in relation to any amendment to provisions conferring a third ranking pre-emptive right of purchase of its shares upon LNA in the Coopers' Articles of Association. The requirement of consent ceased to exist if any person acquired a relevant interest (as that term is defined in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)) in 40 per cent or more of the voting shares of LNA.  Relying on Division 5 of the old Corporations Law, the full court unanimously held that Kirin had acquired a relevant interest in 45 per cent of Lion Nathan and, consequently, had acquired a relevant interest in 100% of LNA.  **(b) Facts**  LNA was a registered proprietary company, and a wholly owned subsidiary of Lion Nathan.  Articles 38 to 54 of Coopers' Articles of Association provided LNA with a third ranking pre-emptive right of purchase (behind other members and members' relatives and Australian Mutual Provident Society) upon the proposed sale of shares by an existing member of Coopers.  Regulation 6 of Coopers' Memorandum of Association provided that a special resolution:   * altering or omitting articles 38 to 54 of Coopers' Articles of Association; or * purporting to amend or delete any article in a manner that is inconsistent with the rights granted to LNA,   did not have any effect unless the consent of LNA was first obtained. Regulation 6 was entrenched by regulation 7.  Regulation 8 provided that regulations 6 and 7 ceased to have effect on a change in control (as defined in article 44 of the Articles of Association) of Coopers.  Finally, article 44 of Coopers' Articles of Association (in the context of changes in the control of members) provided that a "'Change in Control' meant any transfer of any shares or other equity interest in a member or in any entity that directly or indirectly controls or influences the member or any reconstruction, amalgamation or reorganisation of a member or any entity that directly or indirectly controls or influences the member if, after such transaction, there would be a change in the person having the power, a change in the majority of such persons who, acting together, have such power or, without limiting the generality of the foregoing, if any person acquires a relevant interest (as that term is defined in the Corporations Law) in 40 per cent or more of the voting shares of the member".  In April 1998, Kirin acquired a relevant interest in approximately 45 per cent of the issued share capital of Lion Nathan (amounting to 246,454,275 ordinary shares). Four new directors, being nominees of Kirin, were subsequently appointed to the board of Lion Nathan. The appointments brought the total number of directors of Lion Nathan to ten. It was not contested on appeal that, at all relevant times, Kirin held a relevant interest in Lion Nathan within the meaning of Division 5 of the old Corporations Law.  Coopers argued that the acquisition by Kirin gave rise to a deemed acquisition of greater than 40 per cent of the voting shares in the defendant (amounting to a relevant interest) and, as a result, Coopers was able to revoke the articles (38 to 45) that conferred the pre-emptive right of purchase upon the defendant.  **(c) Decision**  The question to be decided on appeal was whether, in the above circumstances, there had been a change of control in LNA, thereby enabling the pre-emptive rights of LNA contained within Coopers' Articles of Association to be altered without the consent of LNA.  The key issue at trial was whether, in April 1998, Kirin had "acquired a relevant interest in more than 40 per cent of the issued share capital of Lion Nathan within the meaning of article 44 of Coopers' Articles of Association, and if so, whether there had been a change in control of LNA within the meaning of regulation 8 of LNA’s Memorandum of Association". The trial judge held in the affirmative for both questions.  On appeal, the issue before the full court was the proper interpretation of Article 44 of Coopers' Articles of Association and the effect of the reference to "relevant interest" as defined in the old Corporations Law.  The full court unanimously held that the correct interpretation of article 44 was that of a two-limbed test, as follows (numbering and emphasis added by Bleby J):  "For the purposes of this Article, "Change in Control" means –  a) any transfers of any shares or other equity interest in a member or in any entity that directly or indirectly controls of influences the member  or  b) any reconstruction, amalgamation or re-organisation of a member or any entity that directly or indirectly controls or influences the member  c) if, after such transaction, there would be –  i. a change in the person having the power to direct its management and policies, or ii. if no one person has such power, a change in the majority of such persons who, acting together, have such power  or, without limiting the generality of the foregoing,  d) if any person acquires a relevant interest (as that term is defined in the old Corporations Law) in 40% or more of the voting shares of the member."  The court noted that, in its application to regulation 8, the references to a "member" in article 44 must be read as a reference to "LNA". The court further noted that for a change in control to have occurred, either paragraph (a) or (b) must have been satisfied, and, in addition, either paragraph (c) or (d) must have been satisfied.  The court also examined the principles of incorporating definitions into a contract (given that the constitution is a contract and incorporates the definition of "relevant interest" from the old Corporations Law). Bleby J (the other judges concurring) relied on the principle that, where a definition incorporated into a contract in any way conflicts with the expressly agreed terms, the express terms must prevail over the inconsistent portion of the imported definition. Therefore, so far as it is consistent with article 44, the whole of the definition of "relevant interest" is incorporated into Coopers' Articles of Association.  The term "relevant interest" is defined in section 9 of the old Corporations Law as having the meaning given by Division 5 (except section 44). Division 5 comprises sections 30-45 inclusive. Section 31 provides that "a person who has the power to vote in respect of a voting share in a body corporate has a relevant interest in the share". In reliance on section 31, the court held that Lion Nathan held a relevant interest in LNA.  Section 33 provides that, where a body corporate has the power to vote in respect of or dispose of a share, a person is deemed for the purposes of Division 5 to have in relation to the shares the same power as the body has if:   * the person has; * an associate has; * associates of the person have; or * the person and an associate or associates of the person together have,   power to vote in respect of not less than the prescribed percentage (prescribed in section 30(7) as 20 per cent) of the voting shares in the body.  The court unanimously held that, by virtue of section 33, Kirin was deemed to have the same power as Lion Nathan in relation to the shares in LNA, i.e. the power to vote in respect of 100 per cent of the shares in LNA. This clearly amounted to Kirin holding a relevant interest in LNA. Relying on the principles of incorporation set out above, the court found no inconsistency and therefore no reason not to incorporate section 33 into the definition of "relevant interest" for the purpose of article 44.  Despite counsel for LNA contending that a number of anomalies purportedly arose if section 33 was to be incorporated into Coopers' Articles of Association, the court held that it was the definition of "relevant interest" set out in section 9 of the old Corporations Law that was to be incorporated, and not section 31 alone.  The appeal was dismissed and Coopers was subsequently able to remove regulations 6-8 from the Memorandum of Association without the consent of LNA.  **5.7 Sale to a third party sub-purchaser: when will a seller lose title?**  (By Charlotte Oppy, Phillips Fox)  Hardy Wine Company Limited v Tasman Liquor Traders Pty Ltd (in liq) [2005] SASC 398, Supreme Court of South Australia, Layton J, 14 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/october/2005sasc398.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/october/2005sasc398.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiff, Hardy Wine Company Limited ("Hardy") sought declarations from the Court regarding transactions in relation to the sale and supply of goods to the defendant, Tasman Liquor Traders Pty Ltd ("Tasman").  The essential issue in dispute was whether Hardy retained title to certain goods ("the Eaglehawk Goods") supplied to Eaglehawk Inn ("Eaglehawk") on the request of Tasman.  Hardy sought declarations that immediately prior to a payment agreement with Tasman, Hardy retained title to the Eaglehawk Goods and pursuant to the payment agreement Hardy was entitled to a sum of $282,276.87 from the Joint Account.  The court rejected the plaintiff's argument that it retained title to the Eaglehawk Goods and refused the application for declarations sought by the plaintiff.  **(b) Facts**  Hardy carried on the business of the production and sale of wine, brandy and other sundry products.  Tasman was a liquor wholesaler and distributor in Victoria until 27 January 2004 when it was placed into voluntary administration. Prior to this Hardy supplied goods to Tasman on the terms and conditions contained in a credit application entered into between the parties. This contained the following retention of title clause:  "The buyer agrees that the property in the goods does not pass to the buyer until the price of such goods, and for all other goods supplied by the seller to the buyer, is paid in full to the seller. The buyer acknowledges that he holds the goods as bailee of the seller until payment is made for the goods and for all other goods supplied by the seller to the buyer. The buyer is obliged to store the goods so they are clearly identifiable as the property of BRL Hardy Limited".  The invoices supplied by Hardy on delivery of goods contained a broadly similar retention of title clauses.  In or about 1999 or 2000 the parties agreed that Hardy would deliver goods to be sold to Tasman directly to the premises of Eaglehawk. Hardy would invoice Tasman for the goods sent to Eaglehawk and Tasman would invoice Eaglehawk for those goods.  Each delivery of goods to Eaglehawk was accompanied by a "delivery copy" invoice from Hardy containing terms and conditions identical to those invoices printed on Hardy's invoices to Tasman.  The invoices sent by Tasman to Eaglehawk also contained retention of title clauses.  At the time of administration Eaglehawk remained in possession of goods delivered by Hardy valued at $282,269.75. Hardy and Tasman both claimed title to those goods.  Subsequently the parties entered into an agreement that Eaglehawk was to pay the value of Hardy's stock into a joint account ("Hardy Wines and Tasman re: Eaglehawk Dispute") and the parties would submit the issue of who had title to the goods to the Court (which accordingly would determine which party was entitled to the money in the joint account).  Hardy argued that it retained property in the goods at all times until Tasman had paid for the goods and the effectiveness of the retention of title clause was not conditional upon Tasman retaining physical possession of the goods. (If possession was a precondition it argued in the alternative that Tasman had constructive possession of the goods).  Further, Hardy argued that because the retention of title clause as between Tasman and Eaglehawk prevented goods being passed to Eaglehawk until payment was made to Tasman (and no payment had been made by either party) property in the goods did not pass from Hardy.  The other alternative arguments raised by Hardy were that Hardy retained title to the goods as a consequence of either delivery bailment by agency or storage bailment by agency.  Tasman argued that the effectiveness of the retention of title clause was conditional upon Tasman retaining actual possession of the goods so that once the goods were delivered by Hardy to Eaglehawk the Romalpa clause no longer applied.  As an alternative argument, even if there was constructive possession of the goods by Tasman as was contented by Hardy, this involved there being a bailment of the goods during the time of delivery between Hardy and Eaglehawk. However, once delivery occurred the bailment ceased and the Romalpa clause similarly ceased to operate.  Tasman further contended that no agency arrangements existed.  **(c) Decision**  His Honour Justice Layton relied heavily on the documentation (the credit application and the invoices) in reaching his decision.  The intention of the parties as indicated by the documentation was that the goods were to be delivered to Tasman and be separately held by Tasman as a bailee of Hardy until payment to Hardy. Because the clause required possession and bailment by Tasman and there was no possession by Tasman of the Eaglehawk goods, the retention of title clause was not enlivened.  Justice Layton rejected the plaintiff's arguments that there was constructive possession sufficient to enliven the Romalpa clause. The clause did not specifically provide for constructive possession and this could not be implied. There was no understanding by Eaglehawk that it would be the bailee of the goods for the plaintiff, there was no contractual arrangement with the plaintiff and no provision to that effect was included in the agreement with Tasman.  Further, the wording of the invoice did not explicitly provide for the retention of title clause to apply to any resale and in particular after resale and delivery of goods to Eaglehawk.  In relation to the agency arguments it was held that Hardy did not deliver the Eaglehawk goods as agent for Tasman and there was no delivery bailment by agency. When Hardy delivered the goods to Eaglehawk it was acting as the seller.  Similarly, his Honour held that Tasman did not act as agent for Hardy in its agreement to re-sell to Eaglehawk and there was no storage bailment by agency. There was no explicit provision in the documentation for resale between Hardy and Tasman or any other evidence to suggest that the resale was to be undertaken by Tasman as agent. Rather, Tasman entered into its agreement with Eaglehawk on its own account.  For these reasons the Court refused to grant the declarations sought by the plaintiff.  **5.8 Acquisitions of relevant interests in group companies and pre-emptive rights provisions in constitutional documents**  (By Joshua Crane, Freehills)  Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2005] FCA 1426, Federal Court of Australia, Goldberg J, 11 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/october/2005fca1426.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/october/2005fca1426.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  On 1 September 2005, the plaintiff, Lion Nathan Australia Pty Limited ("LNA") announced its intention to make a takeover bid for all of the issued shares in the capital of Coopers Brewery Ltd ("Coopers") for $260 per share. On 21 September 2005, Coopers sent a notice to its shareholders to convene an Extraordinary General Meeting for 20 October 2005 ("EGM"). The resolution to be considered at the EGM amended the constitution in various respects, including removing a third ranking right of pre-emption held by LNA over the shares in Coopers.  LNA successfully sought declarations in relation to the effect of the proposed amendments to the constitution of Coopers and interlocutory relief restraining Coopers from conducting the EGM.  **(b) Facts**  Articles 38-54 of Coopers' Articles of Association provided LNA with a third ranking pre-emptive right of purchase (behind other members and members' relatives and Australian Mutual Provident Society) upon the proposed sale of shares by an existing member of Coopers.  Article 143 provided that a competitor of Coopers is prohibited from acquiring shares in Coopers without the consent of the directors. Article 143 specifically deemed LNA not to be a competitor of Coopers.  Regulations 6-8 of Coopers' Memorandum of Association protected and entrenched LNA's pre-emptive right of purchase. However, in accordance with regulation 8, the entrenched and protected pre-emptive right of purchase could be altered or removed by a special resolution of the shareholders if there had been a change in control (as defined in article 44) in LNA. A decision of the full court of the South Australian Supreme Court 19 October 2005 held that a change in control had occurred in LNA as a result of Kirin Brewery Company Limited's acquisition of a 45 per cent shareholding in Lion Nathan Limited (the ultimate holding company of Lion Nathan Australia Pty Limited) – see the discussion of this judgment in Item 5.6 of this Bulletin.  Subsequent to this decision and LNA's takeover bid, more than 5 per cent of shareholders of Coopers requisitioned the EGM to modify the constitution of Coopers to remove both the pre-emptive right of purchase and the reference to LNA in Article 143.  On 2 September 2005, Coopers wrote a letter to its shareholders advising them to take no action in respect of the takeover bid until they received a target statement. On 6 September 2005, Coopers issued a media release in response to LNA's takeover offer. The release stated that, "a statement from the Coopers board said the detailed reasons for their recommendation to reject will be set out in the Company's target statement".  On 21 September 2005, the Chairman of Coopers sent a letter to the shareholders informing them of the EGM and stating that the proposed resolution sought to remove "the references to Lion Nathan Australia Pty Limited". Enclosed with the letter was an Explanatory Memorandum ("EM") purporting to explain the effects of passing or not passing the resolution.  LNA alleged that certain statements and omissions in the letter to shareholders and the enclosed EM resulted in a contravention of section 1041H(1) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and/or section 52 of the [Trade Practices Act 1974](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default). More specifically, LNA alleged that several sections of the EM contained misleading statements and that a number of matters had been omitted from the EM that ought to have been included for the benefit of Coopers' shareholders.  During the course of the hearing, Coopers sought to meet a number of LNA's complaints by proffering a further Explanatory Memorandum. LNA maintained, however, that the EM and further Explanatory Memorandum continued to contain misleading statements and omitted information that ought to have been included.  **(c) Decision**  The key question to be decided was whether there had been "a full and fair disclosure to the shareholders of relevant information to enable them to consider the resolution which had been placed before them".  Coopers submitted that, although the commercial effect of passing the resolution would be to end the takeover offer by LNA, the takeover bid and amendments to the constitution were two separate processes and, as a result, the shareholders in Coopers need not have as much information available to them as if the takeover offer was before them.  LNA submitted that the EM was saying that the shareholders of Coopers were going to need, and receive, further information to enable them to make an informed assessment about the acceptance or rejection of the LNA offer. It was implied in LNA's submissions that the issue to be determined by the shareholders at the EM was whether the takeover offer should be allowed to proceed.  Goldberg J, agreeing with LNA, held that the proper characterisation of the issue before the shareholders was whether or not to allow the takeover offer to proceed. His Honour, relying on Peters' American Delicacy Co Ltd v Heath (1939) 61 CLR 457 at 486, held that the directors were, therefore, bound to make a full and fair disclosure of all matters which are within their knowledge and which would enable the shareholders to make a properly informed judgment on whether to allow the takeover offer to proceed.  Goldberg J held that this obligation was even more significant given that the directors had stated that they intend to vote in favour of the resolution. His Honour held that this was "tantamount to a recommendation to do the same".  Goldberg J further held that the material provided to shareholders "must not be materially misleading and at the same time there should not be omitted any material which is important and relevant to the decision which the shareholders are asked to make". His Honour considered that both the EM and the further Explanatory Memorandum did not satisfy these requirements.  Goldberg J held that the EM misled the shareholders into believing that they would have another opportunity to consider the takeover offer. The shareholders had been advised on 2 September to take no action in respect of the takeover until the target statement had been received. However, now the EM was presenting the shareholders with the option of effectively blocking the takeover bid.  Moreover, his Honour held that shareholders were not provided with sufficient information in relation to the value of the shares in Coopers if the LNA takeover offer was terminated. Goldberg J considered that the directors had at least to tell shareholders what the last valuation carried out by the auditors was and the price per share at which the last sale was transacted.  His Honour stopped short of requiring Coopers to provide information to shareholders equivalent to that required of a target's statement prior to the time that it should be provided under the Corporations Act 2001. Rather, it was critical that it was clear to shareholders that, if they wanted to keep open the option of considering the takeover bid in the future, receiving a target's statement and having made available a director’s recommendation, they should vote against the resolution.  Goldberg J held that, as a result of the misleading statements and omitted information, there was a serious question to be tried and that Coopers should be restrained from conducting the EGM until further order.  **5.9 Validity of special resolution where proxy appointed by shareholder pursuant to shares subject to an irrevocable power of attorney and validity of the chairman's ruling**  (By Nadia Hall, Blake Dawson Waldron)  Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd [2005] NSWSC 1005, New South Wales Supreme Court, Palmer J, 10 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1005.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc1005.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case involved the validity of a special resolution passed at a general meeting of members of The Communications Group Holdings Pty Ltd (Defendant) of which Cordiant Communications (Australia) Pty Ltd (Plaintiff) was a member. The special resolution was passed by counting votes attaching to a proportion of the Plaintiff's shares in the Defendant in respect of which the Plaintiff had given an irrevocable power of attorney to nominees of the Defendant (Attorney Shares). The Plaintiff attended the meeting itself by its corporate representative and asserted it was entitled to vote on the special resolution in respect of all its shares, including the Attorney Shares.  Palmer J found that the Attorney had been validly appointed as the Plaintiff's Proxy to attend and vote at the general meeting in respect of all of the Plaintiff's shares but, by virtue of section 249Y(3) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), the presence of the Plaintiff at the general meeting suspended the right under the Power of Attorney to exercise the rights attaching to the Attorney Shares.  Palmer J found that the special resolution could not be validated in accordance with section 1322(2) of the Act as the Chairman's ruling was not a procedural irregularity. Palmer J held that even if it was considered a procedural irregularity, the Plaintiff suffered substantial injustice preventing validation in accordance with section 1322(2) of the Act.  Palmer J also found that the financial assistance provided by the Defendant pursuant to the special resolution need not be validated as no contravention of section 260A(1)(a) was demonstrated.  Palmer J found that the Power of Attorney remained valid and binding on the Plaintiff and granted an injunction restraining the Plaintiff from lodging a proxy or making an appointment in respect of the Attorney Shares.  **(b) Facts**  The Plaintiff and the Defendant entered into a Shareholders Agreement dated 28 May 2003.  The Shareholders Agreement provided that if there was a change of control in the Plaintiff, the Plaintiff was to give an irrevocable Power of Attorney over a specific number of shares, to two directors of the Defendant. The Power of Attorney gave the nominee directors the power to vote at any shareholders meeting.  A change in control occurred and therefore the provisions of the Shareholders Agreement were triggered and a Power of Attorney was executed.  On 22 October 2004, the Defendant gave a notice to the Plaintiff that a general meeting of members of the Defendant would be held on 18 November 2004 to consider and, if thought fit approve a special resolution to enter into transactions that could constitute financial assistance under section 260A of the Act (General Meeting). The Plaintiff opposed the special resolution.  Prior to the general meeting the Plaintiff appointed a proxy and appointed a corporate representative in accordance with section 250D of the Act to exercise all its powers, including voting rights, at the meeting.  At the General Meeting the Chairman held that the irrevocable Power of Attorney was valid and therefore the Plaintiff was not entitled to vote in respect of the Attorney Shares. The votes attaching the Attorney Shares were counted in favour of the special resolution.  **(c) Decision**  **(i) Could the power of attorney be a "proxy"?**  Palmer J held that a shareholder has no right at common law to vote at a shareholders meeting either by proxy or attorney. If such a right exists, it is to be found in statute and in the company's constitution.  The Act expressly provides for shareholders to vote by proxy (section 249X(1)) and by representative if the shareholder is a corporation (section 250D).  Palmer J held that the reference to "proxy" in the Act was broad enough to encompass an attorney and his Honour accepted that the Defendant's constitution permitted voting by the appointment of an attorney, provided that the appointment complies with the requirements for a valid proxy set out in the Act.  Palmer J upheld the validity of the Power of Attorney despite the Plaintiff's arguments that the Power of Attorney was invalid as it was not signed by the Defendant and did not contain the Defendant's name in accordance with section 250A of the Act.  Palmer J held that an instrument may be signed by a person's attorney or agent and therefore the fact the Power of Attorney was signed by the Defendant's duly authorised attorneys as opposed to the Defendant itself, did not make the Power of Attorney invalid.  Palmer J also held that a proxy form "contains the company's name" if it either expressly states or else refers to the name of the company in a way which is readily identifiable by the parties. Palmer J held it was clear that the Power of Attorney referred to the name of the Defendant by incorporating the definition in another document.  **(ii) Shareholder's statutory right to attend and vote at shareholders' meeting**  Palmer J held that sections 249X and 249Y of the Act give statutory force to the common law principle that a proxy holder is the "agent of the shareholder and has authority to vote on behalf of the shareholder only for such time...as the shareholder allows". Having appointed a proxy, a shareholder may subsequently attend and vote at a shareholders meeting and will only be prevented from doing so where there is a prohibition contained in the statutory contract between the shareholder and the company (ie the company's constitution).  At paragraph 55 of the judgment his Honour held that:  "if the shareholder has contracted with a third party that a proxy shall be irrevocable, the shareholder, in exercising his right to attend and vote at a meeting in person, may commit a breach of that contract but, so far as his relationship with company is concerned, his attendance and his vote are valid and effective; the irrevocable proxy is not revoked by his attendance and vote but is merely suspended for so long as the shareholder is present in person at the shareholders meeting…"  In drawing this conclusion his Honour relied on Cousins v International Brick Company Ltd [1931] 2 Ch 90, Coachcraft Ltd v SVP Fruit Co (1980) 28 ALR 319 and NT Power Generation Pty Ltd v Trevor (2000) 23 WAR 482.  Palmer J went onto hold that section 249Y(3) of the Act confers on a shareholder:  "the statutory right to attend any meeting of shareholders of the company and, by doing so, to suspend whatever rights that shareholder may have conferred on a proxy holder to attend and vote at that meeting".  Palmer J held that the Plaintiff's statutory voting rights could only be removed by a provision in the Defendant's constitution. His Honour held that the Defendant's constitution did not take away the Plaintiff's voting rights and consequently the Plaintiff had validly appointed a proxy and a representative in accordance with the Act to attend the General Meeting and vote in respect of all of its shares. The presence of the Plaintiff's proxy at the General Meeting suspended the right of the nominee directors under the Power of Attorney to exercise any voting rights at the General Meeting in respect of the Attorney Shares.  His Honour held that the Plaintiff had breached the Shareholders Agreement and therefore could be liable for breach of contract.  **(iii) Validity of Chairman's ruling**  Palmer J held that the Chairman's ruling admitting the nominee director's votes in respect of the Attorney Shares was wrong in law. Palmer J held that the Chairman's ruling was not inviolate and could not deprive the Plaintiff of its statutory right conferred upon it by section 249Y(3).  His Honour further held that the Chairman's ruling did not constitute a procedural irregularity under section 1322(2) of the Act. The irregularity was held to be substantive. Palmer J held that:  "when the validity of the admission of votes is in issue, as a general rule …if something occurs which results in the denial of that right…there has been a substantive irregularity".  Such an irregularity prevents the special resolution from being validated under section 1322(2) of the Act.  His Honour went further to hold, that even if the Chairman's ruling constituted a procedural irregularity, the irregularity was substantive in that it deprived the Plaintiff of its statutory right to vote at the General Meeting, at which a special resolution involving the expenditure of millions of dollars was being considered.  His Honour denied the Defendant the right to rely on the common law maxim that a person cannot take advantage of his or her own wrongdoing. His Honour held that the right of the Plaintiff to attend the General Meeting was a pre-existing right conferred on the Plaintiff by the Act and this statutory right did not cease merely because the Plaintiff contracted not to exercise it for the duration of the Power of Attorney.  His Honour then considered whether the special resolution could be validated under section 1322(4) of the Act as this section, unlike section 1322(2), does not depend on there being a procedural irregularity. His Honour held that such a declaration should not be made due to the fact that validating of the special resolution would result in substantial injustice to the Plaintiff as it would produce a different result at the General Meeting.  Palmer J refused to make a declaration that the financial assistance provided pursuant to the special resolution is validated in accordance with section 260D(1) of the Act as his Honour found that a contravention of section 260A(1)(a) had not been demonstrated.  **(iv) Conclusion**  His Honour held:   * that the special resolution was invalid and that a further meeting was necessary to consider the special resolution; * the Power of Attorney remained valid and binding on the Plaintiff; and * the Plaintiff be restrained from committing further breaches of the Shareholders Agreement by denying effective use of the Power of Attorney.   **5.10 Service of an original statutory demand satisfies requirement that a “copy” be served under section 109X(1) of the Corporations Act**  (By Justin Fox, Corrs Chambers Westgarth)  Emhill Pty Ltd v Bonsoc Pty Ltd [2005] VSCA 239, Supreme Court of Victoria, Court of Appeal, Maxwell P, Callaway and Ashley JJ A, 7 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/october/2005vsca239.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/october/2005vsca239.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The question before the court was whether service of an original statutory demand constituted good service for the purposes of section 109X(1)(b) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). That section provides that for the purposes of any law, a document may be served on a company by delivering a "copy" of the document personally to a director of the company. The court ruled that serving an original document was doing more than the Act required and therefore constituted good service.  **(b) Facts**  A director of Emhill had been handed an original statutory demand by a solicitor acting for Bonsoc. Emhill applied for an order under section 459G of the Corporations Act setting aside the statutory demand.  Emhill contended that service of the original statutory demand was invalid service because section 109X(1)(b) requires service of a “copy” and not an original. Section 109X provides that:  (1) For the purposes of any law, a document may be served on a company by:  (a) leaving it at, or posting it to, the company’s registered office; or (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory...  ...  (6) This section does not affect:  (a) any other provision of this Act, or any provision of another law, that permits; or (b) the power of a court to authorise;  a document to be served in a different way ...  At first instance, Mandie J accepted Emhill's argument that service of an original did not constitute proper service under section 109X(1)(b), but found that the document had been properly served on other grounds. Specifically, Mandie J concluded that section 109X(1) drew a clear distinction between service of an original and service of a "copy". His Honour found support for this distinction through the use of the word "it" in subparagraph (a) (which Mandie J considered to be a reference to an original document) as compared to the word "copy" in subparagraph (b). Mandie J ultimately concluded however that the statutory demand had been duly served at common law since the document was nonetheless brought to the attention of the company’s director (its "directing mind and will") who expressly accepted service on behalf of the company.  The matter was then brought before the Court of Appeal.  **(c) Decision**  Callaway and Ashley JJA agreed with the lead judgement of Maxwell P who concluded that, as a matter of statutory construction, service of the original statutory demand complied with section 109X(1)(b). The court did not therefore need to consider whether it constituted valid service on some other basis.  Maxwell P noted concessions by Counsel for Emhill that it would be an absurd result for service of a copy, but not an original, to constitute valid service and observed that there was no discernable reason for Parliament to have intended such a result.  Maxwell P cited the High Court's decision in CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, that an absurd or inexplicable result allowed the court to prefer an alternative construction. However, Maxwell P agreed with the decision at first instance, in so far as the language of section 109X as a whole indicated that "copy" was intended to mean a reproduction of an original, and not an original itself.  Ultimately, however, Maxwell P considered service of an original to be the best form of service. Accordingly, whilst section 109X(1)(b) required service only of a copy, doing more than is required must also suffice and is not a failure of compliance. Maxwell P noted that the doctrine of strict compliance only dictates that nothing less than what is required by statute would suffice. Doing more than the Act requires, in this case, providing an original still constituted good service.  Maxwell P considered such a construction was consistent with the parliamentary intention of section 109X, to facilitate service on companies. Maxwell P cited the Explanatory Memorandum for the Bill which introduced Division 3 of Part 5.4, noting that the provisions were specifically intended to ensure that disputes involving statutory demands are resolved on the basis of commercial justice rather than on the basis of technical deficiencies. In agreeing with Maxwell P, Callaway JA also noted that the alternative, holding that service of an original is ineffective, would be an intolerable result considering that section 109X is a provision of general application for the purposes of any law.  **5.11 For the exemption from the requirement to attach an affidavit to a statutory demand to apply, the amount claimed must be the whole judgment debt**  (By Matthew Baumgurtel, Phillips Fox)  Anderson Formrite Pty Ltd v CASC Hire Pty Ltd [2005] FCA 1424, Federal Court of Australia, Siopis J, 7 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/october/2005fca1424.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/october/2005fca1424.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The defendant served a statutory demand which claimed less than the amount of a judgment debt. Part payment had been made by the plaintiff pursuant to an agreement to satisfy the judgment debt, however $95,554.13 of the $195,554.13 remained outstanding.  The defendant did not attach an affidavit to the statutory demand. The plaintiff claimed that this non-compliance with section 459E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) invalidated the statutory demand. The defendant claimed that an affidavit in support of the debt was not required as the exemption from the requirement to accompany the statutory demand with a verifying affidavit pursuant to section 459E(3) of the Act, was not limited only to the circumstance where the statutory demand was for the very sum of the judgment debt.  His Honour Justice Siopis held that "the exemption is confined to demands for the very amount in respect of which judgment was obtained, and not for any different amount", and accordingly set aside the statutory demand.  **(b) Facts**  In May 2002 the defendant commenced an action against the plaintiff in the District Court of Western Australia in relation to a contract for the hire of building equipment and obtained default judgment against the plaintiff in the sum of $195,554.13.  The parties agreed that the plaintiff could pay the judgment debt in instalments of $50,000. Two payments were made. The plaintiff did not make the third payment as required under the agreement with the defendant. The defendant issued a statutory demand and when the plaintiff did not comply with the statutory demand, the defendant commenced winding up proceedings against the plaintiff.  The parties negotiated a settlement of the outstanding debt. Whether this settlement was agreed subject to it being evidenced in writing (as argued by the defendant) or was binding upon the parties once an oral agreement had been reached (as argued by the plaintiff) was in issue.  A deed of settlement was prepared. It was signed by representatives of the plaintiff and defendant and the defendant subsequently withdrew its winding up application.  The terms of the deed of settlement were not satisfied by the plaintiff and the defendant served a statutory demand dated 17 February 2005 which claimed $95,554.13. The Schedule described the debt owed to the defendant as:  "The balance of the Judgment of the District Court of Western Australia Held at Perth Action No. 1161 of 2002 dated the 18th day of June 2002 entered for the Creditor against the Company for $195,554.13 now standing at $95,554.13 the Company having paid the Creditor the sum of $50,000 on the 4th day of March 2003 and the sum of $50,000 on the 23rd day of May 2003."  No affidavit accompanied the statutory demand.  The plaintiff argued that the statutory demand should be set aside on three grounds, two of which were addressed in detail by Siopis J. First, it agreed that the defendant did not comply with section 459E(3) of the Corporations Act 2001 ('the Act') in that the statutory demand was not accompanied by an affidavit that verified the debt and complied with the 'rules' within the meaning of the Act. The plaintiff relied upon MEC Import Sales Pty Ltd v Iozzelli SRL (1998) 29 ACSR 229 ('Iozzelli') for the proposition that an affidavit must accompany the demand unless the demand is for the very sum of the judgment.  Secondly, the plaintiff argued that there was a genuine dispute in relation to debt because it was uncertain:  1. whether the oral agreement was to have immediate binding effect, or would only have binding effect once a binding deed between the parties was executed; 2. whether the compromise agreed to at the time was to operate as a release of the plaintiff from the date of the agreement; and 3. whether the deed of settlement which was subsequently prepared by the plaintiff's solicitor and was signed by representatives of each party, which postponed the release of the plaintiff from liability in respect of the outstanding debt, was binding on the parties so as to supersede the oral agreement. The plaintiff argued that the formalities required to execute a deed had not been complied with as the defendant had not affixed its seal and only one representative of the defendant had signed the deed.  In relation to the first ground, the defendant accepted that no affidavit had been attached, but submitted that the exemption from the requirement to accompany the statutory demand with a complying verifying affidavit under section 459E(3) of the Act was not limited only to the circumstance where the statutory demand was for the very sum of the judgment debt. It was sufficient if a lesser sum was claimed, provided that the debt emanated from a greater amount that was the very sum recorded in the judgment. The defendant distinguished Iozzelli arguing that it dealt with a judgment debt obtained in a foreign currency.  In relation to the second ground the defendant submitted that there was no genuine dispute because the oral agreement had been superseded by the entering into of a binding written agreement. The defendant accepted that the deed had not been executed by the defendant in compliance with its articles of association, section 127 of the Act or sections 9 and 10 of the Property Law Act. However, it argued that there was no statutory requirement that an agreement to compromise a debt was required to be by way of a deed and that the defendant was, therefore, not required to comply with those formalities. Relying on NZI Securities Australia Limited v Poignand (1994) 51 FCR 584 and MYT Engineering Pty Ltd v Mulcon Pty Ltd (1999) 195 CLR 636, the defendant argued that all that was necessary was for the person who signed the deed on behalf of the company to have been acting within his or her actual or apparent authority. Further, the defendant argued that it was not necessary for the defendant to have executed the deed for it to bind the plaintiff, provided that the plaintiff has executed the deed.  In response the plaintiff sought to distinguish the cases relied upon by the defendant and argued that it was the intention of the parties that both parties execute the deed for it to become binding.  **(c) Decision**  **(i) Was it necessary for the statutory demand to have been accompanied by an affidavit which complied with section 459E(3) of the Act?**  His Honour considered the meaning of the words 'judgment debt' in section 459E(3) of the Act. In order to determine the legislative purpose of the section, his Honour reviewed the Corporations Law Reform Act 1992 and Report No 45 into insolvency matters by the Australian Law Reform Commission published in 1988 upon which the Corporations Law Reform Act was based.  His Honour also considered authorities in relation to section 459E(3), including B & M Quality Constructions Pty Ltd v Buyrite Steel Supplies Ltd (1994) 15 ACSR 433 and Wildtown Holdings Pty Ltd v Rural Traders Co Ltd (2002) 172 FLR 35.  In light of these authorities, Siopis J stated: "[t]he rationale for exempting a statutory demand for the very sum of a judgment, from the need for verification by an accompanying affidavit is apparent." His Honour held that a judgment debt is sufficient support for a statutory demand because the judgment speaks for itself as to the amount which is due and payable and there is an absence of a genuine dispute. However, once the statutory demand is for a sum different from the sum in the judgment, the rationale for the exemption from the verification no longer applies because extraneous events or circumstances have intervened. When a separate agreement in relation to the payment of the judgment debt has been entered into by the parties the judgment debt may have been discharged or have been replaced by a different contractual obligation (see McDermott v Black (1940) 63 CLR 161 at 183-185).  In applying these authorities his Honour held that the intention of Parliament when introducing the exemption that the same requirements for the verification of statutory demands for amounts that were never the subject of a judgment, apply equally to demands for amounts different from the sum in respect of which a judgment was given.  His Honour gave a narrow construction to the words 'judgment debt' in section 459E(3) of the Act. Justice Siopis confined the exemption to "demands for the very amount in respect of which judgment was obtained, and not for any different amount." His Honour held that the "failure to accompany the statutory demand with a complying affidavit is a serious omission."  Following Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452 at 458-459, Wildtown Holdings Pty Ltd v Rural Traders Co Ltd and Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (In Liq) (1994) 14 ACSR 565 at 568), Scopis J held that the statutory demand should be set aside.  In obiter, his Honour noted that he would have found (applying Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd) that there was a genuine dispute on the question of whether the parties reached an agreement to compromise the debt, in particular, whether the parties were bound by the deed of settlement.  **5.12 Pre-incorporation contracts: ratification by the company**  (By Stephen Kerr and Hardi Nagreh, Freehills)  Aztech Science v Atlanta Aerospace (Woy Woy) [2005] NSWCA 319, New South Wales Court of Appeal, Handley, Bryson and Basten JJA, 15 September 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/september/2005nswca319.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/september/2005nswca319.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case, the New South Wales Court of Appeal considered the operation of sections 131 - 133 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'). These provisions of the Act enable promoters of companies to enter into contracts on behalf of companies which have yet to be incorporated, and enable ratification of such contracts by the companies following their incorporation.  The court considered the required timeframe for ratification of such contracts and the requirements for ratification generally for the purposes of the Act.  **(b) Facts**  Antonio Azzi ('Azzi') entered into a contract with Atlanta Aerospace (Woy Woy) Pty Ltd ('Atlanta Aerospace') on 11 November 2002 for the development and commercialisation of certain designs and devices. Azzi entered into the contract in the capacity of promoter for and on behalf of Aztech Science Pty Ltd ('Aztech') a company that had yet to be incorporated.  The contract required Aztech to be registered and to have ratified the contract by 17 February 2003, otherwise the contract would be considered to be at an end and the parties would not have any further rights against each other. Aztech was not registered until 20 February 2003.  Nonetheless, Aztech claimed that representations were made during a meeting between representatives of the parties on 14 February 2003 which extended the required period for registration of Aztech and ratification of the contract. In these discussions Azzi was accompanied by Robert Somosi ('Somosi') – Somosi requested and received an oral extension of time for the registration of Aztech of "a few extra days".  Immediately following the registration of Aztech, Azzi sought from Atlanta Aerospace information necessary for the commercialisation of the devices covered by the contract, and caused the payment of funds to Atlanta Aerospace as required by the contract.  Atlanta Aerospace claimed that the contract had come to an end due to the failure to register Aztech and ratify the contract by 17 February 2003. The court in these proceedings considered whether Aztech was entitled to the benefit of the contract.  **(c) Decision**  **(i) The legislative background**  Sections 131-133 enable the ratification of contracts entered into by promoters on behalf of companies which have yet to be incorporated if this is done within the time agreed to by the parties to the contract, or if there is no agreed time, within a reasonable time after the contract is entered into. The Act refers to such contracts as being "pre-registration contracts".  Sub-section 131(2) imposes liability on promoters to pay damages to the other party to the pre-registration contract if the relevant company is not registered, or if the company is registered but does not ratify the contract or enter into a substitute for it within the timeframe agreed by the parties. The amount of damages payable is stated as being the amount that the company would be liable to pay if it had ratified the contract and then failed to perform it at all. However if the relevant company is registered but fails to ratify the contract, the court may make such orders against the company itself as it considers appropriate, including making an order requiring that the company pay all or part of the damages which the promoter is liable to pay (sub-section 131(3)). Section 132 allows the promoter to obtain a release from the other party to the pre-registration contract for any liability it may face under section 131.  **(ii) The key findings**  The majority of the court (Basten and Handley JJA) held that the discussions between the parties on 14 February 2003 had the effect of extending the required period for registration of Aztech and ratification of the contract by an "extra few days". As Aztech was registered within the required period as varied, and the parties conducted themselves immediately thereafter on the mutual assumption that Aztech had ratified the contract, the requirements of sub-section 131(1) were satisfied and Aztech was entitled to the benefit of the contract. Accordingly, the majority held that Aztech was entitled to declaratory relief.  Bryson JA dissented. He was of the view that the discussions that took place between the parties on 14 February 2003 were not effective to extend the required period for registration and ratification specified by the contract. In addition, he held that the events which took place subsequent to the registration of Aztech could not be construed as ratification of the contract by Aztech.  **(iii) The agreed period for registration and ratification**  All members of the court accepted that the reference to "agreed" in sub-section 131(1)(a) did not require a legally enforceable agreement between the parties with respect to the required timeframe for registration and ratification by the relevant company.  The various members of the court accepted that sub-section 131(1)(a) permits the fixing, varying or waiving of the time required for registration and ratification by agreements which are not legally binding, but which merely involve "mutual understanding" between the parties.  The majority also noted, without deciding the issue, that the reference to "agreed" in sub-section 131(1)(a) may not preclude an estoppel being raised.  The majority accepted that the discussions of 14 February 2003, which Azzi attended with Somosi, were effective as varying the time requirements of the contract despite the lack of formality involved in orally varying a formal written contract. In contrast, Bryson JA was of the view that Somosi did not have the authority to bind Azzi contractually in any way (even though he was accompanied by Azzi during the discussion, and Azzi kept silent when the request for an extension of time was made).  **(iv) Ratification by the company**  The majority held that:   * Ratification of pre-registration contracts for the purposes of section 131 is to be governed by the law of agency. Drawing upon agency law, the majority noted that ratification by the company may be express or implied. Express ratification would arise when the company by unequivocal language or conduct, acknowledges that it is party to the contract. Implied ratification may arise in various ways but often occurs when the company, although not expressly acknowledging that it is party to the contract, acts, or omits to act, in a way which can only be explained on the basis that it accepts the contract as its own. In cases of either express or implied ratification, the essence is that there is a manifestation of the company's intention to be bound. Relevant conduct may be acts of the company itself, or acts of someone who has the authority of the company. * It might be important in some cases to consider if an act of ratification had been communicated to the other party. Given the need of section 131 for the company to act within a certain timeframe, an express act of ratification by an internal action of a company, such as the signing of a board minute stating that the company ratified the contract, might need to be communicated to the other party to the contract in order to be effective for the purposes of section 131. The necessity for outward communication of internal company decisions to the other party of the contract was also emphasised by Bryson JA. * Although there was no express act of ratification, it was to be inferred from the conduct of Azzi, who was the governing mind of Aztech when it was formed (he was a director and secretary of Aztech, and its sole shareholder), that he maintained his commitment to the contract and had acted on that commitment. The majority held that parties had conducted themselves immediately following the registration of Aztech on the mutual assumption that Aztech had ratified the contract, and the relevant acts of Azzi were to be seen as the ratification by Aztech of the contract and communication of that ratification to Atlanta Aerospace. |
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