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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Report of the Special Commission of Inquiry into James Hardie**  On 21 September 2004, Commissioner Mr DF Jackson QC, delivered to the New South Wales Governor the Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation established by the James Hardie Group.  **(a) The Inquiry’s terms of reference**  On 27 February 2004, Mr Jackson was commissioned to inquire into and report upon:           The current financial position of the Medical Research and Compensation Foundation (“the MRCF”), and whether it is likely to meet its future asbestos related liabilities in the medium to long term;          The circumstances in which MRCF was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos related liabilities;          The circumstances in which any corporate reconstruction or asset transfers occurred within or in relation to the James Hardie Group prior to the separation of MRCF from the James Hardie Group to the extent that this may have affected the ability of MRCF to meet its current and future asbestos related liabilities; and          The adequacy of current arrangements available to MRCF under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to assist MRCF to manage its liabilities, and whether reform is desirable to those arrangements to assist MRCF to manage its obligations to current and future claimants.  **(b) Background to the Inquiry**  The following four paragraphs are extracted from an August 2004 research note on James Hardie prepared by the Commonwealth Parliamentary Library:  “The Hardie Group manufactured asbestos products (cement, piping, insulation and brake linings) for over 70 years in NSW, Queensland and Western Australia. Estimates of Australia's total liability for future asbestos claims start around $6 billion. Other companies and federal and state governments also have substantial asbestos liabilities.  Claims are not limited to those who worked in asbestos mines and factories.  Former power station, shipyard and dock workers, railway labourers and members of the defence force, especially the Navy, are at significant risk from asbestos-related diseases. These diseases can take decades to develop—a major difficulty for compensation planning. Mesothelioma (cancer of the chest cavity) can emerge 40 years after exposure.  Since 1945 about 7000 Australians have died from this disease, estimated to rise to 18 000 by 2020. Other asbestos related cancers may be around 30—40 000 by the same time.  “A major problem for the Hardie Group is the range of products it made with asbestos. It faces growing claims from users of these products. Over half the claims made to the NSW Dust Diseases Tribunal in 2002 were against the Hardie Group.  “Between 1937 and 1986 asbestos products were manufactured by two subsidiaries of James Hardie Industries Limited (JHIL): now known as Amaca (building and construction products) and Amaba (brake linings).  Between 1996 and 2001 the assets of Amaca and Amaba were transferred to JHIL (now 'ABN 60'), then to a Netherlands based company - James Hardie Industries NV (JHI NV).   In February 2001 ownership of Amaca and Amaba was transferred to a new body, the Medical Research and Compensation Foundation ('the Foundation'), which was given $293 million to fund asbestos injury claims.  “In October 2001 the Hardie Group assured the NSW Supreme Court that ABN 60 could call on $1.9 billion owed by JHI NV for partly paid shares to meet future asbestos claims.  This assurance was 'pivotal to the court giving approval for the transfer of ABN 60's assets' to JHI NV in the Netherlands.  But in March 2003 ABN 60 cancelled the partly paid shares 'without informing the court or the stock exchange'”  In August 2004, James Hardie indicated that the company would provide additional funds to compensate victims of asbestos related diseases provided a statutory scheme is established and certain prerequisite are met.  **(c) Key findings of the Special Commission of Inquiry**  Several of the key findings of the Commission are:           Between $1.5 billion and $2.24 billion is needed to cover all future asbestos- related claims. Funds currently available to the Medical Research and Compensation Foundation will be exhausted in early 2007.          James Hardie management knew the funds set aside for future claims were not sufficient when it established the Foundation.          A press release issued by James Hardie to the Stock Exchange in February 2001, which said the new Foundation had sufficient funds to meet all legitimate claims, was "seriously misleading". The media release “seems a pure public relations construct, bereft of substantial truth”.           An actuarial report prepared by Trowbridge Deloitte Ltd for James Hardie provided “no satisfactory basis” for claiming that the Foundation would have sufficient funds to meet future claims. The report was flawed in several key respects.          The Commissioner found evidence of false and misleading conduct against several Hardie executives, including the CEO, Peter Macdonald. The Commission also found evidence of breaches of provisions of the Corporations Law which have criminal sanctions. The Commissioner observed that it is a matter for Commonwealth authorities to determine whether further action should be taken in respect of the contraventions.          It is “absolutely clear” that in permitting the incoming directors of the Foundation to rely on the Trowbridge actuarial report, James Hardie engaged in conduct that was misleading or deceptive in contravention of the [Trade Practices Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default). The CEO and the CFO of James Hardie breached their duties as officers of James Hardie by encouraging the Board of James Hardie to act on the Trowbridge report in forming a view that the Foundation would be fully funded.          In relation to the 2001 proceeding before the NSW Supreme Court to approve a scheme of arrangement which was part of the restructuring, by failing to disclose to the court that the separation of James Hardie and consequent cancellation of partly paid shares was likely in the short to medium term, James Hardie and its legal advisers were in breach of their duty of disclosure to the court. The failure to make such disclosure was not deliberate.          While James Hardie was not legally obliged to fund the liabilities of its former subsidiaries, the Commissioner said "in my opinion it is right that it should do so". In relation to the restructuring of the James Hardie group, in practical terms the restructuring was likely to have the effect of contributing to the insufficiency of funds to meet the asbestos claims.          James Hardie had a “culture of denial” as the shortcomings in the funding it had given to the Foundation became apparent.          The evidence of the CEO Peter MacDonald “on so many matters was so difficult to accept…it is only on very few issues that I have been prepared to accept his evidence…A particularly unattractive feature was his unwillingness to accept personal responsibility for matters in which he was obviously personally engaged”.          In relation to advisers to James Hardie for the restructuring: “There is a disturbing feature in the events which took place leading to the February separation. It is why no one of the many advisers which JHIL had in relation to Project Green and separation, ever appear to have said – once the trust scheme was settled upon in late 2000 – that separation was unlikely to be successful unless the Foundation was fully funded, and that this was required to be rigorously checked”. In relation to legal advisers for the key parties setting up the Foundation: “What is also disturbing, however, is that…no one expressed any views on the merits of the underlying transactions. The nature of directors’ duties was discussed at length, the subjects to which the duties relate were not”.          A government-run scheme to which James Hardie would contribute substantial additional funds is the best way to resolve future claims. Legal claims which might be brought seem unlikely to result in damages which would provide significant additional funds to the Foundation. However, the scheme proposed by James Hardie is in an “embryonic and tentative state”. Much work needs to be done to fill in details of the proposal.          The Commissioner states that the circumstances considered by the Inquiry suggest that “there are significant deficiencies in Australian corporate law. In particular, it has been made clear that current laws do not make adequate provision for commercial insolvency where there are substantial long-tail liabilities. In addition, the circumstances have raised in a pointed way the question whether the existing laws concerning the operation of limited liability or the “corporate veil” within corporate groups adequately reflect contemporary public expectations and standards”.  **(d) Response of James Hardie**  On 21 September 2004, James Hardie issued a media release that stated in part:  “The Company acknowledges the seriousness of the findings and comments of the Commissioner and advises that the Board Special Committee and the Board itself will review the report accordingly. The Board will issue a response after a full analysis of the Report has been undertaken by the Special Committee and considered by the Board. James Hardie notes remarks by Commissioner Jackson in the report in support of a Scheme as the best long-term solution for satisfying asbestos liabilities. In this regard, the company reconfirms its funding proposal and its willingness to work with all relevant stakeholders in developing a satisfactory compensation solution for asbestos claimants against its former subsidiaries which it could put to shareholders for approval.”  On 28 September 2004, James Hardie issued another media release in which it stated that Peter Macdonald would stand aside as CEO and Peter Shafron would stand aside as CFO until matters surrounding the Commissioner’s report and the ASIC investigation become clearer. However, it is also stated in the media release that Mr Macdonald will continue to be responsible for the business operations of James Hardie and Mr Shafron will undertake projects for the company outside the CFO’s function.  **(e) Response of ASIC**  On 22 September, Mr Jeffrey Lucy, Chairman of the Australian Securities and Investments Commission (ASIC), announced that ASIC has commenced investigations into the circumstances surrounding James Hardies' creation of a fund to compensate victims of asbestos-related illnesses.  “ASIC is deeply concerned about the serious corporate governance issues that have been raised by Mr Jackson, QC, and the community can be assured that we will vigorously pursue breaches of the law. Our investigation will include the conduct of certain directors and officers of the James Hardie group of companies and associated parties, and market disclosures made by the companies and individuals. While we have closely followed the Special Commission of Inquiry, our investigation is not constrained by the findings of the Special Commission.”  **(f) Accessing the report**  The Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation is available on the website of The Cabinet Office of the NSW Government at [http://www.cabinet.nsw.gov.au/publications.html](http://www.cabinet.nsw.gov.au/publications.html" \t "_new).  **1.2 Disclosure by New Zealand finance companies**  On 24 September 2004, the New Zealand Securities Commission released a discussion paper titled “Disclosure by Finance Companies”.  Over the past few years finance companies have been taking a higher profile in New Zealand, and competing more aggressively for investors’ money. There has been an increase in the marketing and advertising of the various debt securities on offer. The higher interest rates offered by finance companies have been attractive to investors in the low interest rate environment.  The increase in the number and profile of finance companies has seen a corresponding increase in the number of complaints that the Commission receives and deals with. These trends have prompted the Commission to undertake the review.  The discussion paper outlines the Commission’s preliminary views on the information that should be disclosed by finance companies to assist investors to make informed investment decisions. The Commission seeks comments from finance companies and other interested parties on these preliminary views. Once it has received and considered comments, the Commission will publish a report to provide guidance on its expectations for disclosure by finance companies.  The discussion paper does not include detailed issues concerning disclosure of financial information by finance companies. The Commission is undertaking a separate project on financial disclosure by finance companies.  The Commission has identified the following broad issue areas relating to disclosure and compliance by finance companies for inclusion in the discussion paper. Many of these issues are interrelated:           the risk/return relationship – including risk disclosure, principal risks, company activities, related party lending, and the use of rating information;           ranking of securities – including prior ranking claims;           other disclosure issues - including early termination rights, termination charges, and inconsistent information;           advertising – including the prominence of required information and areas of common non-compliance with the advertising requirements of the Act and Regulations.  The discussion paper is available at: [http://www.sec-com.govt.nz/publications/documents/disclosure/index.shtml](http://www.sec-com.govt.nz/publications/documents/disclosure/index.shtml" \t "_new)  **1.3 European Commission consults on shareholders’ rights**  The European Commission on 16 September 2004 launched a public consultation on facilitating the exercise of basic shareholders’ rights in company general meetings and solving problems in the cross-border exercise of such rights, particularly voting rights. Responses will be taken into account in a forthcoming proposal for a Directive which is part of the Commission Action Plan on Corporate Governance. The deadline for responses is 16 December 2004.  The Commission’s consultation paper gives first indications as to the possible future EU regime on shareholders’ rights in listed companies. The Commission considers that this should be based on a Directive, since the effective exercise of such rights requires solving a number of legal difficulties.  The main issues on which the Commission is seeking responses are:           the entitlement to control the voting right - investors in shares are often not recognised as shareholders, in particular in cross-border situations, and are in practice deprived of their right to vote;          the dissemination of information before the general meeting and the possible need for minimum standards to ensure that all shareholders, irrespective of where they live, get information in time;           the criteria for participation in general meetings, and the removal of overly cumbersome criteria, such as share blocking requirements;           possible minimum standards for the rights to ask questions and table resolutions;           possible measures to enable shareholders to vote by post, electronically, or by proxy; and           the dissemination of information following the general meeting and the possible need for confirmation that votes have been executed.  The consultation paper is available at: [http://europa.eu.int/comm/internal\_market//company/shareholders/index\_en.htm](http://europa.eu.int/comm/internal_market/company/shareholders/index_en.htm" \t "_new)  Responses should be sent by 16 December 2004 to DG Internal Market - Unit G4, European Commission, B-1049 Brussels, or to: [Markt-OMPLAW@cec.eu.int](mailto:Markt-COMPLAW@cec.eu.int)  **1.4 UK Government consultation on new European standards for statutory audit**  On 10 September 2004, the UK Government announced that it is seeking views on new proposals for pan-European standards on auditor independence and audit quality. The draft Directive under consideration is the European response to the scandals of Enron, Worldcom and Parmalat and in particular the questions these have raised about the role of the auditor.  The key proposals outlined in the consultation document include:           a uniform high level of audit quality through auditing standards common across Europe;          a new framework against which the statutory auditor can assess independence risks;          confirmation of the principles of auditor independence;          a new system subjecting statutory auditors to monitor and review in order to ensure consistent quality assurance; and          moves to encourage convergence and the development of common principles of public oversight of the audit profession while leaving the organisation of this activity to individual Member States.  On 16 March 2004, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on Statutory Audit of Annual and Consolidated Accounts, and amending Council Directives 78/660/EEC and 83/349/EEC. The proposed Directive will replace the existing EC 8th Company Law Directive of 1984, and make a number of changes of substance to the present rules on statutory audits.  The UK Department of Trade and Industry (DTI) is currently negotiating the terms of the Directive and is seeking views from a range of stakeholders as to which parts of the Directive should be supported and which require amendment. For example, how it might impact certain of the UK's current controls, such as auditor rotation and the establishment of audit committees as a legal requirement. The DTI is also seeking evidence that it hopes will assist in a cost/benefit analysis on the Directive's impact.  The deadline for replies to the consultation is 30 November 2004.  The full Consultation Document is available at: [http://www.dti.gov.uk/consultations/](http://www.dti.gov.uk/consultations/" \t "_new)  Hard copies of the consultation are available on request from: Ray Taylor, Corporate Law and Governance, DTI, Elizabeth House, 39 York Road, London. SE1 7LJ. Tel. 0207 215 0239; fax. 0207 215 0235.  **1.5 US report on voting and transparency in connection with pension plans**  On 9 September 2004 the United States Government Accountability Office (GAO) released a report titled “Pension Plans: Additional Transparency and other Actions Needed in Connection with Proxy Voting”.  According to the report, the retirement security of plan participants can be affected by how certain issues are voted on during company stockholders meetings. Fiduciaries, having responsibility for voting on such issues on behalf of some plan participants (proxy voting), are to act solely in the interest of participants. Recent corporate scandals reveal that fiduciaries can be faced with conflicts of interest that could lead them to breach this duty. Because of the potential adverse effects such a breach may have on retirement plan assets, the GAO undertook the study which describes (1) conflicts of interest in the proxy voting system, (2) actions taken to manage them, and (3) the US Department of Labor’s enforcement of proxy voting requirements.  The GAO recommends that Congress consider amending the Employee Retirement Income Security Act of 1974 (ERISA) to require fiduciaries to (1) develop proxy-voting guidelines, (2) disclose guidelines and votes annually, and (3) appoint an independent fiduciary to vote the company’s own stock in its pension plan in certain instances. The GAO recommends that the Department of Labor conduct another proxy enforcement study, and enhance coordination of enforcement strategies with the US Securities and Exchange Commission.  The report is available at: [http://www.gao.gov/cgi-bin/getrpt?GAO-04-749](http://www.gao.gov/cgi-bin/getrpt?GAO-04-749" \t "_new)  **1.6 World Bank report-Doing Business and Obstacles to Growth**  On 8 September 2004, the World Bank Group published a report titled “Doing Business in 2005: Removing Obstacles to Growth”. The report, co-sponsored by the World Bank and International Finance Corporation, the private sector lending arm of the World Bank Group, benchmarks regulatory performance and reforms in 145 nations.  The top 10 economies in terms of ease of doing business are New Zealand, United States, Singapore, Hong Kong/China, Australia, Norway, United Kingdom, Canada, Sweden and Japan.  The report finds that poor nations, through administrative procedures, still make it two times harder than rich nations for entrepreneurs to start, operate, or close a business, and businesses in poor nations have less than half the property rights protections available to businesses in rich countries.  Overall, rich countries undertook three times as many investment climate reforms as poor countries last year. European nations were especially active in enacting reforms. The top 10 reformers for the most recent survey year were Slovakia, Colombia, Belgium, Finland, India, Lithuania, Norway, Poland, Portugal, and Spain. Of the 58 countries that reformed business regulation or strengthened the protection of property rights in the last year, fewer than a third were poor or lower-middle-income economies.  "Poor countries that desperately need new enterprises and jobs risk falling even further behind rich ones who are simplifying regulation and making their investment climates more business friendly," said Michael Klein, World Bank/IFC Vice President for Private Sector Development and IFC Chief Economist.  On average, it takes a business in a rich nation six procedures, 8 percent of income per capita, and 27 days to get started; in a poor or lower-middle-income economy, the same process takes 11 procedures, 122 percent of income per capita, and 59 days. In more than a dozen poor countries, registering a new business takes more than 100 days.  Potential investors in many rich nations enjoy full access to the ownership and financial information of publicly listed companies while investors in most developing countries have hardly any access.  Doing Business in 2005 updates the work of last year's report in five sets of business environment indicators: starting a business, hiring and firing workers, enforcing contracts, getting credit, and closing a business; it expands the research to 145 countries and adds two new indicators, registering property and protecting investors. Since last year, 13 governments have asked for their countries to be included in the Doing Business analysis.  This year's report catalogs wide variances in hiring and severance costs across countries and shows that high severance costs can discourage job creation. The report also shows that poor regulation of bankruptcy can cause business loans to dry up: in 50 countries, creditors can expect to recover less than 20 cents on the dollar when a business goes bankrupt.  The main research findings of Doing Business in 2005 are:           Businesses in poor countries face larger regulatory burdens than those in rich countries. Poor countries impose higher costs on businesses to fire a worker, enforce contracts, or file for registration; they impose more delays in going through insolvency procedures, registering property, and starting a business; and they afford fewer protections in terms of legal rights for borrowers and lenders, contract enforcement, and disclosure requirements. In administrative costs alone, there is a threefold difference between poor and rich nations. The number of administrative procedures and the delays associated with them are twice as high in poor countries.          The payoffs from reform appear to be large. The report estimates that an improvement from the bottom to the top quartile of countries in the ease of doing business is associated with an additional 2.2 percentage points in annual economic growth. An indication of the payoff comes from Turkey and France, each of which saw new business registration increase by 18 percent after the governments reduced the time and cost of starting a business last year. Slovakia's reform of collateral regulation helped increase the flow of bank loans to the private sector by 10 percent. The payoff comes because businesses waste less time and money on unnecessary regulation and devote more resources to producing and marketing their goods and because governments spend less on ineffective regulation and more on social services.           Heavy regulation and weak property rights exclude the poor - especially women and younger people -- from doing business. The report finds that weak property rights and heavy business regulation conspire to exclude the poor from joining the formal economy. "Heavy regulation not only fails to protect women, young people, and the poor - those it was intended to serve - but often harms them," said Caralee McLiesh, an author of the report. Doing Business shows that countries with simpler regulations can provide better social protections and a better economic climate for business people, investors, and the general public. The report builds on noted economist Hernando de Soto's work, showing that while it is critical to encourage registration of assets, it is as important - and harder - to stop them from slipping back into the informal sector.  Doing Business in 2005 finds that reform took place last year mainly in countries that faced competition and had incentives to measure regulatory burdens. In the enlarged European Union, accession countries reformed in anticipation of the new competitive pressures on their businesses; existing members reformed to maintain their advantage against the lower-wage producers from accession countries.  In developing countries, performance targets set by the International Development Association and donor country aid programs spurred poor countries to examine regulatory obstacles and propose reforms. Most reforms focused on simplifying business entry and improving credit information systems. African countries reformed the least of all regions and had the most regulatory obstacles to doing business, followed by Latin American countries.  The Doing Business project is the product of more than 3,000 local experts - business consultants, lawyers, accountants, and government officials - and leading academics, who provided methodological support and review. The data, methodology, and the names of contributors are publicly available online.  Investment climate indicators and analysis, along with information on ordering the report, are available on the Doing Business website at: [http://rru.worldbank.org/doingbusiness](http://rru.worldbank.org/doingbusiness" \t "_new)  **1.7 Global governance ratings for 2,600 companies**  On 7 September 2004, Governance Metrics International (GMI), the corporate governance research and ratings agency, announced new ratings on 2,588 global companies.  **(a) Key findings**  Twenty-six companies – twenty American, five Canadian, and one Australian - received scores of 10.0, GMI’s highest rating. As a group, these companies outperformed the S&P 500 Index as measured by total returns for each of the last one, three and five year periods by 4.9%, 8.3% and 10%, respectively, as of 31 August 2004. Similar out-performance results were achieved when measured against the MSCI World Index.  US companies overall had improved ratings over the past two years, with their global average rating rising from 6.5 to 7.2.  According to GMI, the Sarbanes-Oxley Act has had clear effects on the levels of behaviour and disclosure when comparing GMI’s newest ratings release to the first release in December 2002. Among the more positive changes in the US are:     95% of companies now report having a qualified financial expert on their audit committee versus 65% in 2002;     73% have hiring policies concerning employees or former employees of auditor firms versus 14% in 2002;     51% of companies have adopted auditor personnel rotation policies versus 8% in 2002; and    83% of audit committees now perform self-evaluations versus 17% in 2002.  In addition to changes from legislative initiatives, there have been several other improvements in governance in US boardrooms over the past two years. For example:           90% of companies now have board evaluation policies versus 35%;           80% of companies now provide director training versus 14%; and           11% of companies paid their auditors more for non-audit fees than for audit related fees versus 48% in 2002.  According to GMI, in the matter of independent board leadership, advances are being made, but US companies still have a long way to go. The difference between the US and UK in this area is noteworthy. Presently, 95% of rated companies in the UK have separated the Chairman and CEO roles, but only one-third of rated companies in the US have done so. In December 2002, 22% of US companies had separated the Chairman and CEO roles. Other companies are attempting to address this issue by naming a “lead non-executive director.” The percentage of US companies naming a lead director increased from approximately 13% to 42% in the period from December 2002 to August 2004. However, nearly a quarter of these non-executive chairman and lead directors cannot be classified as independent under GMI standards.  Approximately 35% of US companies examined by GMI report a related-party transaction involving the Chairman, CEO, President, COO or CFO or a relative thereof. In contrast, 11% of European companies engaged in such related party transactions. For US companies with dual class voting mechanisms where insiders control shares with superior voting rights, this number is notably higher (46%).  Among the more conspicuous transactions in the past year are:           An NYSE company whose President’s son controls a company where sales to his father’s employer have accounted for up to 50% of revenue in the past three years;           An NYSE company where the CEO is also Chairman of another company which is 30% owned by family trusts that he is a trustee and beneficiary of. Both companies are part of partnerships that sell property to the NYSE company. Transactions last year were in excess of $83 million; and           A NASDAQ company where three directors are employees of a company that has invested in a significant customer of that same NASDAQ company.  **(b) Country ratings**  On a national level, US companies had the highest overall average rating of 7.23, followed by Canada (7.19), United Kingdom (7.12) and Australia (6.73). At the other end of the scale, Greek companies had the lowest overall average rating at 2.93 followed by Japan at 3.57. In Europe, companies from Belgium (4.52), Portugal (4.55) and Denmark (4.60) had the lowest overall average ratings. Twenty-five companies received GMI’s lowest overall global rating of 1.0. Thirteen of the 25 are located in Japan, 4 in Greece, 3 in Belgium, 2 in France, and 1 each in Denmark, New Zealand and Hong Kong.  Further information about the study is available at: [http://www.gmiratings.com](http://www.gmiratings.com/" \t "_new)  **1.8 UK government decides not to cap auditor liability**  On 7 September 2004 the UK government announced that it would not cap the liability of auditors. It also announced changes to director liability.  **(a) Auditors**  The government announced that in light of consultations it had undertaken and the report of the Office of Fair Trading that concluded that introducing a cap would not significantly enhance competition, it has decided not to change the law to introduce a cap on the liability of auditors.  In its announcement, the government stated that the Companies (Audit, Investigations and Community Enterprise) Bill (which is currently before Parliament) contains a number of initiatives to improve the quality of the audit and other information provided to shareholders. For example:           the recommendations of the Review chaired by Sir Robert Smith mean that in listed companies there will shortly be enhanced audit committee reporting to shareholders, including better information on key audit judgments;          the Auditing Practices Board, a subsidiary of the Financial Reporting Council, has published for comment draft new ethical standards relating to the independence of auditors which are expected to be finalised this autumn;           the Financial Reporting Council has established an Audit Inspection Unit which has begun independent reviews of the effectiveness of the audit procedures of the four largest audit firms;          the audit regulatory activities of the professional accountancy bodies are now subject to independent oversight by the Professional Oversight Board for Accountancy, a subsidiary of the Financial Reporting Council;           a new Accountancy Investigation and Discipline Board has been established, as a subsidiary of the Financial Reporting Council, in order to investigate public interest cases of alleged breaches of professional standards by auditors and it has commenced its first investigation;          the Financial Reporting Council has recently set up a group under Douglas Flint to review the current guidance on internal risk control; and          the government is also considering the responses to its recent consultation on the Operating and Financial Review.  **(b) Directors**  The government announced that it will introduce two important relaxations of the current prohibition on companies exempting their directors from, or indemnifying them against, liability:           they will permit, but not require, companies to indemnify directors in respect of proceedings brought by third parties (covering both legal costs and the financial costs of any adverse judgment, except for the legal costs of unsuccessful defence of criminal proceedings, fines imposed in criminal proceedings and penalties imposed by regulatory bodies such as the Financial Services Authority);          they will permit, but not require, companies to pay directors’ defence costs as they are incurred, even if the action is brought by the company itself. The director would still be liable to pay any damages awarded to the company and to repay his defence costs to the company if his defence were unsuccessful (except where the company chooses to indemnify the director in respect of his legal costs in civil proceedings brought by third parties).  The Government amendments will also remove an arguable loophole under which a company in the same group may currently provide an indemnity to a director that would be unlawful if it was provided directly by the company of which the individual was a director.  The amendments will also require disclosure in the directors’ report by companies that indemnify directors. Shareholders will also have the right to inspect any indemnification agreement. Companies that do not indemnify directors will not have to make any disclosure.  **1.9 Horwath 2004 corporate governance report**  On 7 September 2004, the 2004 Horwath Corporate Governance Report was published. Almost two-thirds of Australia’s top listed companies fail to meet the minimum standard of director independence, concludes the report. The research for the report was conducted by the University of Newcastle.  **(a) Key findings**  The report finds that 62 per cent of the top 250 companies do not have a majority of independent directors. Of these companies, eight per cent had a board of directors that did not contain a single independent member.   The report uses a star rating system to help investors assess the standard of a company’s publicly reported governance structure. The latest study shows:           17 companies received the top 5 Star rating, compared with 15 last year.          16 companies received the lowest 1 Star rating, the same as last year.          129 companies received a 3.5 Star rating or above, demonstrating they have “good to outstanding” practices of governance in place, compared with 131 last year.          121 companies received a 3 Star rating or below, demonstrating they have “adequate to lacking” practices of governance in place, compared with 113 last year.          The Banking sector was the best performing sector in the survey. However, no companies in the Real Estate or Household/Personal Products sectors received an “excellent” rating (ie 4.5 stars or above).  Findings of the 2004 Horwath Report also include:           A decline in the level of non-audit fees paid to external auditors.          An increase in the number of remuneration committees, and improved disclosures relating to code of conduct, risk management and share trading policies.  According to the report, the vast majority of companies have made an effort to improve their corporate governance in the last twelve months. This is reflected in the decrease in non-audit fees paid to external auditors, an increase in the number of remuneration committees, and improved disclosures relating to code of conduct, risk management, and share trading policies.  The corporate governance structures of 51.6% of companies (54% in the Horwath 2003 Report) could be described as good (or better). Conversely, the corporate governance structures of 33.2% of companies (30% in the Horwath 2003 Report) were lacking in key areas. At face value the results appear slightly worse in the current year. In reality, the slightly reduced result is as a result of Horwath’s increased expectations of corporate governance and hence a tightening of the criteria to achieve a good (or better) rank.  As was the case in the 2002 and 2003 Horwath Reports, the corporate governance gap between the top companies and the lesser ranked companies remains huge.  At the other extreme, 16 companies achieved only a one star ranking. The corporate governance structures of these companies were sub-standard. Corporate governance structures were lacking in most key areas. Almost without exception the board of directors and the associated committees (where they existed) contained no independent members. Overall there was an absolute scarcity of corporate governance structures for these companies.  To test the question of whether good corporate governance makes a difference to the share price of a company, the data from the 2002 and 2003 Horwath Reports were reviewed. The annual percentage change in share price of all companies was calculated after adjusting for dividend payments. For both 2003 data, and the average of 2002 and 2003 data, the 1 star and 2 star companies provided the worst return to shareholders. These companies were either lacking in some or most areas of their corporate governance. These findings are consistent with the view that the market places significant value on the existence of good corporate governance structures within companies.  **(b) Research design**  The research contained in the report is derived from the 2003 Annual Report disclosures of Australia’s top 250 Australian companies based on market capitalisation. The report contains an overall assessment of each company’s corporate governance structures and comprises a star rating out of 5, and a relative ranking.  The corporate governance assessment model developed in the research is based upon a combination of factors identified in national and international best practice guidelines and research studies. These include the USA Blue Ribbon Committee Report (1999), the UK Hempel Report (1999), the OECD Report (2001), the UK Higgs Report (2003), the Australian Ramsay Report (2001), Investment and Financial Services Association of Australia Corporate Governance Guide (2003), the ASX Corporate Governance Council Report (2003), and CLERP 9. As was the case in previous Horwath Reports, central to the model is the need for companies to have appropriate levels of independence on the board of directors, their associated committees and from their external auditor.  The model considers objective factors based on publicly disclosed information pertaining to the existence and structure of a company’s board of directors and associated committees, the level of perceived independence of the company from the external auditors, and disclosures relating to the existence of a code of conduct, risk management and share trading policy.  The report is available at [http://www.horwath.com.au](http://www.horwath.com.au/" \t "_new)  **1.10 APEC corporate governance report** On 1 September 2004, the Australian Commonwealth Department of the Treasury published a report titled "APEC Corporate Governance Pathfinder Report". APEC is the organisation for Asia- Pacific Economic Cooperation (APEC).  Six APEC member economies comprised the Core Group which completed the Pathfinder Survey, participated in the summary process, and produced case studies: Australia, Korea, Malaysia, Mexico, New Zealand, and Singapore. The APEC Pathfinder Survey on Corporate Governance (Pathfinder Survey) is designed to gather information on the Core Group Members' corporate governance regimes and to highlight the areas of strength and of concern. This report is intended to promote continued policy dialogue on corporate governance issues among APEC member economies and with other organisations such as the OECD, the World Bank and the Asian Development Bank. In addition, member economies may be encouraged to undertake the World Bank's Report on Observance of Standards and Codes (ROSC) process on corporate governance. The Pathfinder Survey is based on elements of the ROSC questionnaire.   The Pathfinder Survey comprises three parts: Overview of Environment; Disclosure and Transparency; and Responsibilities of the Board. Overview of Environment consists of questions about the economy's regulatory and legislative framework as well as the bodies that govern it. Disclosure and Transparency covers the reporting and disclosure requirements for companies and the bodies to which reports are made, and includes elements of shareholder rights. Responsibilities of the Board covers the internal mechanisms of companies directed to ensuring compliance with all relevant laws and the relationship between the board, the shareholders and the regulators.   The report is available at [http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=877](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=877" \t "_new)  **1.11 US director pay increases - stock option use declines as restricted stock increases**  On 1 September 2004, a study of remuneration for board members of major US companies was published. The study was undertaken by Hewitt Associates, a human resources outsourcing and consulting firm.  **(a) Director fees**  Hewitt surveyed more than 170 major US companies (median revenue of $3.7 billion) and found that the median retainer for board members grew to $40,000 in 2004 from $35,000 last year. Board member meeting fees also increased to a median of $1,500 per meeting, up from $1,250 in 2003. (These findings are consistent with Hewitt’s analysis of Fortune 250 companies, which shows that total board compensation for this group increased by 17 percent in 2004.) Meanwhile, 23 percent of companies increased retainers for committee chairs, with the Audit Committee Chair receiving the highest fees of $10,000 this year, compared to $5,000 in 2003. The figures in this paragraph are US dollars.  **(b) Equity remuneration**  Hewitt’s study shows that companies are also changing their approach to equity remuneration. Stock options are less popular, with 59 percent of companies providing them to board members in 2004, compared to 68 percent in 2003. At the same time, companies are increasing restricted stock/unit awards (from 27 percent in 2003 to 34 percent in 2004).  Heightened attention on stock ownership has also led some companies to institute ownership guidelines for board members. Specifically, 44 percent of companies currently have such guidelines, compared to 33 percent last year.  **(c) Benefits and perks**  In addition to the traditional cash and equity forms of remuneration, 43 percent of organizations provide benefits to the board and 58 percent offer perks. The most common benefit is travel/accident insurance (79 percent), while the most popular perk is a matching charitable gift program (65 percent).  **(d) Additional data highlights**  Following are additional highlights from Hewitt’s study:           The average number of inside board members is two, while the average number of outside members is nine;           Nearly two-thirds (65 percent) of companies have the current CEO serving as chairman of the board;           On average, companies hold six board meetings per year;          Approximately two-thirds (64 percent) of companies have a mandatory retirement age for directors, which is 70, on average.  **1.12 European investor relations websites rated best**  On 31 August 2004, IR Web Report published a study of 507 investor relations websites of large-cap companies titled “IR Website Global Rankings”. The study covered the period February – July 2004.  The study is available at [http://www.irwebreport.com/index.htm](http://www.irwebreport.com/index.htm" \t "_new)  Spearheaded by German, Swedish, British and Swiss companies, European investor relations professionals are making better use of the Internet in their IR programs than their counterparts in other parts of the world.  Companies' investor relations pages were evaluated for 100 best practice attributes organized into four themes or dimensions, namely completeness, transparency, responsiveness and usability.  The findings indicate that European companies generally take an investor-centric approach to their IR websites and are more prone to best practice, while companies in other countries appear to be oriented more to meeting minimum mandatory requirements.  Geographic differences are clearly evident in the rankings. A wide spread exists in the scores between the top and worst ranking countries. Germany had the best IR websites while Japan had the weakest. One of the most improved performances was among Italian companies, which may be responding to the sharp focus on their practices in the wake of the Parmalat debacle.  Meanwhile, score ranges were tighter on a sector basis with little difference between the standards of companies in different sectors. Based on median scores, Telecommunications firms ranked the highest and Health Care companies the lowest for the overall effectiveness of their IR websites.  **(a) Median total scores by country - Country rank median score**  1. Germany 46.58; 2. Sweden 42.73; 3. Britain 42.70; 4. Switzerland 40.07; 5. Italy 36.52; 6. Australia 34.17; 7. USA 33.95; 8. Netherlands 32.38; 9. Canada 32.37; 10. France 27.34; 11. Japan 26.50  **(b) Median total scores by sector - Sector rank median score**  1. Telecommunications 38.05; 2. Materials 37.39; 3. Financials 37.06; 4. Consumer Staples 35.93; 5. Utilities 35.50; 6. Information Technology 34.48; 7. Energy 34.06; 8. Industrials 32.51; 9. Consumer Discretionary 32.23; 10. Health Care 31.79  **(c)** **Best IR websites**  European companies dominated the Top 50, taking 33 of the top places. North American companies took just 13 or 26% of the top positions, despite accounting for just over half of all companies in the rankings.  **(d) 20 highest scores – Company**  1. Stora Enso; 2. BCE Inc.; 3. Bayer AG; 4. ThyssenKrupp AG; 5. Danske Bank 6. Centrica; 7. Verizon; 8. Allianz AG; 9. Mitchells & Butlers PLC; 10. 3I Group 11. Reuters Group; 12. Adidas-Salomon AG ; 13. Aventis S.A.; 14. Unisys Corp.; 15. Duke Energy; 16. Microsoft Corp.; 17. SKF AB; 18. RWE AG; 19. Boots Group plc; 20. Imperial Chemical Industries  **1.13 Hollinger International special committee report released – finds massive fraud**  On 30 August 2004, the Special Committee of the Board of Directors of Hollinger International Inc. submitted its Report to the US Securities and Exchange Commission. The Report covers the results of the Special Committee’s investigation since it was formed in June 2003 in response to allegations of fiduciary duty violations and other misconduct at Hollinger.  The following is an extract from the executive summary:  “The Report chronicles events at Hollinger over the decade since it first became a US public company in 1994. Hollinger is a publishing company, but the story of the last decade at Hollinger, which is the subject of this Report, is not about Hollinger’s valuable publishing assets or the quality of the staff at its many publications. Rather, this story is about how Hollinger was systematically manipulated and used by its controlling shareholders for their sole benefit, and in a manner that violated every concept of fiduciary duty. Not once or twice, but on dozens of occasions Hollinger was victimized by its controlling shareholders as they transferred to themselves and their affiliates more than $400 million in the last seven years. The aggregate cash taken by Hollinger’s former CEO Conrad M. Black and its former COO F. David Radler and their associates represented 95.2% of Hollinger’s entire adjusted net income during 1997-2003.  “At the outset, the energies of many people went into building Hollinger into a major publishing enterprise. Over time, however, Hollinger went from being an expanding business to becoming a company whose sole preoccupation was generating current cash for the controlling shareholders, with no concern for building future enterprise value or wealth for all shareholders. Behind a constant stream of bombast regarding their accomplishments as self-described “proprietors,” Black and Radler made it their business to line their pockets at the expense of Hollinger almost every day, in almost every way they could devise. The Special Committee knows of few parallels to Black and Radler’s brand of self-righteous, and aggressive looting of Hollinger to the exclusion of all other concerns or interests, and irrespective of whether their actions were remotely fair to shareholders.  “The Special Committee believes that the events at Hollinger were driven in large part by insatiable pressure from Black for fee income from Hollinger to prop up the highly levered corporate structure of Ravelston and HLG, and to satisfy the liquidity needs he had arising from the personal lifestyle Black and his wife had chosen to lead. The intensity of the pressure for tens of millions in cash payments to Black, irrespective of corporate performance or the fairness of transactions to shareholders, led to a series of abusive transactions in which Hollinger was a victim of Black and Radler’s ravenous appetite for cash.  “The cash that the insiders pursued so ravenously did not come from taking an aggressive share of the growth of an expanding firm, or from gains generated through the value of outsized equity grants. The bulk of what Black and Radler were taking from Hollinger was cash, and that cash did not come from earnings or the creation of value for all shareholders. Rather, one scheme after another was devised to siphon away Hollinger’s opportunities, its cash flow and a share of its balance sheet. For years Black and Radler found excuses for transferring existing cash or assets to themselves, even if it required dismantling Hollinger for their own benefit.  “Black and Radler (together with Ravelston and HLG, the corporate vehicles that they controlled and utilized in their improper acts) were the principal actors with the greatest responsibility for conceiving and directing most of the events described in this Report. Others facilitated or assisted efforts to skim cash from Hollinger improperly, or failed to detect and prevent the looting of the Company. The Report describes the actions of those individuals as well.  “The Committee has already commenced the Illinois Action against Black, Radler, Amiel Black (Mrs. Black), Colson and Boultbee as individuals, and against Ravelston and HLG as corporate vehicles, seeking $1.25 billion in damages suffered by Hollinger from the individual acts and events described in the Report, and from a long course of fraudulent activities in violation of federal racketeering statutes.  “The problems traced in this Report are not new. Indeed, Hollinger does not appear ever to have been run in accordance with accepted governance principles in the world of public corporations. While individual issues and transactions can and will be the subject of dispute and interpretation, the evidence reviewed by the Committee establishes an overwhelming record of abuse, overreaching, and violations of fiduciary duties by Black and Radler, the two controlling shareholders.  “Hollinger wasn’t a company where isolated improper and abusive acts took place. Rather, Hollinger was a Company where abusive practices were inextricably linked to every major development or action. For most companies, operating in compliance with law and following ethical practices are key objectives, and specific concerns of the CEO. At Hollinger, Black as both CEO and controlling shareholder, together with his associates, created an entity in which ethical corruption was a defining characteristic of the leadership team. Indeed, at Hollinger during the years covered by this Report transactions or strategies were particularly attractive if they offered opportunities for extraordinary payments to the control group.”  The full report is available on the [SEC website](http://www.sec.gov/" \t "_new).  **1.14 Inaugural corporate responsibility index results published**  On 28 August 2004, the results of the inaugural Corporate Responsibility were published. Westpac has achieved first place in the Corporate Responsibility Index, followed closely by BP, Rio Tinto, BHP Billiton and Toyota. Australian companies perform well in this inaugural international benchmarking of corporate social responsibility. The Index results show local businesses are equal to their counterparts in the UK, although weaker in the area of assurance.  A voluntary, self-assessment survey, the Index sets up a process that compares the systems and performances of different companies in and across specific sectors. It was established two years ago by 80 leading businesses working with UK charity Business in the Community (BITC).  The first round of Australian results are consistent with other international surveys indicating that while many companies are at an advanced stage in policy development, only a few are really successful in actually driving corporate responsibility throughout the business.  Responding to the need for a credible Index that allows companies to accurately benchmark corporate responsibility practices with those of their peers, St James Ethics Centre joined forces with The Sydney Morning Herald, The Age and Ernst & Young to introduce the Corporate Responsibility Index to Australia. St James Ethics Centre has played no role in rating the performance of participating companies. Rather, the Centre acts as Trustee for the process – ensuring its overall integrity, free from conflicts of interest.  The primary focus areas examined in the Index are strategy, integration, management practice, performance and impact, and assurance. It acts as a business tool by providing a practical framework for improving and communicating performance.  26 companies participated in the inaugural Australian Corporate Responsibility Index, ranging from the finance sector to manufacturing to extractive industries.  Companies at the top of the Index display the following characteristics: they have incorporated the rhetoric of their corporate values and principles into the way the organisation is managed; they can measure and report how this works in practice; and they are taking action to reduce any negative impacts of their products or services and maximise their positive qualities in the marketplace.  To accommodate differences between participants and industry sectors, the Index allowed participants to tailor certain sections of the survey to their particular business challenges. For example, in relation to social impacts, participants had to answer two of five questions concerning 'product safety', 'occupational health and safety', 'human rights in the supply chain', 'diversity in the workplace', and 'community investment', but were able to choose the ones that were most relevant to them.  The complete results of the Corporate Responsibility Index are available at: [http://www.corporate-responsibility.com.au/](http://www.corporate-responsibility.com.au/" \t "_new)  **1.15 US Public Company Accounting Oversight Board releases reports on inspections of big four accounting firms**  The Public Company Accounting Oversight Board issued on 26 August 2004 reports on the Board’s 2003 limited inspections of the four largest public accounting firms in the United States.  The inspections examined compliance, quality control and selected public-company audits in the national and regional practice offices of Deloitte & Touche LLP, Ernst & Young LLP, KPMG LLP and PricewaterhouseCoopers LLP.  In the inspections, the Board identified significant audit and accounting issues that were missed by the firms and identified concerns about significant aspects of each firm's quality controls systems. The Board's inspection reports describe those issues.  “As our reports state, their emphasis on criticisms do not reflect any broad negative assessment of the firms' audit practices,” said PCAOB Chairman William J. McDonough. “The Board's inspections are unprecedented, and in this first year, our findings say more about the benefits of the robust, independent inspection process envisioned in the Sarbanes-Oxley Act of 2002 than they do about any infirmities in these firms' audit practices.”  The Sarbanes-Oxley Act of 2002 requires the PCAOB to conduct annual inspections of registered accounting firms that audit more than 100 public companies. The four firms that consented to the limited inspections in 2003 and four other U.S. firms are subject to full inspections in 2004.  The limited inspections of the four largest U.S. firms were conducted between June and December 2003 to provide the Board with a foundation for the full-scale inspections and to obtain a baseline understanding of the firms' internal systems of quality control over auditing. The inspections involved both an examination of each firm's policies, practices, and procedures related to public company auditing and a review of aspects of selected recent audits performed by each firm.  Final inspection reports are provided to the Securities and Exchange Commission and certain state authorities and made available to the firms, as provided in the Board’s rules.  With the reports, the Board issued a [statement](http://www.pcaobus.org/documents/Inspections/2004/Statement_Concerning_Inspection_Reports_2004-08-26.pdf" \t "_new) concerning the issuance of inspection reports, describing in detail the nature of the inspections, statutory limitations on public disclosure of parts of the reports and other matters related to the reports.  The statement and the reports are available under Inspections at [http://www.pcaobus.org/Inspections/](http://www.pcaobus.org/Inspections/" \t "_new)  **1.16** **New members of the Companies Auditors and Liquidators Disciplinary Board** On 24 August 2004, the Federal Treasurer made seven new part time appointments to the Government's Companies Auditors and Liquidators Disciplinary Board (CALDB). The key function of the CALDB is to determine if an auditor or liquidator has failed to carry out or perform adequately their duties or functions or is not a fit and proper person to remain registered as an auditor or liquidator. The powers the CALDB may exercise include cancelling or suspending the registration of an auditor or liquidator.  An important change to the CALDB introduced by the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) is to increase the number of members of the CALDB who are not members of professional accounting bodies. The new part time members are Patrick Burroughs, accountant; David Barnett, Australian Stock Exchange; Tom Bostock, lawyer; John Keeves, lawyer; Professor Ian Ramsay, the University of Melbourne; John Story, lawyer and director; and Simon Streeton, barrister.  **1.17 Remuneration for directors of largest US companies**  Board compensation grew 13% to nearly $176,000 in 2003. The increases follows two straight years in which Board pay at the Top 200 US industrial and service companies was nearly flat, according to a new study released on 12 August 2003 by compensation consultants Pearl Meyer & Partners. The figures in the study are in US dollars.  Compensation for committee service saw the biggest jump, swelling on average by approximately 35% to over $23,000, including a 47% rise in Audit Chair fees and retainers and a 24% pay increase for Compensation Committee heads. In a significant shift, the use of full value shares surpassed stock options for the first time since equity became an integral part of Director compensation programs a decade ago.  **(a) Shift in pay patterns**  The percentage of pay delivered in equity - full value shares and stock options - declined for the second straight year, from 60% to 57% of total Board remuneration. Average equity values increased 7% to over $99,000, while cash compensation rose 21% to $75,000, including a 17% increase in average cash retainers to $45,000.  Following a similar shift in the use of equity incentives for top executives, fewer companies granted stock options to Directors - 59% of the Top 200 companies compared to 70% one year earlier. The change in equity use reflects a consensus among governance activists that full value incentives better promote a long-term perspective on corporate performance. Stock option values were down over 5% to about $49,000, due in part to the market slump in the first half of 2003, while full value awards rose 23% to more than $50,000.  Close to half of the Top 200 Boards in 2003 provided premiums for service on specific committees - most commonly Audit and Compensation - based on the additional time and responsibility involved. As an example, Audit Committees met an average of nine times in 2003 - twice as often as five years earlier - due largely to new requirements.  **(b) Financial and Healthcare Firms remain pay leaders**  The Securities industry ranked first in Board pay at nearly $307,000 - roughly 75% more than the average Top 200 Director - and also reported the largest stock awards at over $234,000 and second highest committee fees at over $28,000. Diversified Financial companies ranked second in total pay, averaging $258,000, followed by Healthcare at $255,000. While those three industries also led in use of Board equity, Healthcare's cash retainer was the lowest among the 24 industries studied at $35,000, and theSecurities sector provided the second lowest Board meeting fees at $2,500 annually. The Energy/Utilities, Food/Drug Store Chains and Transportation/Delivery sectors reported the lowest levels of Board compensation, averaging $124,000, $127,000 and $136,000 respectively and ranked at the bottom in equity use.  **1.18 US securities litigation study**  According to the latest PricewaterhouseCoopers Securities Litigation Study published on 2 August 2004, the number of securities litigation cases with accounting allegations remains well above historical averages. Mega-settlements continue to drive average settlement values significantly higher than ever before. The involvement of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) adds additional potency to the nature of securities litigation.  **(a) Accounting-related cases**  The number of accounting-related cases remains high, totalling more than 60 percent of the 175 cases filed in 2003 and 57 percent of the 111 cases filed in the first seven months of 2004.  The number one allegation made in accounting-related cases continues to be revenue recognition, alleged in over fifty percent of these cases in 2003.  The study also finds two other allegations that are emerging in accounting-related cases: accounting estimates and internal controls. In 2003 each of these allegations appeared in over 40 percent of the accounting cases.  **(b) Settlement values continue to rise**  In 2003, average settlement values increased by 20 percent to $23.2 million. The increase was fuelled in large part by six settlements topping $100 million each, including three settlements of $300 million or greater, with one of those settlements topping $500 million.  Excluding several partial settlements, including the recent $2.65 billion partial Worldcom settlement, the average settlement in the first six months of 2004 surged to over $32 million. So far in 2004, 14 settlements have been announced for $30 million or greater, five of which settled for $100 million or more. The average accounting case, led by five case settlements over $100 million each, settled for over $38 million. While large settlements continue to lift settlement averages to new heights, the median 2004 settlement is approximately $6.3 million and the median accounting settlement is greater than $7 million, both up from the 2003 numbers.  **(c) Triple jeopardy increases potency of cases**  The dynamic of securities litigation has changed dramatically in securities litigation class actions when the SEC and DOJ are also involved. This year for the first time, PricewaterhouseCoopers explored a phenomenon called “triple jeopardy”, where companies are subject to securities class actions along with SEC and DOJ investigations. In 2002, was an all-time high of over 40 such cases. In 2003 the study finds only 8 such instances which marks a return closer to historic norms. The preliminary 2004 research indicates that at least 13 companies are facing “triple jeopardy” this year, already surpassing the 2003 total.  **(d) Other trends**  The study also explores many other trends in securities litigation, including:           The decline in the percentage of cases against “high-technology” companies.           A greater percentage of cases involve public pensions as lead plaintiffs in shareholder class actions.  The 2003 PricewaterhouseCoopers Securities Litigation Study is available at: [http://www.10b5.com/](http://www.10b5.com/" \t "_new)  **1.19 Corporate governance by the numbers doesn’t work: new study**  Three academics at Wharton Business School have published a research study titled “Does Corporate Governance Really Matter?” in which they question the value of much recent corporate governance research and the work of some corporate governance consultancy firms.  Wharton accounting professors David Larcker, Irem Tuna and Scott Richardson say a check-box approach to corporate governance doesn't work. Companies and their situations are too diverse. "The recipe book is big, and there's a different recipe for each company," Richardson notes. Even worse, the professors say, are consultants and ratings services that use formulas - which they typically refuse to reveal - to boil down a company's corporate governance to a single number or grade.  "Lots of people are coming up with governance scorecards," Larcker explains. "They're coming up with best practices and selling this stuff. As far as we can tell, there's no evidence that those scorecards map into better corporate performance or better behaviour by managers."  The authors examine the relation between a broad set of corporate governance factors and various measures of managerial behaviour and organizational performance. Using a sample of 2,126 US firms they distil 38 structural measures of corporate governance (e.g., board characteristics, stock ownership, anti-takeover variables etc.) to 13 governance factors using principal components analysis. For a wide set of dependent variables (eg, abnormal accruals, excessive CEO compensation, debt ratings, analyst recommendations, Q and over-investment) they find that the 13 governance factors on average explain only 1% to 5.5% of the cross-sectional variation using standard OLS multiple regression techniques and 1.4% to 9.1% of the variation using exploratory recursive partitioning techniques. Overall, the results suggest, according to the authors, that the typical structural indicators of corporate governance used in academic research and institutional rating services have very limited ability to explain managerial behaviour and organizational performance.  The summary of the research is available at: [http://knowledge.wharton.upenn.edu/article/1041.cfm](http://knowledge.wharton.upenn.edu/article/1041.cfm" \t "_new) and the full research paper is available at: [http://knowledge.wharton.upenn.edu/papers/1281.pdf](http://knowledge.wharton.upenn.edu/papers/1281.pdf" \t "_new)  **1.20 Property investment advice: discussion paper**  The Ministerial Council on Consumer Affairs Property Investment Advice Working Party has published a discussion paper on property investment advice. The working party consists of representatives of Commonwealth, State and Territory consumer protection and fair trading agencies, including the Australian Securities and Investments Commission. The lead agency for the project is the Queensland Office of Fair Trading.  Following is an extract from the executive summary:  The paper is in two parts. Sections 3-6 provide information about the property investment market, consumer and marketplace problems, and the current legal framework. In the light of this information, law reform issues are addressed in sections 7-10:  **(a) Section 3 - Retail investors and the property market**  There has been a significant increase in the level of investment in rental properties by retail investors (including individuals and family-based businesses) in recent years. A number of factors have been advanced to explain this increase, including the desire of investors to earn capital gains from investing in rental property, the ready availability of investment finance, and the taxation treatment of investments in residential property. The marketing of property investment and investment ‘training’ would also appear to have been a factor. Risks associated with investment in residential property are noted, including those relating to ‘bubble markets’ for property. The Working Party considers that the current level of investor awareness of these risks may not be adequate.  **(b) Section 4 - Property investment advice and promotion**  For the purposes of the paper “advice” is understood broadly to include information, opinions and recommendations where the adviser has a vested interest in, or hopes to obtain financial or other gain as a result of their recommendations, as well as the situation where the advice given can be described as genuinely independent or disinterested. As defined, advice about property investment is currently provided by a range of individuals and businesses, including financial advisers, real estate agents, and seminar operators/ wealth creation promoters. As most of the problems identified by State and Commonwealth agencies relate to the unlicensed promoters, this section provides a detailed overview of their operations.  **(c) Section 5 - The problems of concern**  The preliminary view of the Working Party is that there are significant problems associated with the provision of property investment advice and wealth creation training services in Australia today. Key areas identified include:           the variable quality of advice services, including concerns about the appropriateness, feasibility and, in some cases legal or ethical character of recommended investment strategies;          the lack of disclosure of commissions and arrangements and relationships which promoters have with property developments;          misrepresentations that proposed investment strategies are risk-free or very low risk; and          failure to provide promised refunds on seminars and courses and the difficulties consumers experience in obtaining redress.  **(d) Section 6 - Current legal framework and regulatory action**  The general consumer protection laws of the various State and Territory jurisdictions, and the Commonwealth, are currently the principal means of dealing with the marketplace and consumer problems referred to in section 5. Other sector-specific laws including the State and Territory real estate and consumer credit laws, and Commonwealth financial services laws may also have some relevance—however, this will generally be limited. This section provides an overview of the laws in question, and alludes to relevant State and Commonwealth agencies’ regulatory activities based on these laws.  **(e) Section 7 - Objectives of government intervention and the current legal framework**  The objectives of government in relation to the property investment advice market are to ensure:           that the market is transparent and operates consistently with community standards and expectations;          that advisory services to retail investors and prospective investors are of a generally high standard; and          that retail investor decision-making, and ultimately returns for investors, are generally enhanced by property investment advisory services.  The paper argues that these objectives are not currently being met, and may not be fully achievable within a regulatory framework based primarily on the general consumer protection laws.  **(f) Section 8 - The scope or coverage of regulation**  The Working Party’s view is that any new regulatory scheme should be limited to retail investors in real property (including industrial, retail and commercial as well as residential property). Further, a functional approach should be taken by regulating property investment advice in the event that a new scheme were to be introduced—in other words, regulation should generally cover all those who engage in property investment advisory activities (including advice about financing arrangements) whatever the setting or form of the advice and whoever the provider of the advice may be. However, the question of whether there should be a carve-out of any particular types of advice/ adviser (for example, real estate agents) under a new scheme is also raised.  **(g) Section 9 - Reform options and their impact**  The paper considers three broad Options for reform and the costs and benefits of each for consumer, industry and government stakeholders. The Options considered are:           retention of the status quo, perhaps with greater emphasis on its effective utilisation. Even if the objectives of government are not fully achievable within the current regulatory framework, if the additional costs of a new regulatory scheme outweigh the benefits, this would be the appropriate approach;          a new ‘medium intensity’ regulatory scheme imposing additional conduct and disclosure requirements; and          a new ‘high intensity’ regulatory scheme requiring those who give property investment advice to be licensed and, as part of this, to meet mandated training and competency requirements, as well as enhanced conduct and disclosure requirements.  The requirements under Options 2 and 3 might be modelled on those applying under the financial services laws in relation to investment advice about financial products; however, other or variant requirements might also be considered. Views are sought as to which of the three Options should be adopted and what specific regulatory requirements should/should not be imposed.  **(h) Section 10 - A States and Territories or a Commonwealth responsibility**  This section considers advantages/benefits and disadvantages/costs associated with either State or Territory or Commonwealth responsibility for a new regime regulating property investment advice.  The discussion page is available at: [http://www.consumer.qld.gov.au](http://www.consumer.qld.gov.au/" \t "_new)  **1.21 The world’s largest companies**  In a recent issue, Business Week published its list of the top 1,000 companies based on the share price of these companies as at 31 May 2004. The list ranks companies from 38 countries and, for the first time, includes companies from what Business Week refers to as emerging markets.   Companies from the following countries make up the top 1,000 list (2003 and 2002 figures are in brackets where these figures are available):  Australia - 21 (27) (19); Austria - 3 (2) (1); Belgium - 10 (9) (10); Britain - 73 (77) (85); Canada - 37 (41) (39); Chile - 1; China - 6; Denmark -  4 (6) (6); Finland - 5 (5) (6); France - 44 (48) (51); Germany - 35 (35) (35); Greece - 8 (7) (3); Hong Kong - 15 (18) (15); Hungary - 1; India - 8; Indonesia - 1; Ireland - 4 (4 )(5); Israel - 2; Italy - 23 (24) (24); Japan - 137 (129) (142); Korea - 10; Malaysia - 5; Mexico - 6;  Netherlands - 15 (19) (19); New Zealand - 1 (1) (1); Norway - 5 (5) (5); Poland - 2; Portugal - 3 (4) (3); Russia - 9;  Singapore - 5 (6) (6); South Africa - 11; Spain - 17 (18) (15); Sweden -15 (17) (17); Switzerland - 16 (17) (20); Taiwan - 18; Thailand - 3; and United States - 423 (488) (473).  **1.22** **Analysis of the Google IPO** The Wharton School of Business has published an analysis of the recent Google IPO titled "Lessons from Google's IPO". Google raised US$1.67 billion by going public at $85 a share - down from the US$135 a share top target, or $3.6 billion, that the company was hoping for. In addition, as noted in the Wharton analysis, "Google raised its capital largely thumbing its nose at Wall Street's typical method of going public, opting instead to use a Dutch auction that in theory would put shares in retail investors' hands and cut down on commissions to investment bankers".   The full article is on the Wharton website at: [http://knowledge.wharton.upenn.edu/article/1036.cfm](http://knowledge.wharton.upenn.edu/article/1036.cfm" \t "_new)  **1.23 New research papers available on Centre for Corporate Law website**  Two new research papers are available on the Centre for Corporate Law and Securities Regulation website. The papers are available at [http://cclsr.law.unimelb.edu.au/research-papers/index.html](http://cclsr.law.unimelb.edu.au/research-papers/index.html" \t "_new)  **(a) The role and responsibilities of directors on board sub-committees (by Andrew Lumsden)**  Public pressure for accountability and reform has seen its most powerful emanation in a new ‘enthusiasm’ for committees of the board filled with independent directors as a panacea for all that ails corporate Australia according to the author. This paper examines the changing expectations for committees and suggests a number of practical measures that committee members can take to ensure they are satisfying their obligations and that boards should consider when establishing a committee***.***  **(b) The liability of directors of corporate trustees and the decision in Hanel v O'Neill (by Jeremy Cooper)**  The recent decision of the Full Court of the Supreme Court of South Australia in Hanel v O’Neill has created significant debate and calls for law reform.  Following the popularity of the trading trust in the 1970s, there was a general recognition that legislation was required to level the playing field in favour of trust creditors. Legislation (now reflected in [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), s 197) came into effect in 1986 imposing liability (jointly and severally with the corporation and other directors (if any), subject to s 197(2)) for debts and other trust obligations on directors of corporate trustees in certain circumstances. The recent decision in Hanel v O’Neill has, however, brought into question the scope of that liability. The original basis on which the corporate veil was to be pierced in the case of corporate trustees seems to have been obscured during the legislative “simplification” and economic reform programs of the 1990s. A legislative clarification of the scope of that liability is now required according to the author.  This paper is published with the permission of Lawbook Co. |
| **2. Recent ASIC Developments** |
| **2.1 ASIC provides relief for financial services guides given in time critical situations**  The Australian Securities and Investments Commission (ASIC) issued on 14 September 2004 class order [CO 04/1055], Information in a Financial Services Guide given in a time critical situation, to facilitate the provision of a Financial Services Guide (FSG) in a time critical situation under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).  The FSG is a key disclosure document under the Act that sets out the terms and basis under which a person will provide a financial service. It is provided to retail clients to help them make an informed decision on whether to acquire a financial service. In a time critical situation, such as during the sale of a financial service over the phone, it may not be reasonably practicable to provide an FSG before the financial service is provided. Instead, the Act permits a statement of certain key information to be given at the time, with the FSG given to the retail client within five days, or sooner if practicable, after the financial service is provided.  However, as the Act requires an FSG to be 'up to date' at the time it is given to the client, the information in the FSG provided later may contain different information to an FSG that would be given in normal circumstances.   To reduce the potential for a significantly increased compliance burden in having to provide customised information in an FSG, class order [CO 04/1055] provides that information in an FSG given in a time critical situation need only be up to date as at the time the earlier statement was given to a retail client.  A copy of the class order is available from the ASIC website at [http://www.asic.gov.au/co](http://www.asic.gov.au/" \t "_new) or by calling ASIC's Infoline on 1300 300 630.  **2.2 Operators of managed discretionary account services-licence authorisation**  On 9 September 2004, the Australian Securities and Investments Commission (ASIC) announced that from 30 September 2004, new and existing Australian financial services (AFS) licensees will be able to apply for an AFS licence authorisation to provide managed discretionary account (MDA) services to retail clients.   If an applicant provides, or intends to provide, MDA services to wholesale clients only, they will not need to apply for an authorisation to provide MDA services.  Under ASIC [Policy Statement 179](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=ps179_pdf" \t "_new) Managed discretionary account services[PS 179], existing AFS licensees that are currently operating MDA services must vary their AFS licence no later than 10 December 2004. Applicants will not be able to operate an MDA service after 10 December 2004 if they do not have the appropriate licence authorisation.  ASIC's Pro Forma 209 Australian financial services licence conditions [PF 209] will be revised to specify the additional conditions that will apply to MDA operators.  Copies of PS 179, ASIC Class Order 04/194 [CO 04/194] and ASIC's previously issued information releases and class orders are available from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.3 ASIC issues report card on financial services licensees**  On 6 September 2004, the Australian Securities and Investments Commission (ASIC) issued its findings on a program of randomly conducted verification visits on Australian financial services (AFS) licensees.  The 353 visits, which were conducted between December 2002 and July 2004, were undertaken to check that certain declarations made in a licensee's AFS licence application were true and to ensure that the licensee's required procedures are operational. In a small number of cases ASIC will be undertaking a further compliance review.  The visits examined a number of key areas, including:                 risk management and compliance arrangements;                 supervision of representatives and authorised representatives;                 adequacy of financial resources;                 compensation arrangements; and                 internal dispute resolution procedures.  ASIC intends to continue conducting random compliance visits on AFS licensees.  Copies of the key findings of the ASIC verification visit program can be obtained from the ASIC Infoline by calling 1300 300 630 or from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.4 ASIC reaches agreement with John Greaves in One.Tel proceedings**  Mr Jeffrey Lucy, Chairman of the Australian Securities and Investments Commission (ASIC), announced on 6 September 2004 that ASIC has reached an agreement with Mr John Greaves, a former non-executive director and chairman of One.Tel Limited (One.Tel), in the Supreme Court proceedings against him.  Mr Greaves is one of four defendants in the proceedings brought by ASIC following the collapse of One.Tel in May 2001. The other defendants are Mr Jodee Rich, Mr Mark Silbermann and Mr Bradley Keeling. Mr Keeling settled ASIC's civil claim against him in March 2003.  Previously, Mr Greaves had sought to strike out the claim brought against him by ASIC on the basis that the duties of a chairman were not, at law, as extensive as ASIC wished to establish. In February 2003, Justice Austin ruled against Mr Greaves on this point.  Under the agreement with ASIC, Mr Greaves has admitted to contraventions of the Corporations Law between January 2001 and 30 March 2001 in relation to the discharge of his duties as a non-executive director, and the chairman, of One.Tel.  Pursuant to the agreement, ASIC and Mr Greaves made joint submissions to Mr Justice White at hearings on 31 August 2004 and 2 September 2004. As a result of the hearings and submissions, Mr Justice White made orders that Mr Greaves:           be prohibited from managing a corporation for a period 4 years;           be found liable for the compensation of $20 million to One.Tel; and           be ordered to pay ASIC's costs of $350,000.  As part of the terms of agreement, Mr Greaves admits that during the period January 2001 to 30 March 2001, he failed to take the steps that he should have in order to ensure that he and the board of One.Tel properly monitored management and were aware of the true financial position of the company.  There is further discussion of Justice White’s decision in Item 5 of this issue of the Bulletin.  ASIC's proceedings against Mr Rich and Mr Silbermann are continuing.  **2.5 Australia and Japan strengthen corporate regulation capabilities**  The Australian Securities and Investments Commission (ASIC) and the Japanese Financial Services Agency (FSA) will be in a stronger position to act against unlawful corporate behaviour after the Chairman of ASIC, Mr Jeffrey Lucy joined the FSA's Commissioner Gomi on 3 September 2004 to sign a Statement of Intent Concerning Cooperation, Consultation and the Exchange of Information.  Information may be used in civil and administrative investigations and proceedings, and to assist a self-regulatory organisation's surveillance or enforcement activities. Information can also be used to assist criminal investigations.  The Statement of Intent provides a framework for the exchange of information, which is supported by an Exchange of Notes between the Australian Embassy and the Japanese Ministry for Foreign Affairs in Japan on 26 August 2004.  **2.6 ASIC issues conflicts management policy** On 30 August 2004, the Australian Securities and Investments Commission (ASIC) announced how it expects financial services licensees to manage their conflicts of interest. This is set out in Policy Statement 181 Licensing: Managing conflicts of interest[PS 181].  **(a)** **Background**  The Commonwealth Government amended the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) with effect from 1 January 2005 to impose an obligation on Australian financial services licensees (AFS licensees) to have adequate arrangements to manage conflicts of interest. This obligation was contained in the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) which commenced on 30 June 2004.  **(b) ASIC's policy proposal paper**  PS 181 follows ASIC's policy proposal paper Licensing: Managing conflicts of interest published in October 2003. This policy proposal paper (PPP) set out a number of proposals on what arrangements AFS licensees should put in place so as to comply with the new legislative conflicts management obligation. PS 181 takes into account the 15 submissions ASIC received on the PPP.  The PPP contained more detailed draft guidance for research report providers taking into account domestic and international developments (in Schedule 2). This guidance has not been included in PS181. ASIC is finalising its guidance on research report providers and after further discussions with industry will be publishing this guidance as a separate document in September or October.  **(c) The policy statement**  To comply with the conflicts management obligation, ASIC expects licensees to have arrangements to manage all conflicts of interest affecting their business. These arrangements will involve the following mechanisms:           controlling conflicts of interest;           avoiding conflicts of interest; and           disclosing conflicts of interest.  Section B of the policy contains guidance on controlling and avoiding conflicts of interest, and Section C contains guidance on disclosing conflicts of interest.  **(d) Controlling and avoiding conflicts**  In controlling conflicts of interest, ASIC expects that licensees' arrangements will enable them to:           identify the conflicts of interest relating to their business;           assess and evaluate those conflicts; and           decide upon, and implement, an appropriate response to those conflicts.  Licensees must have written conflicts management arrangements. They must also keep written records of how they manage conflicts of interest (For example, records of disclosures made and actions taken over any breaches of their policies and procedures).  Some conflicts of interest have such a serious potential impact on a licensee or its clients that the only way to adequately manage those conflicts will be to avoid them. In such cases merely disclosing them and imposing internal controls will be inadequate. A licensee's conflicts management arrangements must enable the licensee to identify and avoid these types of conflicts.  **(e) Disclosing conflicts**  Part of managing conflicts of interest is making appropriate disclosures to clients. While disclosure alone will often not be enough, disclosure is an integral part of managing conflicts of interest.   Licensees should ensure that clients are adequately informed about any conflicts of interest that may affect the provision of financial services to them. This means providing clear, concise and effective disclosure so that clients can make an informed decision about how the conflict may affect the relevant service. ASIC expects disclosure by licensees to focus on material conflicts.  The new conflicts management obligation itself applies equally to services provided to retail and wholesale clients. ASIC recognises that the disclosure needed to comply with the law for a wholesale client will sometimes be less detailed than for a retail client. What constitutes appropriate disclosure to any given client will depend on all of the facts and circumstances, including:           the level of financial sophistication of the client;           the extent to which other clients (especially retail clients) are also likely to rely, directly or indirectly, on the service;           how much the client already actually knows about the specific conflict; and           the complexity of the service.  PS 181 is available at [http://www.asic.gov.au/](http://www.asic.gov.au/" \t "_new) |
| **3. Recent ASX Developments** |
| **3.1 ASIC releases report card on ASX**  On 16 September 2004, the Australian Securities and Investments Commission (ASIC) released the findings of ASIC's most recent assessment of the Australian Stock Exchange (ASX).  Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), ASIC must conduct an annual assessment of how well ASX is complying with its obligations to supervise its market.  This is the second assessment ASIC has undertaken. ASIC's report to the Government concludes that ASX has adequate arrangements for supervising the market, including arrangements for:           handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way,           monitoring the conduct of participants; and          enforcing compliance with its rules.  The report identifies some areas where ASX should strengthen its supervision and compliance arrangements, to ensure it can continue to comply with its obligations in the future. Key recommendations are that ASX should:           accelerate steps to restructure its supervisory areas to ensure a more co-ordinated approach and provide clearer lines of accountability,           review its arrangements for managing conflicts of interest, and           work towards greater consistency in monitoring and enforcing listing rules.  The report is available at: [http://www.asic.gov.au/](http://www.asic.gov.au/" \t "_new) |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Australian Leisure and Hospitality Group Limited: Panel declines to commence proceedings**  On 8 September 2004, the Takeovers Panel announced that it has considered the application by Bruandwo Pty Limited (Bruandwo) dated 27 August 2004 alleging unacceptable circumstances in relation to its takeover bid for all the ordinary shares in Australian Leisure & Hospitality Group Limited (ALH).  The Panel has decided not to conduct proceedings in relation to the application.  This decision follows ALH’s agreement to issue a supplementary target’s statement containing further disclosure regarding:           change of control clauses in ALH’s material agreements which might be relevant to one of the defeating conditions in Bruandwo’s bid; and          the effect of ALH’s takeover defence costs on its expected dividend and earnings.  **(a) Background - the application**  Bruandwo alleged that unacceptable circumstances existed because of misleading or deceptive statements in, or material omissions from, ALH’s target’s statement. Specifically, Bruandwo alleged that the target’s statement was deficient in the following ways:           it raised concerns regarding the process undertaken by KPMG Corporate Finance (Aust) Pty Limited (KPMG) in the preparation of its independent expert report, which was included in ALH’s target’s statement, as well as the content of that report;          there was no information about the impact of ALH’s takeover defence costs on the expected earnings and dividend for the 2004/2005 financial year;          there was insufficient information regarding the ALH material agreements which could trigger the defeating condition set out in clause 8.8(a)(vii)(B) of Bruandwo’s bidder’s statement (the Change of Control Waiver Condition); and          there was no information from the ALH board regarding its view of the likely post-bid ALH share price.  The Panel received preliminary submissions from ALH in response to the application, as well as further correspondence from Bruandwo in support of its application.  **(b) Offer conditions**  In its preliminary submissions to the Panel, ALH advised that there were no material agreements that could be the subject of the Change of Control Waiver Condition other than those agreements summarised in ALH’s IPO prospectus dated 19 September 2003.  The Panel considered that this statement was significantly more informative than the statements made in Part D of ALH’s target’s statement that there were “many” material agreements to which the Change of Control Waiver Condition could apply.  Given the additional information provided in ALH’s preliminary submissions, the Panel advised ALH that it would be appropriate for ALH to inform ALH shareholders about which of its material agreements were relevant to the Change of Control Waiver Condition. The Panel considered that this disclosure is important to an ALH shareholder’s decision whether or not to remain a shareholder if Bruandwo attains control of, but does not wholly own, ALH.  ALH agreed to provide the relevant information in its supplementary target’s statement.  **(c) Takeover defence costs**  The Panel advised ALH that if there were circumstances under which the quantum of defence costs payable to ALH’s advisers would have a material effect on ALH’s earnings or dividend for the 2004/2005 financial year, ALH would be required to disclose that possibility in its target’s statement.  ALH agreed to include a statement in its supplementary target’s statement regarding the effect that its defence costs may have on ALH’s expected earnings and dividend.  **(d) Other issues raised in the application**  **(i) Independent expert report**  The Panel carefully reviewed Bruandwo’s allegations regarding KPMG’s independent expert report, as well as the details set out in ALH’s preliminary submissions regarding the process undertaken in the preparation of KPMG’s independent expert report. The Panel also had regard to ASIC Practice Note 42: Independence of expert’s reports.  The Panel considered that neither Bruandwo’s application, nor the details provided in ALH’s preliminary submissions indicated that the independence of KPMG had been diminished or compromised, and that no additional disclosure regarding the preparation of KPMG’s report was required.  **(ii) Future share price**  Bruandwo asserted that the ALH board’s view about the post-bid ALH share price was material information which should have been included in the target’s statement, given the ALH board’s recommended rejection of Bruandwo’s offer and the trading price of ALH shares prior to the announcement of Bruandwo’s bid.  KPMG’s independent expert report includes statements (at page 6) regarding the prospect of the ALH share price falling in the event that Bruandwo’s offer lapses. The Panel notes that Bruandwo has emphasised these statements in its own public releases following the dispatch of ALH’s target’s statement.  Given KPMG’s stated view and the absence of any marked change in ALH’s affairs, the Panel does not think that it is necessary for ALH to make any prediction regarding the future market price of ALH shares in the event that Bruandwo’s bid lapses and there is no counter-bid.  **(e) Decision**  The Panel considered that ALH’s further disclosure in its supplementary target’s statement addressed the only issues raised in Bruandwo’s application on which it might have decided to conduct proceedings.  Accordingly, under Regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default), the Panel decided not to conduct proceedings on the application.  The sitting Panel was Elizabeth Alexander (sitting President), Jennifer Seabrook (sitting Deputy President) and Professor Ian Ramsay. |
| **5. Recent Corporate Law Decisions** |
| **5.1 ASIC’s examination and production powers continue after commencement of proceedings** (By Nicholas Bagot, Mallesons Stephen Jaques)  Australian Securities and Investments Commission v Elm Financial Services Pty Ltd, [2004] NSWSC 859, New South Wales Supreme Court, Austin J, 16 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc859.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc859.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In a decision involving consideration of the availability of ASIC’s investigatory powers after commencement of a proceeding relating to the same subject matter, the New South Wales Supreme Court (Austin J) held that:           ASIC’s investigatory powers of examination and production continue to operate notwithstanding that a proceeding has been commenced by ASIC; and          on the facts before the court, there were no other considerations of fairness to the defendants in the proceeding (or contempt of court) which would justify the court’s intervention to restrict use by ASIC of its investigatory powers after commencement of the proceeding.  **(b) Facts**  In May 2003, the Australian Securities and Investments Commission (“ASIC”) commenced an investigation into possible breaches of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Corporations Act”) relating to certain financial products promoted or managed by Elm Financial Services Pty Ltd (“Elm”) and certain associated companies.  After commencing the investigation, ASIC decided to commence proceedings against Elm and its associated companies and certain of their directors in relation to the financial products the subject of the investigation, seeking orders for the winding up of the corporate defendants, and the disqualification of the individual defendants from managing any corporation.  ASIC continued its investigation after the proceeding had been commenced. ASIC issued a notice under s 19 of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (“ASIC Act”) for the examination of a Mr Terence Stokes, a person who was thought to be in possession of information relevant to the investigation. Mr Stokes was not a defendant in the proceeding commenced by ASIC. ASIC also issued a notice under s 32A to Elm requiring production of certain documents.  The solicitors for the defendants subsequently sought undertakings from ASIC that any information obtained in the continuing investigation would not be used against the defendants in the proceeding. ASIC declined to give the undertaking and certain of the defendants thereupon applied to the court seeking orders to prevent ASIC enforcing the notices under ss 19 and 32A or issuing further notices under s 19 in relation to other individuals (who again were not defendants in the proceeding).  The defendants argued that:          the subject matter of the notices issued by ASIC in its investigation overlapped directly with the subject matter of the proceeding and that ASIC was pursuing the notices for the purpose of obtaining material to assist in the proceeding;          obtaining information by enforcement of the notices would have the effect of giving ASIC an unfair advantage not available to it by the normal procedures of court;          the use of ss 19 and 32A is spent once a proceeding has been commenced for a declaration of a contravention of a civil penalty provision; and          the notices constitute an improper exercise of ASIC’s investigative powers in circumstances where ASIC has already instituted a proceeding against the defendants.  In response, ASIC argued that:           in this case, on the facts, neither of the defendants pursuing the application had any right or privilege that could excuse compliance with the notices by the persons to whom they were addressed;          the operation of ss 19 and 32A are not restricted by their express terms and there is no statutory or general law principle that impliedly restricted ASIC’s powers so that they ceased to be available against anyone as soon as a proceeding was commenced;           ASIC was not seeking an advantage beyond that which would be available to it under the normal procedures of the court because it could issue a subpoena or notice to produce on the first defendant and could then obtain access to the same documents and make the same use of them against all defendants; and          there was no risk to the proper administration of justice in the proceeding merely because ASIC, in the course of its wider investigation, obtains information from non-parties which may be relevant to the proceeding.  **(c) Decision**  Austin J, dismissing the defendants’ application, held that the body of statutory materials and case law referred to by the parties supports the conclusion that there was no proper basis for preventing ASIC from continuing with its investigation, notwithstanding that ASIC had commenced the proceeding.  There are two questions to be considered:           whether the statutory provision conferring the investigatory power, on a proper construction of the legislation, continues after the commencement of a proceeding;           whether the use or the purported use of those investigatory powers constitutes a contempt of court if invoked after commencement of a proceeding.  **(i) Construction of legislation granting investigatory power**           Sections 19 and 32A of the ASIC Act may be used across a broad range of regulatory circumstances, not necessarily related to the commencement of legal proceedings. On a proper construction of the legislation, the investigatory powers conferred on ASIC by ss 19 and 32A are not extinguished simply because a legal proceeding has been commenced.          Unlike statutory powers considered in some of the earlier cases which were held to be spent on the commencement of a proceeding, ss 19 and 32A are not conditioned on the existence of a belief from the repository of the power that some form of offence or breach had been committed under the relevant legislation. Sections 19 and 32A are part of a more detailed and comprehensive investigatory regime rather than a statutory power of investigation available prior to the commencement of proceedings.          If ASIC had directed its investigatory powers to a person who was a defendant in a prosecution or civil penalty proceeding already underway, the court may arrive at a different conclusion in light of the principle that Parliament should not be regarded, except by express words, to have abrogated the privilege against self incrimination.          However, there is nothing in the cases, and no principle which can be discerned from them, that would justify reading down the plain words of s 19 so as to prevent it from being used against a person other than the defendant in a civil penalty proceeding, just because a civil penalty proceeding has been commenced. The same analysis applies to s 32A.  **(ii) Misuse of investigatory powers and contempt of court**           There was no evidence before the court to support a finding that ASIC wishes to continue its investigation for the dominant purpose of gathering evidence to be used against the defendants in the proceeding, or for any purpose of gaining an advantage in respect of the proceeding that would not be available to it under the rules of court.          The fact that a substantial amount of information gathered in ASIC’s further investigation will be relevant to the proceeding and may be used as evidence against any one or more of the defendants does not itself mean that the continuation of the investigation will amount to a misuse of the statutory powers or a contempt of court.          In relation to s 19, the fact that ASIC will be able, by continuing the investigation, to interrogate the examinees under compulsion is simply a consequence of the continued availability of the statutory powers under s 19, and it is not the kind of advantage that the cases have in mind to grant intervention by the courts of use of such power.          So far as the s 32A notice is concerned, there is no advantage to ASIC which would not have been available under the court’s rules because Elm (being a corporation) cannot claim the benefit of any privilege against exposure to a penalty.          There was no other consideration of procedural or other fairness which should lead the court to prevent the continuation of the investigation. In this case, there is no unfairness of the kind that would justify the court’s intervention.  **5.2 Discovery: Privilege against exposure to penalties - civil penalties - disqualification from managing a corporation** (ByMichelle Dean, Mallesons Stephen Jaques)  Rich v Australian Securities and Investments Commission [2004] HCA 42, High Court of Australia, Chief Justice Gleeson and Justices McHugh, Gummow, Kirby, Hayne, Callinan and Heydon, 9 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/high/2004/april/2004hca42.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2004/april/2004hca42.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In the context of proceedings already on foot, ASIC brought an application seeking discovery. The appellants objected to the application on the basis that the proceedings, brought pursuant to the civil penalty provisions of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), exposed them to penalties.  The High Court allowed the appeal, holding that the New South Wales Supreme Court should have refused any order for discovery on the basis that the disqualification orders of the civil penalty provisions exposed the appellants to penalties.  **(b) Facts**  ASIC brought proceedings against former directors of One.Tel Ltd, seeking:           declarations of contravention under section 1317E of the Corporations Act 2001;          compensation orders pursuant to section 1317H(1) of the Corporations Act 2001; and          orders pursuant to sections 206C and 206E disqualifying the former directors from managing a corporation for a certain period.  In the context of that action, ASIC bought an application seeking orders for discovery against the former directors. The appellants refused the application on the basis that the proceedings exposed them to penalties.  **(c) Decision**  The majority of the Court held that the nature of the relief afforded by the relevant sections of the Corporations Act 2001 was penal.  While the description of the provisions as “civil penalty provisions” was inconclusive, focusing on the content of the privilege against exposure to penalties, the Court examined the meaning of “penalty”, noting that the meaning was not confined to monetary exactions and was wide enough to encompass examples such as loss of civil status consequent on bankruptcy and exposure to loss of office as a member of the police force.  The majority of the Court examined the Commission’s authority to institute proceedings and the inter-relationship between the relevant provisions of the Corporations Act 2001.  The Court took into account the facts that the order was sought by a regulatory authority, its grant would be founded on a demonstrable contravention of the law and it would lead to vacation of existing offices and imposition of a continuing disability. These consequences, inflicted on account of a defendant’s wrongdoing, were able to be characterised as penalties and the test was therefore satisfied - the proper course was to refuse an order for discovery.  In a separate judgment, McHugh J also considered whether the provisions were punitive or protective - he held that the factors which the Court takes into account when ordering disqualification under the corporations legislation make it impossible to hold that the civil penalty provisions and, in particular, the disqualification provisions, are purely protective in nature (the majority of the Court considered that the protective/pecuniary distinction detracted from the real test).  In a dissenting judgment, Kirby J held that since the provisions were enacted in the wider context of national and global corporate governance compliance, they were intrinsically regulatory rather than penal, and as the Court had a duty to interpret the Corporations Act 2001 according to its true meaning, the appeal should be dismissed.  **5.3 Former One.Tel Chairman negotiates settlement with ASIC** (By Tiffany Davy, Clayton Utz, Sydney)  ASIC v Rich [2004] NSWSC 836, New South Wales Supreme Court, White J, 9 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc836.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc836.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Following the collapse of the telecommunications group One.Tel in May 2001, ASIC commenced proceedings against four officers of the corporation for breaches of their directors' duties. ASIC sought orders that the former officers be disqualified from managing a corporation and compensation for the reduction in value of the company prior to its collapse.  Mr Greaves, the former Chairman of One.Tel and a chartered accountant, sought to have the claim against him struck out on the grounds that the duties of a chairman were not as extensive as ASIC alleged. He was unsuccessful (ASIC v Rich (2003) 21 ACLC 672).  ASIC and Mr Greaves subsequently negotiated a settlement and sought to have the terms of the agreed settlement confirmed by the Court under sections 1317E and 1317F of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  **(b) Facts**  Mr Greaves was the non-executive chairman of the One.Tel Group from May 1995 until 31 December 1995 and from 25 July 1997 until his resignation on 30 March 2001.  Under the agreement with ASIC, Mr Greaves admitted that he had contravened section 180(1) of the Corporations Law by, amongst other things, failing to take reasonable steps to monitor and manage the financial position and performance of the One.Tel Group and failing to recommend that the Group cease trading or appoint an administrator.  Section 1317E contains the list of civil penalty provisions. If the Court is satisfied that a person has contravened section 180(1) (or the other listed provisions), the Court must make a declaration of contravention. Once the declaration has been made, a pecuniary penalty order (section 1317G) or a disqualification order (section 206) can be sought by ASIC.  As a result of the agreement with Mr Greaves, ASIC applied to the Court for five declarations of contravention under section 1317E and the disqualification of Mr Greaves for a period of four years. ASIC also sought an order under section 1317H that Mr Greaves pay compensation to One.Tel Limited in the sum of $20million and ASIC's costs.  **(c) Decision**  In addressing the application for the declarations of contravention, White J followed the principle in Williams v Powell [1894] WN (Eng) 141that the Court does not make declarations relating to public rights (or rights which are analogous thereto) by consent or admissions, but only if satisfied by evidence. Having regard to the disqualification order which might follow the declaration, his Honour concluded that the present case involved public or other analogous rights. He therefore went on to examine the evidence of the conduct and omissions of Mr Greaves said to have constituted contraventions of the Act.  His Honour held that the material a Court may have regard to in determining whether there has been a contravention may include a statement of agreed facts and admissions by the parties. The Court also relied upon the reports of three experts - a forensic accountant who reviewed the financial position of the Group and two experienced public company directors who detailed the duties performed by chairmen of listed public companies. The directors made particular reference to the obligation to ensure that boards are kept fully informed of material financial information.  His Honour found that financial information provided to the One.Tel board during the relevant period had been limited and inaccurate in two particular respects: the statements of cash balances and the omission of data on the aging of debtors. It was not suggested that Mr Greaves was aware of these deficiencies, but he admitted that he had not taken reasonable steps to ensure that the information provided to the Board was accurate and adequate. Therefore, he had, by omission, breached his duty under section 180(1) of the Corporations Law to exercise his powers and discharge his duties with the requisite degree of care and diligence.  His Honour went on to assess whether, where the conduct which constituted the contravention was by omission, the declaration must specify the particular acts which the contravening person should have taken in order to discharge their duties. He determined that such steps were unnecessary. However, the declarations must be "self contained and intelligible", making reference to all necessary information without recourse to extrinsic material.  Finally, his Honour examined the order for disqualification sought by ASIC pursuant to section 206E. It was submitted that the approach in determining the appropriateness of a disqualification period agreed to by the parties ought to be the same as that taken in relation to pecuniary penalties in NW Frozen Food Pty Ltd v ACCC (1996) 71 FCR 285 at 290-1. Despite the difference in subject matter and legislation, his Honour agreed that the Federal Court's approach was appropriate. In consideration of the wording of section 206E, his Honour held the Court will not rubber stamp orders for disqualification which are sought by consent, as the Court must be satisfied that the "disqualification is justified" and that the consent of the parties does not equate to justification.  His Honour examined whether the four year period of disqualification was in the appropriate range for a contravention and would satisfy the concerns of general and specific deterrence and the protection of investors. His Honour found that other than the period between January and March 2001 Mr Greaves had not failed to honour his responsibilities as a director. He further found that Mr Greaves did not act for personal gain and that the contraventions were not advertent. Mr Greaves demonstrated appropriate contrition and regret for the losses suffered by the creditors of One.Tel. However, the breaches were serious and the losses were great, and in such circumstances his Honour considered that disqualification was justified and the agreed period was appropriate.  Mr Greaves is therefore subject to a disqualification period of four years and is liable to pay $20 million in compensation to One.Tel and ASIC's costs of the proceedings.  **5.4 The scope of shareholder examinations of company books** (By Georgina Johnson, Clayton Utz, Brisbane)  Majestic Resources NL v Caveat Pty Ltd [2004] WASCA 201, Supreme Court of Western Australia, Court of Appeal, Malcolm CJ, Templeman J and Wheeler J, 3 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/september/2004wasca201.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/september/2004wasca201.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The exercise of the Court's discretion in determining whether to grant an order to inspect books of a company pursuant to section 247A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires the Court to consider not only whether it is appropriate to make an order for inspection but also the width of such an order for inspection and therefore to consider which of the books of the company should be made available.  **(b) Facts**  Caveat Pty Ltd ("Caveat"), a shareholder in the appellant, Majestic Resources NL ("the Company"), was concerned about a number of the Company's transactions.   * The Company declined Caveat's request for information about the transactions. Caveat then brought an application under section 237 and section 247A of the Act seeking leave to commence proceedings in the Company's name against present and former directors and to inspect the books and records of the Company. The Company opposed the application on the basis that Caveat was acting in bad faith or for an improper purpose. Among other things, the Company submitted that the width of the list of documents sought by Caveat was itself an indication of a lack of good faith. * At first instance, Master Sanderson noted that the list of documents sought by Caveat was extensive. However, he held that section 247A does not give the Court the power to limit what books of the company are to be available for inspection if an application is successful. * Master Sanderson found that the application had been brought in good faith and for a proper purpose and made an order allowing inspection under section 247A. Curiously, despite his view of the inability of the Court to limit the books a successful applicant could inspect, the Master made an order for Caveat to inspect the documents specified in its list, not all the documents of the Company.   The Company appealed. The appeal turned on the correctness or otherwise of the Master's finding that a successful applicant would be entitled to inspect all the books and records of the subject company, the Court having no power to narrow or restrict that inspection. That finding had led to the Master's view that the width of inspection sought by an applicant was irrelevant to the exercise of the Court's discretion whether to make an order for inspection.  **(b) Full Court decision**  The Full Court allowed the appeal.  It held that the exercise of the Court's discretion to grant an order for inspection of a company's books under section 247A requires the Court to consider not only whether it is appropriate to make such an order but also to consider which of the books of the company should be made available (Acehill Investments Pty Ltd v Incitec Ltd [2002] SASC 244 followed).  The width of the inspection sought by Caveat was a relevant consideration and should have been taken into account by the Master in the exercise of his discretion under section 247A.  The Full Court had power to exercise the discretion specified in section 247A afresh by virtue of Order 63 rule 2(1) of the [Rules of the Supreme Court](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=16410" \t "default), which states that all appeals to the Full Court whether from a Judge or a Master are by way of rehearing. However, the Court declined to follow that course and remitted the matter back to the Master for further consideration on the basis that:           it was impossible for the Court to know to what extent (if at all) the Master's decision would have been influenced by the width of the orders sought, had the Master taken that into account; and           it was almost two years since the Master's decision, and since that time the Company's circumstances had changed significantly and the Company wished to adduce further evidence. It was evident that a new hearing was necessary and the Court believed it more appropriate that matters of this kind be heard by the Masters.   * **5.5** **Diversion of corporate opportunities** (By Peter Hulbert, Blake Dawson Waldron)   Dwyer v Lippiatt; Re: Backpackers R Us.Com Pty Ltd [2004] QSC 281, Supreme Court of Queensland, White J, 3 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/september/2004qsc281.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/september/2004qsc281.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case involved two proceedings – the "partnership proceedings" and the "oppression proceedings", surrounding the business of Backpackers R Us.Com Pty Ltd ("Backbackers"), a company established by two couples to produce and market various discount cards to backpackers.  In the partnership proceedings White J found insufficient evidence to support the existence of a partnership said to have been established verbally between the couples in respect of all business developed by either couple outside the core business of Backpackers.  In the oppression proceedings, Mrs Dwyer brought an action for the winding up of Backpackers based on allegations that Mr Kirk, an officer of the company, had diverted contracts away from Backpackers for his own profit. White J adopted an approach of first determining the scope of the fiduciary duty in the circumstances, and then determining whether there was a sufficient causal and temporal connection between the duty and the opportunity taken by the officer to establish a breach of fiduciary duty. White J found that Mr Kirk had breached his duty to direct the contracts to Backpackers and ordered that Ms Lippiatt purchase Mrs Dwyer's shares in the company for a value to be determined at a later stage, possibly by treating Mr Kirk's profits as if made by a wholly-owned subsidiary of Backpackers.  **(b) Facts**  **(i) Establishment of the business**  Around mid 2001 Mr Kirk established a business of providing discount cards to backpackers called globalexplorers.com. Around that time Mr Kirk and Ms Lippiatt, who were a de facto couple, befriended Mr and Mrs Dwyer, and Mr Dwyer became convinced that the two couples could make a successful business of globalexplorers.com. The couples changed the website name to BackpackersRUs.com.au and added a telephone card feature. In early 2002 Mr Kirk and Mr Dwyer gave a presentation on the card to senior executives at Optus, and Mr Kirk later executed a letter of understanding with an Optus affiliate for two business proposals on behalf of "Backpackers".  **(ii) Formation of the company / partnership**  Having worked on the business from home for some time, Mrs Dwyer became anxious to formalise her interest in the venture. The two couples formed Backpackers R Us.com Pty Ltd, and the original directors were Mrs Dwyer and Ms Lipiatt (Mr Kirk was a bankrupt at the time). Mrs Dwyer held 18% of the shares, and Ms Lippiatt held 82%. The couples agreed that profits would be distributed by way of dividends in proportion to the shareholdings and control would be similarly split, although Mrs Dwyer later complained of an unfair distribution of income and lack of managerial control.  The Dwyers alleged that the two couples had verbally agreed that the operations of Backpackers were to be confined to the sale of discount cards and that any business or corporate opportunity which was outside the company's core business was to be the subject of a joint venture on the basis of a 50-50 split between the two couples.  Mr Morrissey, a chartered accountant who advised the couples on the incorporation of Backpackers, gave convincing evidence that no mention of a further partnership arrangement between the couples about non-core business had ever been raised with him.  **(iii) The Optus contracts**  Some time in early to mid 2002 Mr Kirk contacted Optus to discuss potential contracts to distribute Optus products door-to-door and by telephone. Mr Kirk discussed the desire for Optus contracts in the context of the Backpackers business, and Mr Dwyer said that doing work for Optus was discussed by all at Backpackers.  During 2002 Mr Dwyer prepared various powerpoint presentations which Mr Kirk presented to Optus. The presentations were based around "Blue Marble Unlimited", a business name registered by the company as the brand for its distribution arm, and referred to Backpackers R Us and certain expertise held by people in the Backpackers team, including Mrs Dwyer. Mr Kirk said that these presentations were prepared by Mr Dwyer strictly as a friend, and not as a part of the broader Backpackers business.  On 20 November 2002 Mr Dwyer's company, Avoncare Pty Ltd, executed a Small Business Outbound Marketing Agreement with Optus. After terminating that contract in early 2003, Optus offered Avoncare a new agreement in respect of telephone marketing and in July 2003 Optus and Avoncare entered into an agreement for the indirect selling of mobile phones.  **(c) Decision**  **(i) Was there a partnership agreement?**  White J found insufficient evidence to establish an oral agreement between the parties to share the profits of any future business opportunity. No agreement was ever reduced to paper, which conflicted with Mrs Dwyer's insistence that the couples form a company to formalise their business relationship. The company's accountant gave evidence that he had not been informed of any such arrangement.  White J raised the authority of Mason, Brennan and Deane JJ in United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1, who stated that a fiduciary relationship can arise even where the parties have not reached agreement on the consensual terms which are to govern the arrangement between them. However, their Honours in that case referred to a situation where the partners have embarked on the conduct of a venture (at page 12) "before the precise terms of any relationship have been settled". Here, no terms other than the 50-50 split were said to have been discussed. Accordingly, even if White J had accepted the evidence of partnership discussions, the arrangement was far too vague to have legally binding consequences.  **(ii) Ought the Optus contracts have been offered to Backpackers?**  White J found Mr Kirk to be an officer of Backpackers within the definition in section 9 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and accordingly he owed it a fiduciary duty encompassing loyalty, good faith and the avoidance of conflict of duty and self interest.  White J then discussed the authorities dealing with diversion of corporate opportunities, including the factors enumerated by Laskin J of the Supreme Court of Canada in Canadian Aero Services Ltd v O'Malley (1973) 40 DLR (3rd) 371 at 392. Those factors include the office held, the nature of the opportunity, its ripeness, its specificness and the officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained, whether the knowledge was special or private, the factor of time where the alleged breach has occurred after the termination of the officer's relationship with the company and in that case, the circumstances in which the relationship was terminated.  White J also referred to the judgement of Cooper J in the Federal Court in SEA Food International Pty Ltd v Lam & Anor; Megamix Pty Ltd v SEA Food International Pty Ltd (27 February 1998, BC 9800437). In that case Cooper J stated a director (or officer) will act in breach of his or her fiduciary obligations if he or she takes an opportunity for profit where there is a sufficient temporal or causal connection between the obligations and the opportunity. Cooper J also stated that the starting point is to determine the scope of the fiduciary obligations in the circumstances and to identify the conduct (or failure to act) which is said to amount to a failure to discharge those obligations (citing Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 73, 102).  White J found that Mr Kirk had not made it clear to Mr Dwyer that his pursuit of the Optus contracts was for himself alone, and thought it unlikely at best that Mr Dwyer would have carried out tasks for Mr Kirk's personal profit. White J considered that Mr Kirk's use of the company name, its marketing name and its personnel to his own advantage satisfied the causal and temporal connection between his fiduciary obligations and the opportunities which he took for himself.  In respect of the subsequent Optus contracts, White J found that Mr Kirk was not entitled to take these up for himself (even though the Dwyers had left Backpackers by that time) because the subject matter of the contracts was not sufficiently different from the original agreements.  **(iii) Was there oppression?**  White J stated that the diversion of a profitable undertaking to the detriment of a member and the benefit of another member may be oppressive. His Honour also found that none of the other conduct by Ms Lippiatt or Mr Kirk of which Mrs Dwyer complained could be characterised as oppressive, commenting that the alleged exclusion of Mrs Dwyer from decision making was a product of her own personality as was her leaving the company.  **(iv) Orders**  White J found no reason to wind-up the company and instead made orders that Ms Lippiatt purchase Mrs Dwyers shares for an amount to be determined by later valuation. White J considered that it may be appropriate to proceed by treating the profits made by Mr Kirk in breach of his duty as if made by a wholly-owned subsidiary of the company, an approach adopted by the Full Court of the Supreme Court of Victoria in Re Bright Pine Mills.  **5.6 Shareholder's claim for the loss of value of his shareholding** (By Niti Gupta, Blake Dawson Waldron)  Thomas v D'Arcy [2004] QSC 260, Supreme Court of Queensland, Douglas J, 18 August 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/august/2004qsc260.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/august/2004qsc260.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case concerned claims made by the plaintiff, Mr Thomas, against his former solicitors, seeking damages for an alleged breach of retainer and breach of duty through the provision of negligent advice and services in the early 1990s. The defendants sought to strike out certain parts of the pleading that claimed the loss of value of Thomas' shareholding in two companies, on the basis that this was not a loss separate and distinct from that of the companies, and also sought orders in respect of the disclosure of certain documents.  The court held that the loss pleaded by Thomas could not be pleaded as it merely reflected the loss of the companies. The companies had the right to claim such a loss and could have brought an action to do so.  The court further held Thomas should swear an affidavit outlining the circumstances in which certain documents either ceased to exist, or passed out of his possession or control.  **(b) Facts**  The plaintiff, Thomas, owned 50% of the shares in Movado Pty Ltd ("Movado") (a mobile phone business which in turned owned all of the shares in the Carphone Company of Great Britain Pty Ltd) and 50% of the shares in Meadowbury Pty Ltd ("Meadowbury"). Thomas retained the defendant solicitors in 1987 to provide advice in relation to the management of those interests and his personal affairs.  Both companies were lent money by the National Australia Bank in 1989 and 1990, in return for which the bank took mortgages and company charges over the assets and undertaking of each company and over real property owned by Thomas and Movado as trustee. The bank called in its securities on 8 June 1990 and appointed Mr Ebbage of Arthur Andersen as agent to recover the amounts owed to it. Ebbage sold the assets of the companies and the other mortgaged properties, at what Thomas claims was a significant undervalue, thus constituting a breach of the duties owed to him and to the companies by Ebbage.  Thomas further claimed that he regularly consulted with the defendants as to what could be done to prevent the sale occurring at an undervalue and to delay, until last, the sale of real property owned by himself. He then alleged that the advice he had received from the defendants was negligent because it did not advise him of the immediate action he could have taken to seek to prevent the sale. He alleged that he suffered loss and damage in that, but for the defendants' failure to ensure the bank and/or Ebbage acted in good faith and took reasonable care to sell the assets at market value, he could have retained, among other things, all or part of the value of his shareholding in Movado and Meadowbury.  This judgment centred around two issues:           a strike-out application by the defendants in respect of those parts of the pleading that claimed the loss of value of Thomas' shareholding in the two companies on the basis that it was a claim that should have been brought by the companies themselves rather than by a shareholder; and          orders sought by the defendants, requiring Thomas to swear an affidavit stating the circumstances in which documents from a file (File 15054), which were not disclosed, including a memorandum of advice from the defendant solicitors, ceased to exist or passed out of Thomas' possession or control, as well as further orders in respect of other documents and/or files.  **(c) Decision**  **(i) Strike out application**  The first part of the decision dealt with the defendants' strike out application.  Douglas J stated that the relevant question was whether the loss pleaded could be characterised as a loss "separate and distinct" from that suffered by the companies, caused by breach of a duty independently owed to the shareholder, or whether it was merely a reflection of the companies' losses.  The court held that while the defendant solicitors may have owed a duty to the plaintiff separate from that which they owed to the companies, the loss pleaded was loss that would have been made good if the companies had enforced the rights they may have had against Ebbage. The companies had such rights, but sought not to enforce them.  The only loss alleged by Thomas was the decrease in the value of his shareholdings attributable to the provision of allegedly negligent advice. Such a loss was not separate from the companies' loss, but was rather merely a reflection of the companies' losses from its assets being sold allegedly at an undervalue.  The court accordingly struck out the relevant parts of the pleading.  **(ii) Disclosure of documents**  The second part of the decision discussed the orders sought by the defendant in respect of the disclosure of certain documents, including a letter from the defendant solicitors to Thomas allegedly revealing advice of a different nature from the oral advice said to have been given by them to Thomas in his amended statement of claim.  The court found that it was likely that Thomas had direct contact with the documents in File 15054 and that the absence of many of those documents, in particular the advice given by the defendants, created a circumstance requiring direct explanation from Thomas. The court accordingly held that Thomas should be required to swear an affidavit as to the circumstances in which the documents from File 15054 ceased to exist or passed out of his possession or control.  **5.7 Section 447A of the Corporations Act 2001 can be relied upon by liquidators who seek to pool assets and liabilities of companies** (By Naomi Gingold, Phillips Fox)  Dean-Willcocks re Alpha Telecom (Aust) Pty Limited [2004] NSWSC 738, New South Wales Supreme Court, Barrett J, 17 August 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc738.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc738.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The liquidators in this case wished to consolidate the assets and liabilities of two companies. They sought orders from the court to effect this consolidation despite the dissent of one creditor. This case concerned the need to find a statutory foundation upon which to base such an order. The court used the procedural requirements of section 510 by way of analogy, and, in doing so, was able to employ the wide discretionary power in section 447A. Thus, an order was made which would allow for consolidation upon unanimous consent of all members of the companies.  **(b) Facts**  Mr Dean-Wilcocks and Mr Malanos were liquidators of ACN 099 627 362 ('Alpha') and Alpha Telecom (Aust) Pty Limited ('Alpha (Aust)').  Resolutions were made at meetings of each of the companies on 30 June 2004 and 12 July 2004 that, subject to the passing of a like resolution of the members and creditors of the other company, the assets and liabilities be consolidated for the purposes of winding up.  On 19 July 2004, Barrett J directed that the objections be put in writing before the court. MC World Com Pty Ltd ('MCI'), a creditor of Alpha, was the only creditor to maintain its initial objection. MCI's central allegation was that the liquidators had not demonstrated that there would be any benefit to MCI or any other creditor resulting from the consolidation. It also disputed a claim by the liquidator that a possible area of recovery of monies was the alleged potentially voidable transaction made by Alpha Aust to MCI.  **(c) Decision**  **(i) Consolidation: possible procedural grounds**  Barrett J noted four grounds of procedural possibilities for giving effect to a consolidation, as enunciated by Young J in Dean Willcocks v Soluble Solution Hydroponics Pty Ltd [1997] 42 NSWLR 209. The possible procedures identified in that case were:           A scheme of arrangement between each company and its creditors under Part 5.1;          A compromise with creditors under section 477(1)(c) which is made applicable to voluntary winding up by section 506(1)(b);          An arrangement under section 510 between a company in the course of winding up and its creditors; and          By resort to the extensive jurisdiction created by section 447A.  Barrett J added to this list a deed of company arrangement under Division 10 of Part 5.3A.  Subsequent cases in which consolidation was approved on various statutory bases were then examined by Barrett J. He also noted the importance of unanimous consent of creditors in some of these cases (Dean Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 24 ACSR 79 and Re Charter Travel Co Ltd (1997) 25 ACSR 337).  Indeed, Barrett J then concluded that there were no statutory bases upon which the creditors could rely to establish that the majority view could bind all the creditors. He found the possibility of compromise under section 477(1)(c) and (d) was not established. He also noted that there were no steps taken under Part 5.1 to apply to the court under section 411(1), no resolutions in accordance with section 510 and no attempt to have the company become party to an appropriate deed of company arrangement under Part 5.3A.  **(ii) Can the assets of the companies be pooled together?**  Primarily, Barrett J's approach was to use the discretionary power under section 447A. While employing this broad power, he used the processes under section 510 as a framework for assessing the liquidator's claims. Section 510 allows for an arrangement to be binding on creditors and the company if a particular arrangement is passed in accordance with the requirements of that section.  Barrett J concluded that the companies in liquidation could pool their assets as long as all members unanimously consented to the consolidation. This is in contrast to section 510(1)(a) which requires a special resolution. Unanimity is required because any objection would open up the possibility of appeal as set out in section 510(4). Barrett J claimed to have reservations about employing section 447A to confer this jurisdiction on a court.  In light of this requirement of unanimity and the right of appeal under section 510(4), Barrett J examined the nature of MCI's objections. He noted that positive votes represented 75% of creditors which satisfied the level of creditor approval envisaged by section 510(1)(b). Barrett J also found that creditors were not, by material provided to them, unduly convinced to favour the consolidation. Finally, he decided that the views of the approving majority represented the interests of the creditors as a whole. In doing so, he pointed out that MCI had different interests to the other creditors. Indeed, MCI was a possible target of recovery proceedings and was a creditor of both companies. Thus, Barrett J concluded that MCI's objections could not prevent relief being granted under section 447A.  **(iii) Orders**  Barrett J made orders for each company that, pursuant to section 447A, section 446A could be modified to insert an additional subsection. The subsection provided that the terms of a resolution in relation to the consolidation of assets and winding up of both companies as a single company would be effective upon the liquidator receiving written consent of all members of both companies. The terms of the resolutions would be taken to be terms of an arrangement as mentioned in section 510(1) and neither subsection 510(1A) nor subsection s510(4) would apply.  **5.8 Creditors do not receive priority where they have incurred a liability to recover property during administration** (By Tom Evans, Phillips Fox)  Fuji Xerox Australia Pty Limited v Tolcher [2004] NSWCA 284, New South Wales Court of Appeal, Spigelman CJ, Sheller and Tobias JJA, 9 August 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswca284.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswca284.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Section 564 provides that 'in any winding up' the court may make orders giving a creditor priority in relation to particular property where the creditor has provided an indemnity or paid costs in relation to the successful recovery of that property.  Section 564 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('Act') applies to facts and matters that occur in the course of a winding-up, rather than to facts and matters that occur from the day on which the administration begins.  **(b) Facts**  This case considers the meaning of the words 'in any winding up' in section 564 of the Act. In its entirety, section 564 provides:  “Where in any winding up:  (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or  (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;  the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.”  The issue before the Court was whether or not certain expenditure incurred by the appellant ought to have been included in the computation of the amount recoverable by the application of the formula determined pursuant to section 564. The amount in question was an amount of some $103,700 which the appellant paid out to meet the operations of an administrator appointed under Pt 5.3A of the Act to investigate the affairs of the company.  At first instance, Barrett J of the NSW Supreme Court determined that the amount of $103,700 should not be incorporated into the formula for the purposes of the application of section 564. His Honour's reasons were adopted by Spigelman CJ and are outlined below.  The appellant appealed, relying on the terms of section 513B and C of Division 1A of Part 5.6 of the Act, which establish that a winding-up is deemed to commence on the day on which the administration began.  **(c) Decision**  The NSW Court of Appeal dismissed the appeal.  Spigelman CJ, with whom Sheller and Tobias JJA agreed, found that for the purposes of section 564 of the Act, the words 'in any winding up' refer to facts and matters that occur in the actual course of a winding-up, rather than to facts and matters that occur from the day on which the antecedent administration begins. Spigelman CJ adopted the reasoning of the trial judge, Barrett J, agreeing that:           The reference to 'a liquidator' in section 564(b) suggests that the period in contemplation cannot begin until there is 'a liquidator'.          The types of activity considered by section 564(a) are normally associated with a liquidator, rather than an administrator.          There is a public interest dimension in the task to be performed by a liquidator that is not evident in the functions of an administrator. A liquidator is focused on collecting the assets of the company to make them available to creditors. An administrator is focused on the carrying on of the business of the company, so that an investigation may take place and a decision can be made on the company's fate.          The legislative antecedents of section 564 applied only to activities that were performed by a liquidator. There is no evidence of a legislative intention to extend that application.  Spigelman CJ also found that:           There is a clear distinction in the authorities between the date that administration commences and the date that liquidation commences.          The authorities also establish that the same words may have different meanings in different sections of the Act, depending on their context. The words 'winding up' denote a different period of time in section 564 to that defined in sections 513B and C. |
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