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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Governance and fund management: survey**Ninety-five per cent of respondents to a global survey published on 15 February 2007 believe that the adoption of sound governance practices in fund management is important or very important for retaining investors' trust.Interviews were conducted with investment fund executives from 192 companies in 25 countries, including Australia. The survey was undertaken by KPMG International and CREATE.The mutual fund scandals in the US including market timing and late trading gave rise to the perception that many fund managers did not have sound practices in their own businesses at a time when they were becoming more involved in the governance of companies in which they invest. Quite independently, market evolution forced a re-evaluation of business practices as businesses have become more global, products more complex and the value chain more fragmented. It has become increasingly difficult and expensive for fund managers to ensure compliance with the growing mountain of detailed regulation applicable across the globe. The study showed that although processes and controls (so-called 'tick-box compliance') remain important, fund managers are also turning to cultural (92 per cent) and behavioural (92 per cent) initiatives to reinforce good business governance on a global basis. This was particularly marked in North America and Asia Pacific where relatively high levels of effectiveness were recorded. The study revealed that in Asia Pacific, the main driver behind recent changes in business governance has been a desire to protect brand and the implementation of risk controls. Regulatory pressures and the mutual fund scandals in the US have been important but were secondary factors. In the future, rising client education and a drive towards full transparency in performance and charges are expected to lead to further changes to business governance globally. In the Asia Pacific region, the study found better governance has been implemented not just to meet regulatory requirements but also to meet client needs. In Australia, the experience is that more organisations are embedding good governance in their culture rather than just following requirements. As such the net impact of business governance has had a more positive effect in Asia Pacific than in North America or Europe with the positives outweighing the negatives by 11 per cent.The study revealed that some of the key benefits of these initiatives on business performance in Asia Pacific have been: improvements in brand image (65 per cent), client service (59 per cent), fund managers' relationships with regulators (56 per cent), client retention (56 per cent) and investment performance (53 per cent). Further information is available on the [KPMG](http://www.kpmg.com.au/Default.aspx?TabID=214&KPMGArticleItemID=2377" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.2 Introduction of Bill to amend takeovers law** On 14 February 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce, introduced the [Corporations Amendment (Takeovers) Bill 2007](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=94675" \t "_default) into Parliament.The Bill responds to concerns, arising from the recent court cases between Glencore and the Takeovers Panel, that the Panel might not have the powers it needs to perform its role effectively. The Bill implements legislative amendments to the provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) that relate to the Takeovers Panel (the Panel). It is designed to allow the Panel to continue to act in an effective, efficient and expeditious manner, as the primary forum for resolving disputes during takeover bid periods, relying on the specialist expertise of its members, so that the outcome of any takeover bid can be resolved by the target shareholders on the basis of its commercial merits.The fundamental objective underlying the takeovers law is to ensure that the purposes set out in section 602 of the Act are achieved, and in particular that the acquisition of control over the voting shares or voting interests in companies ('companies' here includes listed bodies and listed managed investment schemes) takes place in an efficient, competitive and informed market. The Panel requires broad and flexible powers to perform the role envisaged for it, which includes being 'the main forum for resolving disputes about a takeover bid until the bid period has ended' in accordance with those principles. Two decisions relating to the Panel, Glencore International AG v Takeovers Panel [2005] FCA 1290 and Glencore International AG v Takeovers Panel [2006] FCA 274 (the Glencore cases), have interpreted the limits of the jurisdiction of the Panel, as set out in the current legislation. As a result of those cases, concerns were raised that it may be open to read the Panel’s powers and jurisdiction in the current legislation in a way that is too narrowly formulated to enable the Panel to perform effectively the role envisaged for it by Parliament.In particular there were concerns that: * the interpretation of the term 'substantial interest' in the decisions, based on existing defined provisions, may prevent the Panel from being able to deal with new and developing interests and tactics in relation to takeovers;
* the Panel may not be able to act to prevent the effects of unacceptable circumstances (even if clearly apprehended), but rather, may need to wait until those effects, and the consequent harm, have actually occurred;
* the Panel may not be able to address all the circumstances which impair or affect the efficient, competitive and informed market for control of voting securities in companies; and
* under the interpretation set out in the Glencore cases, the Panel's power to make orders to protect the rights or interests of persons affected by unacceptable circumstances may be too confined, with the result that the Panel may not be able to properly address the effects that the circumstances have on the interests of those persons.

The Corporations Amendment (Takeovers) Bill 2007 responds to those concerns and also addresses concerns about the limits of the orders the Panel can make and the time-limit for concluding a review of a Panel decision.The Bill and the Explanatory Memorandum are available at the [Parliament of Australia](http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=Legislation%20%3E%20Current%20Bills%20by%20Title" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.3 CAMAC to examine the Sons of Gwalia ruling**On 7 February 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce, announced that he has referred issues arising from the High Court decision in Sons of Gwalia Ltd v Margaretic (the Sons of Gwalia case) to the Corporations and Markets Advisory Committee (CAMAC) for consideration and advice. The High Court decision in the Sons of Gwalia case has reinterpreted a longstanding provision of the law, making it easier for shareholders to recover funds in circumstances where they acquired shares as a result of misleading conduct prior to a company becoming insolvent. The High Court decision is discussed in greater detail in item 5.1 of this Bulletin.In its judgment, the High Court noted that the new treatment of shareholder claims would reinforce a range of investor protection measures that have been introduced in recent years. However, allowing shareholders enhanced rights to participate in insolvency proceedings may complicate these proceedings in some cases.CAMAC is a statutory advisory committee that was established to provide advice to the Australian Government on corporations' and financial markets' law and practice. The Parliamentary Secretary has requested that CAMAC examine three issues:1. Should shareholders who acquired shares as a result of misleading conduct by a company prior to its insolvency be able to participate in an insolvency proceeding as an unsecured creditor for any debt that may arise out of that misleading conduct? 2. If so, are there any reforms to the statutory scheme that would facilitate the efficient administration of insolvency proceedings in the presence of such claims?3. If not, are there any reforms to the statutory scheme that would better protect shareholders from the risk that they may acquire shares on the basis of misleading information?http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.4 IAIS establishes insurers' corporate governance task force** On 14 February 2007, the International Association of Insurance Supervisors (IAIS) announced a new corporate governance task force. The IAIS already has corporate governance as a major part of its framework for supervision and has specific requirements for insurers within its overall principles and standards, but the task force is needed to review these existing requirements. Good governance practices – including sound risk management and decision-making processes – are a key component of insurance supervision which supervisors expect all insurers to have in place. Effective corporate governance allows the supervisor to place reliance on the work performed by boards of directors, senior management, external auditors and actuaries. In so doing, the supervisory process operates more effectively, facilitating the stability of the insurance industry and hence confidence in the broader financial system and financial stability. The work of the task force will focus on those aspects of corporate governance which are specifically relevant for regulation and supervision of insurers and reinsurers. A particular emphasis will be on the protection of policyholders' interests. Further information is available on the [IAIS](http://www.iaisweb.org/%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.5 Credit rating agencies – IOSCO reports good progress in adoption of Code of Conduct** On 14 February 2007, the International Organisation of Securities Commissions (IOSCO) announced significant progress in the adoption of its Code of Conduct for Credit Ratings Agencies (CRAs). This is outlined in a "Consultation Paper" on the IOSCO CRA Code, which IOSCO has published.In the Consultation Paper, it is revealed that any variations from the IOSCO Code are usually noted and adequately explained by the CRA. Nevertheless, IOSCO has noted that in specific areas, there is still room for improvement. Accordingly, it has undertaken to continue to monitor progress in the adoption of the Code as well as new developments in the market that may require revising the Code in the future.In order to achieve further progress, IOSCO believes that additional efforts need to be made to promote the IOSCO Code among small and mid-sized CRAs. It is noted that adoption of the Code could improve the competitiveness of this segment of the market. Accordingly, it is important that a greater number of small and mid-sized CRAs be encouraged to adopt the Code.The IOSCO Code which was published in December 2004 includes a set of provisions designed to assist investors and enhance market efficiency by improving the transparency by which CRAs decide ratings and guardagainst conflicts of interest as well as other factors that might influence the analysis carried out by a CRA.IOSCO believes the Code is equally relevant to all types of CRAs, regardless of the business or analytical model. IOSCO invites submissions on the Consultation Paper. The closing date is 11 May 2007.Further information is available on the [IOSCO](http://www.iosco.org/news/pdf/IOSCONEWS100.pdf%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.6 ABI publishes responsible investment disclosure guidelines** On 1 February 2007, the Association of British Insurers (ABI) published its Responsible Investment Disclosure Guidelines. These update and replace the Socially Responsible Investment (SRI) guidelines, launched by the ABI in 2001, which call on board of companies to confirm that they have assessed and are managing environmental, social and governance risks. The changes to the guidelines highlight aspects of responsibility reporting on which shareholders place particular value. They also take into account new EU and UK legislation, including the Business Review.The guidelines are available on the [ABI](http://www.abi.org.uk/Members/circulars/viewAttachment.asp?EID=15636&DID=14121" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.7 Directors and investors recommend majority voting in board elections and clear links between CEO pay and performance: US report** On 31 January 2007, a panel of US corporate directors and institutional investors issued a report that supports majority voting for directors, section 404 of the 2002 Sarbanes-Oxley Act and clear links between CEO pay and performance. The report, "Looking Back, Looking Forward: Recommendations on Majority Voting, section 404, and Executive Compensation", offers best practices for companies and shareowners. The report concludes 10 months' of discussion by a joint task force of the Council of Institutional Investors (CII) and the National Association of Corporate Directors (NACD). The best practices embraced by the task force include recommendations that:* Directors who sit on corporate boards should be elected by a majority of votes cast in uncontested elections. An incumbent candidate who fails to win majority support from shareowners should be required to submit his or her resignation.
* Boards should disclose the performance targets, thresholds and peer groups they use to determine executive compensation.
* A significant portion of executive pay should be tied to company performance based on metrics that are consistent with the interests of long-term investors.
* Boards should consider seeking advisory shareowner votes annually on executive compensation.
* Shareowners and directors should support strong internal financial controls and oppose efforts to weaken section 404, which requires companies to assess the strength of their internal controls and auditors to evaluate that assessment. However, investors and boards should encourage management and auditors to find ways to make compliance more efficient for companies large and small.

Further information is available on the [NACD](http://www.nacdonline.org/nacd/pressdetail.asp?pressID=37" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.8 EU Commission inquiry finds major competition barriers in retail banking** On 31 January 2007, the European Commission (Europa) published the final report of its competition inquiry into the retail banking sector. The inquiry has found a number of competition concerns in the markets for payment cards, payment systems and retail banking products. Particular indicators are large variations in merchant and interchange fees for payment cards, barriers to entry in the markets for payment systems and credit registers, obstacles to customer mobility and product tying. Some market participants have already offered voluntary reforms following the publication of preliminary findings on payment cards in 2006 (see IP/06/496 and MEMO/06/164). The Commission will use its powers under the competition rules to tackle any serious abuses, working closely with national competition authorities. The outcome of the inquiry should boost retail banking competition in the run-up to the creation of the Single Euro Payments Area.**(a) Payment cards and payment systems** The European payment cards industry is large and provides the means for consumer payments with an overall value of €1,350 billion per year. Such payments generate an estimated €25 billion in fees annually for banks from EU firms. The Commission's inquiry found indications of several concerns:* highly concentrated markets in many Member States, particularly for payment card acquiring, may enable incumbent banks to restrict new entry and charge high card fees;
* large variations in merchant fees across the EU. For example, firms in Member States with high fees have to pay banks three or four times more of their revenue from card sales than firms in Member States with low fees;
* large variations in interchange fees between banks across the EU, which may not be passed on fully in lower fees for cardholders. The Commission is not arguing for zero interchange fees; however, their operation in some payment networks raises concerns;
* high and sustained profitability – particularly in card issuing – suggests that banks in some Member States enjoy significant market power and could impose high card fees on firms and consumers;
* rules and practices which weaken competition at the retailer level; for example blending of merchant fees and prohibition of surcharging; and
* divergent technical standards across the EU prevent many service providers from operating efficiently on a pan-EU scale.

The European banking industry – with the full support of the Commission and the European Central Bank – is working to create a Single Euro Payments Area (SEPA) to improve efficiency and lower the cost of retail payments. The sector inquiry has highlighted several market barriers that should be addressed in the SEPA context.**(b) Retail banking product markets**The EU retail banking industry generates €250-275 billion per year in gross income, equivalent to 2% of EU GDP. Markets are generally fragmented along national lines, divided by factors including competition barriers and regulatory, legal and cultural differences. The sector inquiry found indications of competition problems in several areas:* in some Member States, the conjunction of sustained high profitability, high market concentration and evidence of entry barriers raises concerns about banks' ability to influence the level of prices for consumers and small firms;
* some credit registers, holding confidential data that lenders use to set loan rates, may be used to exclude new entrants to retail banking markets;
* some aspects of cooperation among banks, including savings and cooperative banks, can reduce competition and deter market entry;
* product tying, e.g. where a loan customer is forced to buy an extra insurance or current account, is widespread in most Member States. This could reduce customer choice and increase banks' power in the market place to influence prices; and
* obstacles to customer mobility in banking – notably the inconvenience of changing a current account – are high. The inquiry's analysis suggests that banks' profit margins are lower where customers are more mobile.

The sector inquiry opened in June 2005 (see IP/05/719). Interim reports were published on payment cards in April 2006 (see IP/06/496) and current accounts and related services in July 2006 (see IP/06/999).The final report of the Commission's sector inquiry and associated documents are available on the [Europa](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.9 US board practices and board pay study** On 30 January 2007, Institutional Shareholder Services (ISS) published its 2007 Board Practices, Board Pay Study, a report that examines the board structure and compensation of boards of directors at S&P 1500 companies based on 2006 disclosures. The most significant study finding was that the proportion of S&P 500 companies with classified boards dropped dramatically by 8 percentage points. This led, for the first time, to a majority of these companies holding annual elections for all of their directors.Another key development was rising director pay, which was up 12 percent to an average of US$160,493. The recent growth in director pay stemmed from both a rise in cash pay levels and the increase in stock prices fuelling the value of equity awards. An interesting discovery was the disparity between fees paid to non-executive chairs classified as independent directors, versus those who are affiliated with the companies they serve. Extra pay reported for the former group averaged US$79,183, while the overall average for affiliated chairmen totalled US$189,852. The frequency of extra compensation for lead directors also increased as of 2006, but only by three percentage points, to 41 percent of the 812 lead directors named by the study companies. The striking trend in directors' long-term compensation was the continuing decline in the use of stock options, balanced by the increased prevalence of restricted and deferred share awards. Only 54 percent of the study companies reported granting stock options to directors, down from 58 percent the prior year and from 66 percent the year before that, and declines were seen in all three market indexes. In conjunction with this downward trend in option grants, the prevalence of restricted and/or deferred share awards jumped even more significantly, from 44 percent in 2005 to 51 percent in 2006, marking the first time since the study began in 1996 that more than half of the companies made these awards. More companies also disclosed stock ownership guidelines for non-employee board members. The proportion of study companies doing so rose to 37 percent, from 28 percent as of 2005, and is up to 56 percent at S&P 500 companies. ISS' 2007 Board Practices Board Pay Study is available for purchase on the [ISS](http://www.issproxy.com/bookstore/index.jsp%22%20%5Ct%20%22_new) website. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.10 Global pension fund assets double in ten years** Global institutional pension fund assets in the 11 major markets have more than doubled during the past ten years and now total US$23,200 billion, according to Watson Wyatt's Global Pension Assets Study released on 24 January 2007, having grown at a compound annual rate of 7.5%. The assets have also increased from 58% to 81% as a proportion of the Gross Domestic Product (GDP) of the countries included in the survey.During 2006, global pension assets grew by around 11% in local currency terms and just over 13% in US dollar terms. At the same time the global pensions balance sheet strengthened, with asset liability indicators suggesting it is in the best relative position since the end of 1999.**(a) Ten-year global asset data for the P11** Other highlights from the report include:* Most countries have at least doubled their pension fund assets in local currency terms, with Japan and Germany being exceptions;
* The US, Japan and UK, respectively, were the largest pension fund markets in 1996, and this remained the case in 2006, but with the UK making up ground on Japan;
* The US represented the largest market by some margin at the end of both 1996 and 2006, accounting for around 60% of total pension fund assets globally;
* Australia and Ireland had the highest growth rates in this period of 14.6% pa and 13.0% p.a. respectively; and
* Germany and Japan had the lowest growth rates during this period of 3.8% pa and 4.7% p.a. respectively.

**(b) Asset allocation for the P7*** From 1996 to 2006: Equity allocations grew to 60.2% from 51.6% and bond allocations reduced to 25.5% from 36.5%; and
* Other assets, especially real estate and to a lesser extent hedge funds, private equity and commodities, have shown growth in recent years.

**(c) Global liability data for the P7*** Between 1998 and 2006 the Watson Wyatt global liabilities indicator showed an increase of 37.5%, while global assets rose by 34.4%
* Between 1998 and 2002, global liabilities substantially outperformed assets, leaving weak solvency positions for most defined benefit funds, however in recent years the situation has been reversed; and
* During 2006 global defined benefit assets grew 11.1%, while liabilities showed a 5.9% growth.

**(d) Defined Benefit (DB) vs. Defined Contribution (DC) for the P7*** There has been a general switch from dB to DC during the last ten years;
* Australia has the highest proportion of DC pension assets, having increased them from 73.4% to 90.6% of overall assets between 1997 and 2006;
* In 2006, the US had the second highest proportion of assets in DC (54%), while Japan and the Netherlands only had about 1% each in DC; and
* During the nine years to the end of 2006, total DC pension fund assets grew at an average annual rate of 9.8% compared with 5.5% for dB The share of total global DC assets relative to dB grew from 34% to 42% during this period.

**(e) Trends and changes among pension funds**According to the Global Pension Assets study, pension fund investment is subject to change on an unprecedented level. It highlights six specific changes that are affecting the industry in all countries and to a material extent. Four of these changes concern investment strategy of which the most prominent is Liability Driven Investment. The others are: * Increased use of absolute return mandates and alternative assets;
* Alpha beta separation and integration;
* Beta prime innovation, capturing systematic 'alpha' effects in index form;
* Reducing dB funds' risk budgets to match with sponsor covenant and risk appetite; and
* Increasing fund power to influence pricing and product design, particularly when there is collaboration.

The P11 refers to the 11 largest pension markets included in the study which are Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Netherlands, Switzerland, the UK and the US. The P7 refers to the 7 largest pension markets and exclude Germany, France, Ireland and Hong Kong from the P11. The Global Pension Assets study is available on the [Watson Wyatt](http://www.watsonwyatt.com/research/reports.asp%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.11 Significant gaps exist between corporate governance rules and practice in East Asia: study**The formal regulatory environment and market perceptions of corporate governance practices in nine East Asian economies diverge on a number of fronts, concludes a working paper released by The Centre for International Governance Innovation (CIGI) on 23 January 2007.The paper, entitled "Scorecard on Corporate Governance in East Asia", employs two surveys to measure the perceptions of fund managers and analysts in nine East Asian economies (China, Hong Kong, Indonesia, Malaysia, the Philippines, Singapore, South Korea, Taiwan, and Thailand) against established corporate governance frameworks in the region. In particular, the study looks at progress made by these economies toward implementing the regulations established by the Pacific Economic Cooperation Council (PECC) in the aftermath of the Asian financial crisis of 1997.This study concludes that there is not a significant correlation between the rules and regulations pertaining to corporate governance in the nine economies and how corporate governance is actually seen to be practiced in each economy. Reforms that were deemed necessary by regional and international players following the major financial crisis have been enacted unevenly, leaving many initiatives for the economies to implement if they intend to strengthen their corporate governance practices. The paper is available on the [CIGI](http://www.cigionline.org/cigi/Publications/workingp/scorecar%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.12 Report on auditors' implementation of PCAOB standards relating to auditors' responsibilities with respect to fraud** On 22 January 2007, the US Public Company Accounting Oversight Board (PCAOB) issued a report that discusses auditors' implementation of PCAOB interim standards regarding the auditor’s responsibility with respect to fraud. The auditor's responsibility with respect to the detection of fraud is an important focus of the Board and has been discussed by the Board's Standing Advisory Group in past meetings. The report draws on important or recurring observations made during the Board's inspection of audit work performed by registered public accounting firms. Using those observations as a focal point, the report addresses several topics, including:* Auditor's Overall Approach to the Detection of Financial Fraud;
* Required Brainstorming Sessions and Fraud-Related Inquiries;
* Auditor's Response to Fraud Risk Factors;
* Financial Statement Misstatements; and
* Fraud Associated with Management Override of Controls.

The report is a general report under the Board's Rule 4010 and does not identify any firm or firms to which the inspection observations in the report relate. The report is available on the [PCAOB](http://www.pcaobus.org/Inspections/Other/2007/01-22_Release_2007-001.pdf%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.13 Audit quality study** On 18 January 2007, the European Federation of Accountants (FEE) published a report that studies the audit quality assurance systems and public oversight arrangements of 29 European countries, as of 1 July 2006. The two major findings are:* Firstly, a significant number of EU Member States are still considering the impact of the Statutory Audit Directive in relation to the creation of a system of public oversight and the implementation of Article 29 on quality assurance.
* Secondly, all countries surveyed except one have a system of external quality assurance in place that covers all audit firms or all statutory auditors.

The study finds that 11 EU Member States have yet to create a system of public oversight responsible for quality assurance systems as prescribed by the Statutory Audit Directive. FEE emphasises that the Directive allows for the application of different quality assurance systems in the European Union and requires mutual recognition of these different regulatory arrangements of European Member States. This reflects the principle of home country regulation and oversight by the Member State in which the statutory auditor or audit firm is approved.The Statutory Audit Directive includes provisions related to third-country auditors and audit entities and their systems of oversight, quality assurance systems and systems of investigation and penalties. Such systems may be recognised as equivalent by Member States until the European Commission decides on equivalence at an EU level. In the European Union, the Statutory Audit Directive forms the basis for such coordination with third countries. The report finds two different types of quality assurance systems generally operating in Europe. In 'monitoring reviews', quality assurance reviews are undertaken by staff employed by a review organisation. In 'monitored peer review', the review organisation organises and supervises the reviews to be undertaken by experienced and authorised practitioners of audit firms or statutory auditors. Despite these differences, both systems of monitoring and monitored peer review comply with the Statutory Audit Directive.Drawing on the experiences in different European countries, FEE also highlights several recommendations for quality assurance systems. The report is available on the [FEE](http://www.fee.be/%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.14 Economic impact of private equity in Australia** A report published by PricewaterhouseCoopers' contains findings on the economic impact on Australia of private equity and venture capital investment – collectively referred to as 'private equity' (PE) in most instances.The information contained in the report was derived from an in-depth survey of Australian companies that have received PE or venture capital investment over the past five years and other research.The key findings are summarised below.**(a) Employment generation**PE backed companies are a major employer group, providing jobs for up to 650,000 Australians, being 8% of total private sector employment. They are also an important job-creation driver, with 76% expecting to hire additional workers in 2007. According to Dun & Bradstreet, the corresponding economy-wide measure is 5%. **(b) Innovation facilitator** Australian technological innovation and R&D commercialisation are some of the main benefits of PE investment: three-quarters of investee companies launched new products in the past year, while only 27% did so prior to the PE investment. Furthermore, for the recipients of venture capital in particular, the investment is usually necessary for the first product launch to occur.**(c) Management advice**PE managers are having overwhelmingly positive impacts on companies' cost management, efficiency, cash flow and strategy formulation and implementation. This improves Australia's overall productivity and competitiveness.**(d) Investment in people** PE investee companies are committed to the training and development of their staff. For instance, 21% of the surveyed businesses offer apprenticeships and 82% provide ongoing technical training.**(e) Good governance**The closer interaction between PE shareholders and management provides robust strategic and risk management oversight. Hence, PE investee companies generally have strong corporate governance. Furthermore, the independence of PE investee companies' board is comparable to that of the ASX200.**(f) Sharing the profit**PE investee companies share profits with employees, as 79% of respondents distributed some of the wealth created by the business through employee share options programs and bonus plans.**(g) Future opportunities**The report also shows that the Australian PE industry is expanding at an increasing rate. The cumulative amount invested since 1999 is $14 billion; the average fund has grown in size by 27% per year between 1999 and 2006, reaching $415 million; and the total number of investee companies is approaching 900 (including New Zealand).Finally, featured case studies reveal that private equity funding was crucial in the development of such diverse businesses as Austal, JB Hi-Fi and Seek.The full report is available on the [AVCAL](http://www.avcal.com.au/ftp/AVCAL_PWC_Reports_07.pdf%22%20%5Ct%20%22_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.15 Survey of Australian board audit committees and comparison with international experience** KPMG has published a report identifying the key challenges faced by Australian audit committees. The study was part of a worldwide initiative that involved more than 1200 audit committee members across 17 countries. Within Australia, 143 contributed to the study and the report presents their insight into Australian audit committee practices and processes. Where relevant, the results were benchmarked against those from the US, UK and Canada.The report profiles key areas of focus such as audit committee effectiveness, risk management and many others including committee composition and member background, financial exposure and compensation.The report is available on the [KPMG](http://www.kpmg.com.au/aci/docs/aci_agents-of-change200612.pdf%22%20%5Ct%20%22_new) website. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**1.16 Corporate governance conference** On Friday 16 March 2007, Institutional Shareholder Services (ISS) and the Centre for Corporate Law and Securities Regulation are co-hosting a one-day Corporate Governance Conference. The event is being held at the Melbourne Cricket Ground.Themes include:* The interplay between governance / private equity
* Governing for value in takeover / MBO situations
* Optimal regulatory settings
* Alignment between shareholder interests and executive pay

Speakers include:* Paul Costello - Future Fund;
* Kevin Murphy - Visiting US Academic;
* Jeremy Cooper - ASIC;
* Eric Mayne – ASX;
* Andrew Sisson – Balanced Equity Management;
* Richard Searby – ex Woodside NED;
* Alan Kohler – Eureka Report;
* John Durie – Australian Financial Review;
* Linda Nicholls – AICD;
* John Brakey – Macquarie Bank;
* Doug Little – Constellation Investment Management and
* Ken Jarrett – Former CFO of Elders IXL.

The conference registration form can be downloaded [here](http://www.issproxy.com/pdf/2007Conference_Australia.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif |
| **2. Recent ASIC Developments** |
| **2.1 ASIC commences proceedings relating to James Hardie**On 15 February 2007, the Australian Securities and Investments Commission (ASIC) announced that it has commenced civil penalty proceedings in relation to James Hardie, including against a number of former and current directors and former executives. The proceedings arise from ASIC's investigation of matters identified by the Special Commission of Inquiry into the Medical Research and Compensation Foundation. ASIC's investigation into possible criminal actions continues. ASIC has filed civil penalty proceedings in the Supreme Court of New South Wales relating to disclosures by James Hardie Industries Limited (JHIL) in respect to the adequacy of the funding of the Medical Research and Compensation Foundation (MRCF). In commencing these proceedings, ASIC is seeking to address alleged breaches by certain former and current corporate entities in the James Hardie group, and by certain former executives and certain former and current directors. ASIC's proceedings seek declarations that a number of former and current directors and former executives failed to act with requisite care and diligence. The regulator is asking the court to consider banning individuals from acting as a company director and imposing fines. The action also seeks declarations that the companies, JHIL and James Hardie Industries NV (JHINV), made misleading statements and contravened continuous disclosure requirements. ASIC further alleges that JHINV failed to act with requisite care and diligence in relation to its then-subsidiary JHIL.In its announcement, ASIC states that it has no desire to, nor does it believe it likely that its legal proceedings in relation to JHIL and JHINV will, adversely impact the new compensation arrangements recently agreed by shareholders of JHINV. However, should it emerge that any aspect of the action in relation to JHIL does adversely impact the compensation arrangements, the regulator will consider amending this aspect of the proceedings. The civil penalty actions allege various breaches of duties under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), including: 1. JHIL's ASX announcement of 16 February 2001 and related press conference statements in relation to the establishment of the MRCF. ASIC alleges these communications were misleading. 2. The failure to disclose the existence of the Deed of Covenant and Indemnity between the MRCF and JHIL, which created, amongst other things, an ongoing asbestos-related liability of JHIL. 3. The Information Memorandum (IM) for the 2001 Scheme of Arrangement that proposed a restructure of the James Hardie group. The restructure had the effect of JHIL (the then-ASX-listed company) becoming a subsidiary of JHINV, a Netherlands company. ASIC alleges the IM was misleading in failing to disclose pertinent information relating to the meeting of JHIL's future liabilities. 4. A series of presentations by a senior executive to institutional investors in 2002. ASIC contends these presentations contained misleading information about the adequacy of the funding of the MRCF and the James Hardie group's asbestos liabilities. 5. The cancellation of the partly paid shares in JHIL, which were held by JHINV and represented as having been issued for the purpose of JHIL meeting any future liabilities. ASIC alleges that JHINV failed to act with the requisite care and diligence in requesting JHIL to cancel these shares. ASIC also alleges that JHINV failed to disclose certain important information to the ASX regarding the cancellation. ASIC has also sought orders that JHINV execute a deed of indemnity up to a maximum of $1.9 billion, or such amount as JHIL or its directors consider is necessary to ensure that JHIL remains solvent. However, if the conditions precedent to the Final Funding Agreement (referred to in the JHINV’s announcement to the ASX dated 1 December 2005) are satisfied, ASIC will not pursue the claim of indemnity against JHINV.ASIC's investigation commenced in late 2004 following the report of the Special Commission. The investigation, which continues, has involved a complex corporate structure, it has spanned three countries (the United States, the United Kingdom and Australia) and it has involved about 348 billion documents, 72 examinations and the issuing of 284 notices to obtain evidence.The Special Commission of Inquiry into the MRCF was established on 27 February 2004 and reported in September 2004. Commissioner Jackson QC raised serious issues about corporate governance and disclosure and raised particular concerns about potential breaches of the Corporations Act. ASIC also considered possible avenues for compensation in respect to those potential breaches. ASIC then commenced its investigation, which had regard to the Jackson Report and was facilitated by the James Hardie (Investigations and Proceedings) Act, which was passed by the Commonwealth in December 2004.Further information is available on the [ASIC](http://www.asic.gov.au/asic/ASIC_PUB.NSF/print/07-35%2BASIC%2Bcommences%2Bproceedings%2Brelating%2Bto%2BJames%2BHardie?opendocument" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**2.2 ASIC releases policy on auditor rotation** On 12 February 2007, the Australian Securities and Investments Commission (ASIC) released a new policy statement which outlines its approach to applications for relief from auditor rotation requirements in the Corporations Act.ASIC has limited power to give relief from the auditor rotation requirements. Policy Statement 187 Auditor rotation [PS 187] sets out when ASIC will use its limited relief power.**Background**Auditor rotation is part of the auditor independence requirements introduced into the Act 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) (CLERP 9). Auditor rotation is mandatory for auditors of listed entities. The auditor rotation requirements apply to an audit for a financial year that begins on or after 1 July 2006.The Act provides that the auditor of a listed company or listed registered managed investment scheme (listed scheme) is only eligible to play a significant role in the audit of a listed company or listed scheme for a limited period. ASIC has limited power to modify the auditor rotation obligations by extending this eligibility period by up to two years.A copy of the policy statement is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps187_pdf" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**2.3 ASIC amends policy statement on time-sharing schemes** On 8 February 2007, the Australian Securities and Investments Commission (ASIC) released a number of revisions to Policy Statement 160 Time-sharing schemes [PS 160].[PS 160] outlines ASIC's policy on how it will regulate time-sharing schemes including the factors ASIC will take into account in considering applications for relief.In making changes ASIC has also had regard to materials that formed part of a Parliamentary Joint Committee's recent consideration of the timeshare industry.The key policy amendments in [PS 160] focus on: * allowing certain time-sharing operators with ASIC relief to have internal dispute resolution arrangements that meet s912A(2)(a) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) rather than external dispute resolution arrangements;
* ensuring the cooling-off period for purchases of time-sharing interests is consistent with the 14 day period set out in the Act;
* granting licensing relief for certain time-sharing schemes for the resale of time-sharing interests; and
* removing the concept of an industry supervisory body from ASIC's policy.

ASIC will also revise the relief instruments and pro formas issued under [PS 160] to implement these policy changes.ASIC will give time-sharing schemes, operators and promoters and member-controlled clubs until 30 September 2007 to comply with the new amendments to [PS 160]. The updated policy is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps160_pdf" \t "_new) website.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**2.4 Enhanced co-operation between ASIC and foreign regulators** On 8 February 2007, the Senate passed without amendment the [Australian Securities and Investments Amendment (Audit Inspection) Bill 2006](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=93056" \t "_default).The Bill empowers the Australian Securities and Investments Commission, with the consent of the Minister, to enter into cooperative audit arrangements with foreign regulatory bodies.ASIC will now be able to enter into a cooperative audit arrangement with the US Public Company Accounting Oversight Board (PCAOB).The proposed joint inspection arrangement between ASIC and the PCAOB will streamline the information-gathering process. It is expected that this will produce significant cost savings for audit firms as they will need to only accommodate one joint inspection, rather than two separate inspections by ASIC and the PCAOB.The Bill will also enhance ASIC's domestic and international audit inspection powers. The Bill also contains a technical amendment to a transitional provision relating to auditing standards made by the professional accounting bodies, bringing the period of immunity against criminal liability applying to the standards into line with the extended life of the standards.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**2.5 APRA ASIC working group status report** On 5 February 2007, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) announced that they continue to work together to identify ways to reduce the regulatory burden on entities regulated by ASIC and APRA. Over the past year, the agencies worked with the Treasury to remove some of the legislative sources of regulatory overlap, inconsistency or duplication. The agencies are now reviewing their administrative practices for unnecessary regulatory burden and evaluating how any overlaps, inconsistencies or duplication might be reduced.The agencies also invited the Finance Industry Council of Australia (FICA) to regular meetings with APRA Members and ASIC Commissioners to discuss emerging industry and supervisory issues and regulatory coordination as a means to strengthen consultation on regulatory issues with the financial services industry. **(a) Achievements** In summary, over the past year the agencies have: * contributed to the Government's 'Streamlining Prudential Regulation: Response to Rethinking Regulation' discussion paper to streamline the agencies' breach reporting requirements and processes;
* worked on Standard Business Reporting (SBR) with the Treasury to provide a significant and sustained reduction in business to government reporting burden;
* identified possible overlaps in financial data reported to each agency;
* identified possible overlaps in the agencies' Australian Financial Services (AFS) and superannuation licensing requirements and post-licensing processes;
* identified possible duplication in the agencies' audit requirements and audit reporting requirements; and
* matched the agencies' respective responsible person populations.

**(b) Proposals for law reform**To date, ASIC and APRA have worked with the Treasury to identify legislative sources of regulatory overlap, inconsistency or duplication for jointly-regulated entities, as legislation determines the context in which ASIC and APRA apply their administrative practices and policies. Legislative amendments are an important step towards reducing regulatory overlap and inconsistency, and lessening the burden of red tape for entities. Legislative amendments are proposed in the Australian Government's 'Streamlining Prudential Regulation: Response to 'Rethinking Regulation' discussion paper that was released for public comment on 4 December 2006. Specifically addressing the requirements for jointly-regulated entities to report breaches to ASIC and APRA, the discussion paper recommends: * Introducing a materiality test for reporting breaches to APRA. The materiality test will align APRA's requirements with the significance test for reporting breaches to ASIC under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corps Act).
* Aligning breach reporting periods for AFS licensees and APRA-regulated entities.
* Removing the requirement to report breaches of prudential requirements to both ASIC and APRA. APRA will collect information about breaches and share it with ASIC where appropriate.

**(c) Next steps** ASIC and APRA will continue their work with the Treasury on the SBR programme.Consistent with the proposed legislative amendments, the Group will continue its review of the agencies' administrative practices and policies in the areas of data reporting, licensing, audit, breach reporting, and responsible persons.**(i) Data reporting**By comparing ASIC and APRA's data reporting requirements and reconciling their regulated entity populations ASIC collects financial reports under Chapter 2M of the Corporations Act 2001 and AFS Licensee accounts under Chapter 7. APRA collects data under the [Financial Sector (Collection of Data) Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=57996" \t "_default), the Group has found that: * Almost all APRA-regulated authorised deposit-taking institutions, general insurers and life insurers hold AFS licenses. It appears that around half of APRA's licensed superannuation trustees also hold AFS licences.
* It appears that a number of entities have provided incorrect information to ASIC about their APRA-regulated status. ASIC will make enquiries in these cases and share its findings with APRA.
* It also appears that different entities, mainly superannuation trustees and funds, have provided identical ABNs to ASIC and APRA.
* There is some overlap between the reporting requirements prescribed under Chapter 7 of the Corps Act and the Financial Sector (Collection of Data) Act 2001 for non-superannuation entities.
* There is some reporting duplication for AFS licensees subject to Chapter 2 and Chapter 7 of the Corps Act.

This exercise highlighted potential regulatory actions for ASIC and areas for improvement in the agencies' record keeping. ASIC and APRA will explore the extent to which reporting requirements can be consolidated for jointly-regulated entities and may consult industry during 2007 on the best way for the agencies to collect data from regulated entities.**(ii) Licensing**By reviewing the agencies' AFS and superannuation licensing requirements and processes in the post-licensing environments, the Group has found that there is little overlap between the agencies' licensing obligations. This is as a result of existing legislative carve-outs. The agencies will produce an industry guide to explain ASIC and APRA’s licensing objectives, requirements and processes for jointly-regulated superannuation trustees. This guide will refer to the existing provisions and practices that reduce regulatory burden on jointly-regulated superannuation trustees, such as the exemption from the general AFS licensee obligations to maintain risk management and resourcing frameworks where the AFS licensee is an APRA-regulated entity. **(iii) Audit**By comparing the agencies' audit requirements and audit reporting requirements, the Group has found that: * There is little overlap between the audit requirements prescribed under Chapter 2 of the Corps Act and by APRA as they fulfil two different purposes.
* There is minimal overlap in the audit requirements prescribed under Chapter 7 of the Corps Act and by APRA as a result of legislative carve-outs.
* There is some duplication in the collection of audit reports by the agencies.

The potential to reduce audit reporting requirements for some entities will be assessed as part of the more detailed review of reporting obligations to be conducted during 2007.**(iv) Responsible persons**By matching the agencies' data on their respective responsible person population, the Group has found that there is considerable overlap between the agencies' responsible persons populations, even though the obligations of these officers differ under ASIC and APRA administered legislation. This exercise highlighted the potential to reduce responsible person reporting requirements.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif |
| **3. Recent ASX Developments** |
| **3.1 ASX Corporate Governance Council review of corporate governance principles and recommendations**The ASX Corporate Governance Council (the 'Council') released an Explanatory Paper for public comment on its proposed changes to the 2003 Principles of Good Corporate Governance and Best Practice Recommendations (the 'Principles') and an Exposure Draft of the proposed changes.When the Principles were released the Council committed itself to an ongoing review to ensure they remain relevant to the Australian business and investment communities. The review comes after two years of monitoring by ASX of company disclosures of corporate governance practices in annual reports. The proposed changes to the Principles are designed to:* Remove areas of regulatory overlap between the Principles and equivalent provisions in the Corporations Act and Accounting Standards;
* Promote understanding of the application of certain Principles by merging principles and recommendations that cover common areas of governance;
* Refine the Principles to take into account feedback from Council review groups and users of corporate governance information; and
* Clarify possible ambiguities in certain principles and ensure consistent terminology throughout the Principles.

The key changes proposed are identified below.The Principles and Recommendations have been restructured as follows:* The number of Principles has been reduced from 10 to 8:
	+ Material in Principle 8, disclosure of performance evaluation processes for management and board, has been split between Principle 1, which deals with management issues, and Principle 2, which deals with board issues;
	+ Material in Principle 10, which deals with codes of conduct, will be incorporated into Principle 3 – Promote ethical and responsible decision making, and material on the link between recognising the interests of stakeholders and risk management will be incorporated into Principle 7 – Recognise and manage risk;
* The term "Best Practice" has been replaced by "Good Practice"; and
* Plain English drafting and consistent terminology have been used.

Areas of overlap between the Principles and Recommendations and the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and Accounting Standards have been removed – section 295A CEO/CFO sign-off on financial statements, section 250RA Attendance by external auditor at AGM and section 300A and AAS 124 Related Party Disclosures.Principle 7 – Recognise and manage risk – has been clarified by providing:* Greater clarity on the nature of risk management and the risk management process;
* Clarification that "material business risks" in Principle 7 already embraces financial reporting risks and other material business risks, also called "non-financial risks" - for example, operational, environmental, sustainability compliance, reputation and human capital;
* Splitting Recommendation 7.2 into two separate Recommendations:
	+ A separate Recommendation (7.2) to cover a written statement to the board by the CEO/CFO that the section 295A sign-off on the financial statements is founded on a sound system of risk management and that the system is operating effectively in all material respects in relation to financial reporting risks; and
	+ A separate Recommendation (7.3) to cover a written statement to the board by the CEO, or equivalent, and other responsible senior executives confirming the effectiveness in all material respects of the risk management and internal control system in relation to "material business risks" not covered by Recommendation 7.2.
	+ Principle 3 – Promote ethical and responsible decision making – will deal with all company codes of conduct and their content and disclosure;
	+ New wording will address the issue of hedging unvested options - the proposal is that companies’ trading policies prohibit these arrangements. The other proposal is that the hedging of vested options should be disclosed to companies so that they do not inadvertently hold out that entitlements are "at risk"; and
	+ Principle 2 – Structure the board to add value – the “definition of independence” has been amended to list a series of "indicators of independence". The intention is to encourage companies to turn their minds to the issue of independence and to disclose their practices.

The Council also released a separate Consultation Paper on the issue of corporate responsibility/sustainability. Stakeholder input was sought on whether the Principles should recommend the disclosure of corporate responsibility/sustainability risks that are material business (non-financial) risks. The Council was formed in August 2002 and brings together 21 businesses, shareholder and industry groups. This is the first complete review since the Council released the Principles in March 2003.Submissions closed on 9 February 2007. The Council will meet at the end February 2007 and review the submissions during the first quarter of 2007 and will release its response to the submissions. The proposed effective date for the revised Principles is the first financial year commencing on or after 1 July 2007.The Review of the Principles of Good Corporate Governance and Best Practice Recommendations Part A (Explanatory Paper) and Part B (Consultation Paper on corporate responsibility/sustainability) and the proposed changes to the Principles (the Exposure Draft) and the submissions on the proposals are available on the [ASX](http://www.asx.com.au/supervision/governance/index.htm%22%20%5Ct%20%22_new) website. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Insider participation in control transactions – Panel publishes draft guidance note and issues paper for comment**On 21 February 2007, the Takeovers Panel released for public comment a draft Guidance Note and Issues Paper in relation to when the Panel may consider unacceptable circumstances exist where there is insider participation in control transactions.When the Panel commenced its consideration of the issues in November 2006, it was primarily motivated to do so against the background of private equity takeover bids both in Australia and overseas. However, following its initial work, the Panel considered that framing the draft Guidance Note in terms of private equity issues would be too narrow. The Panel considers that the issues of insider participation apply more widely than simply to private equity bids, and indeed to other buy-outs, and therefore has formulated the draft Guidance Note in terms of participation by insiders, regardless of the nature of the bidder. The draft Guidance Note and Issues Paper are intended to be read together. The Issues Paper sets out the policy issues on which the Panel is considering providing guidance in the draft Guidance Note and the policy issues on which the Panel does not currently intend to provide guidance. The Panel invites comment on the policy issues which are currently addressed in the draft Guidance Note as well as any policy issues not currently addressed in the draft Guidance Note. The Panel will consider the responses to the Issues Paper and draft Guidance Note and will determine whether it would be appropriate to publish a final Guidance Note, either in a form similar to the draft Guidance Note or in an amended form. The Issues Paper and draft Guidance Note are available on the [Panel](http://www.takeovers.gov.au/display.asp?ContentID=1187" \t "_new) website. The Panel is seeking comments on the draft Guidance Note by Friday 6 April 2007. Comments should be addressed to the Panel's Director, Mr Nigel Morris at the address below, or to the Panel's Counsel, Mr Bruce Dyer at the same address.Level 47, 80 Collins StreetMelbourne, Vic 3000Ph: +61 3 9655 3501 mailto:nigel.morris@takeovers.gov.auhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif |
| **5. Recent Corporate Law Decisions** |
| **5.1 High Court rules that shareholders can rank equally with creditors**(By Kathryn Gordon and Elissa Tobin, Freehills)Sons of Gwalia Ltd v Margaretic; ING Investment Management LLC v Margaretic [2007] HCA 1, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 31 January 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/january/2007hca1.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/january/2007hca1.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**On 31 January 2007, the High Court ruled that where a company has entered administration, a claim for misleading and deceptive conduct which induces the purchase of shares is a provable debt that will not be postponed to the debts due to ordinary creditors.By a majority of 6 to 1, the court found that such a debt is not a debt due to a shareholder in their capacity as a member and thus that section 563A of the Corporations Act 2001 does not apply to postpone the debt.**(b) Facts** On 18 August 2004, the respondent, Luka Margaretic, purchased 20,000 shares in Sons of Gwalia Ltd ('SGL'), a gold mining company listed on the stock exchange. A short time later, the company was placed in administration. It became apparent that, at the time the shares were purchased, they were worthless.The respondent claimed that SGL had failed to comply with its obligation to notify the stock exchange that its gold reserves were insufficient to meet its gold delivery contracts. He claimed that this constituted misleading and deceptive conduct and relied on section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default), section 1041H of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and section 12DA 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) to bring a claim in the Federal Court for compensation totalling the difference between the purchase price of the shares and their true value (nil). There are many other shareholders in SGL with similar claims.In the Federal Court, Emmett J found in favour of the respondent. The appellant appealed the decision to the Full Court of the Federal Court, which also found in favour of the respondent. The appellant then appealed to the High Court. The second appellant, ING, is a general creditor of SGL. The primary issue in contention was whether, in the context of a deed of arrangement, section 563A of the Corporations Act 2001 (Cth) (Act) dictates that claims such as the respondent’s should be postponed to the debts due to ordinary unsecured creditors.Section 563A states that:"payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied".**(c) Decision** The High Court found in favour of the respondent. There were 7 separate judgments handed down. **(i) Reliance on common law principles**The appellant argued that Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15 ('Webb') stood as authority for the proposition that there is a common law principle, emerging in Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317 ('Houldsworth'), which precludes a shareholder from proving in a winding-up for damages for misrepresentation inducing any acquisition of shares unless the shareholder has first rescinded the membership contract. It was claimed by the appellants that this principle prevented Mr Magaretic from establishing a provable debt, or that it acted to postpone shareholder claims in favour of creditor’s claims, in accordance with section 563A. Gleeson J indicated that if this principle existed, section 563A could not apply – it would subordinate a liability which does not exist. The majority dismissed the appellants' reliance on the principles espoused in Webb, expressing a reluctance to have regard to the common law principles of old English company law. They also questioned the legal validity of the decision in Webb, indicating that the parties in Webb had placed Houldsworth, a decision decided before Salomon v Salomon & Co, rather than the applicable statutory provisions, at the forefront of their arguments.**(ii) The correct approach – statutory interpretation**The majority indicated that rather than engaging in an examination of the common law principles, the court should decide the case on the basis of the proper construction of the key legislative provision – section 563A. Gummow J stated that focusing on the principles emerging from case law would merely "distract attention from the supreme importance of statute law".**(iii) Nature of section 563A**Members of the majority highlighted the fact that section 563A does not embody a general policy of deferring all shareholder claims. Gleeson J indicated that the section distinguishes between debts owed to a member in their capacity as a member and debts owed to a member otherwise than in such a capacity. Some members of the majority indicated that, whilst it may have been more consistent with the general policy of the statute, it was not the role of the judiciary to shape the criterion adopted by the legislature.The majority considered that it was necessary to examine the type of debt which would be owed "to a person in the person's capacity as a member of the company." As the respondent’s claim clearly did not relate to dividends or profits, the court looked at whether or not such a claim could be classified as "otherwise" in the context of the section. Kirby J indicated that section suggests that "what is involved in the postponement are sums constituting the ordinary revenue (and possibly the capital) of the company and not the claims of an extraordinary and exceptional kind for false and misleading conduct".**(iv) Misleading and deceptive conduct - a deferred claim under section 563A?**Gleeson J pointed out that the respondent's claim was not founded upon any rights he obtained or any obligations he incurred by virtue of his membership in the company and that his claim would have been no different if he had ceased to be a member at the time it was made or if his name had never been entered on the register of members. Hayne J stated that the obligation for which enforcement was sought stood apart from any obligation created by the Act and owed by the company to its members. In this respect, the majority stated that the claim was not "owed by a company to a person in the person's capacity as a member of the company".**(v) Comparative analysis - USA**Some members of the majority contrasted section 563A with the Bankruptcy Code (US), which directly subordinates claims made by shareholders arising out of the purchase of shares. Kirby, Gleeson and Gummow JJ indicated that section 563A could easily have been drafted to resemble the US provision, which is much more explicit about comprehensively deferring all shareholder claims. According to some members of the majority, this contrast is indicative of an intention by the Australian legislature to allow some shareholder claims to compete with those of unsecured creditors.Kirby J concluded that if Parliament considered that the judicial interpretation of the section favoured shareholders unreasonably, section 563A could easily be amended to better reflect the policy of the government.**(vi) Callinan J's dissent**Callinan J dissented. He noted the importance of reading statutes so as to maintain coherence in the law and to promote fairness, if such a construction is reasonably available. On this basis, he was prepared to construe section 563A so as to defer the claim of the respondent to those of ordinary unsecured creditors. Callinan J expressed concern about the various policy implications involved in allowing shareholders such as Mr Margaretic to claim alongside ordinary creditors. He referred specifically to the risk that large bodies of shareholders could severely dilute creditors' rights.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.2 Amending pleadings for section 588FF applications** (By Lisa Thomas, DLA Phillips Fox)Davies v Chicago Boot Company Pty Ltd (No 2) [2007] SASC 12, The Full Court of the Supreme Court of South Australia, Gray, Sulan and Anderson JJ, 19 January 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/January/2007sasc12.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/january/2007sasc12.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case concerned an appeal against the decision of the primary Judge, who allowed an appeal against a decision of a Master regarding the amendment of a pleading. An application was made to amend an existing pleading to add a claim which was statute barred under section 588FF(3) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"). The court considered section 588FF of the Corporations Act, [Supreme Court Rule 53](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=55083" \t "_default) and relevant case law. The court allowed the appeal, set aside the decision of the primary Judge refusing the application and remitted the matter for hearing and determination by the Master. **(b) Facts** Harris Scarfe Limited operated a department store in Adelaide and other retail outlets. Harris Scarfe Wholesale Pty Ltd was a wholesale purchaser and both companies were wholly owned subsidiaries of Harris Scarfe Holdings Limited. Chicago Boot Company Pty Ltd supplied Harris Scarfe Wholesale Pty Ltd with goods. Before the companies went into liquidation, funds were paid by the companies to Chicago Boot Company Pty Ltd in satisfaction of trading debts. On 3 January 2002, a resolution for voluntary winding up of the three companies was carried at a meeting of creditors, and liquidators were subsequently appointed.On 2 April 2004, the liquidators of Harris Scarfe Limited and Harris Scarfe Wholesale Pty Ltd ("the appellant") commenced proceedings against Chicago Boot CO Pty Ltd ("the respondent") in order to claw back the funds paid by Harris Scarfe to the respondent under sections 588FE and 588FF the Act. In essence, the appellants sought to have the transactions declared void because Chicago Boot Company, as a creditor, had been paid in preference to other creditors.Section 588FF(1) of the Act allows a company's liquidator to apply to a Court for one or more specified claw-back orders, where the Court is satisfied under section 588FE, that a transaction of the company is voidable. However, a time limit is placed on applications under 588FE(3), such that an application under subsection (1) may only be made:(a) within 3 years after the relation-back day; or(b) within such longer period as the court orders on an application made by the liquidator within those 3 years.**(ii) The issues**The original statement of claim filed by the appellant joined two separate claims, each seeking to set aside voidable transactions as preferences, which were comprised of:* a claim by the liquidators in their capacity as liquidators of Harris Scarfe Limited in the sum of $273,261.23; and
* a claim by the liquidators in their capacity as liquidators of Harris Scarfe Wholesale Pty Ltd for an amount of $43,510.10.

The liquidators sought to file an amended statement of claim after the expiry of the 3 year limit, in order to disjoin the Harris Scarfe Wholesale Pty Ltd claim. The respondent then sought to amend its defence to include a plea that there was no relationship of debtor and creditor between Harris Scarfe Limited because the goods were contracted to be supplied to Harris Scarfe Wholesale Pty Ltd.The issue was whether these amendments could be allowed, given that the 3 year time limit imposed under section 588FF(3) had expired.**(iii) Decision of primary Judge**The primary Judge granted the respondent leave to amend their defence for the following reasons:* the amendments would clarify issues and enable the real matters in controversy between the parties to be addressed;
* the amendments raised arguable issues;
* there had been no undue delay;
* the action had not been set down for trial;
* there was no prejudice to the liquidators which could not be cured by costs order; and
* the interests of justice are of paramount concern.

However, the primary Judge refused to grant the appellant leave to amend its statement of claim on the grounds that the proposed amendment sought to advance causes of action that were statute barred under section 588FF(3) of the Act. **(iv) Issues for consideration on appeal**On appeal, the appellant sought to vary the terms of their proposed amendments, so that the claims be rejoined in the Supreme Court. The amendments were proposed to include an allegation in the alternative that in respect of the Harris Scarfe Limited contract, Harris Scarfe Wholesale Pty Ltd made a payment on behalf of Harris Scarfe Limited and that with respect to the Harris Scarfe Wholesale Pty Ltd contract, Harris Scarfe Limited made a number of payments on behalf of Harris Scarfe Wholesale Pty Ltd. Despite Harris Scarfe Wholesale Pty Ltd not being a party to the proceedings, the appeal was argued on the basis that if the appellant succeeded in showing error on the part of the primary Judge, rejoinder and amendment were appropriate orders.The court considered the decision of Rogers v Commissioner of Taxation (1998) 88 FCR 61 which was factually similar to the case. The court also considered the application of Rule 53 of the Supreme Court Rules, which authorises the court to add a new cause of action to an existing action, even if the relevant limitation period has expired. In Rogers, the Full Federal Court considered the application of Order 13 of the [Federal Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "_default) (which was in the same terms as Rule 53 of the Supreme Court Rules) in the context of section 588FF of the Act.The court distinguished between section 588FF and Order 13 on the basis that section 588FF(3) is concerned with the making of an application to the court, that is, the commencement of the proceeding itself and not directed at an amendment of an existing claim. Order 13 on the other hand, regulates the position after a proceeding has been commenced which enables the court to allow an amendment, despite a relevant limitation period having expired. Order 13 was held in this case to allow amendment to the pleadings, as proceedings had already commenced.**(c) Decision** The court decided that Rogers should be followed, as the reasoning in that case allows a consistent approach to be taken to the amendment of existing applications in accordance with well-established procedures in all Australian jurisdictions. Further, in considering other authorities, the court held that it is appropriate to utilise the applicable rules of the courts to allow amendments to add new causes of action against the same defendant outside the relevant statutory limitation period.The court therefore allowed the appeal, set aside the order of the primary Judge refusing the appellant's applications for amendment and rejoinder, and remitted those applications to a Master of the court for hearing and determination.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.3 When is it appropriate to appoint a provisional liquidator to a company?** (By Jeremy McCarthy and Paul Martin, Corrs Chambers Westgarth)David Alexander Grace v Deborah Sharon Grace [2007] NSWSC 6, Supreme Court of New South Wales (Equity Division), Brereton J, 18 January 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/January/2007nswsc6.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/january/2007nswsc6.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Three family members, Mr David Grace ('Mr Grace'), Ms Deborah Grace ('Ms Grace') and Dr Julienne Grace ('Dr Grace'), each directors and together the controlling members of four companies, suffered a breakdown in relations such that one sought appointment of a provisional liquidator to three of the companies or, alternatively, injunctive relief pending final hearing of related proceedings in which a winding up of each company was sought on oppression and/or just and equitable grounds. The basis of the claim was the exclusion of Mr Grace from the affairs of the companies, the preferential treatment of Ms Grace and Dr Grace by the companies in respect of dividends and directors' and management fees, and the engagement by the companies of solicitors who, in part, were using company resources to protect the interests of Ms Grace and Dr Grace.Brereton J stated that a provisional liquidator will only be appointed where there is a reasonable prospect that a winding-up order will be made, and the assets of the company are in jeopardy such that they need to be put under protection of a provisional liquidator pending trial. Where winding up is sought on oppression or just and equitable grounds however, it is sufficient that there is a reasonable prospect that some form of relief under section 233 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act') will ultimately be granted.Given the defendants' consented to winding up orders in respect of two companies, the control of those companies by Ms Grace and Dr Grace in circumstances where it was likely control would pass to Mr Grace, and the likely misuse of company resources in protecting the interests of the two directors, it was appropriate to appoint a provisional liquidator. Appointment was inappropriate in the case of the other company given control was likely to remain with Ms Grace and Dr Grace, and that even if company resources were used to protect the interests of the two directors, this could be factored into the quantum of any buy-out order made in the related proceedings. Injunctive relief, however, was granted to prevent the continued exclusion of Mr Grace from the affairs of the company.**(b) Facts**Three members of the Grace family, Mr David Grace, Ms Deborah Grace and Dr Julienne Grace were directors of a number of family companies, including Nevilda Holdings Pty Ltd ('Holdings'), Nevilda Investments Pty Ltd ('Investments'), Sharander Pty Ltd ('Sharander') and Dutchie Pty Ltd ('Dutchie'). In April 2006, Mr Grace claimed that he discovered that under his late father's will he was entitled to inherit the residuary estate including 2,003 cumulative preference shares in Holdings and 12 ordinary shares in Investments, which would have given him effective control of both companies. He claimed however, that Ms Grace, with the knowing participation of Dr Grace, unfairly procured him to transfer 667 of his shares in Holdings to each of them, and procured other shares to be transferred to themselves, such that together they controlled both companies. Upon his discovery, Mr Grace engaged in an investigation of the affairs of each of the companies. The result of this was the uncovering of evidence that from 2000-04, benefits such as dividends and management and directors' fees were paid only to Dr Grace and Ms Grace, or if 'paid' to Mr Grace, were, without his knowledge or consent, 'lent back' to the companies. Other irregularities were also unearthed.From this period on, the relationship between the parties broke down markedly. From October 2006, notice of a number of general meetings and directors' meetings were given by each of Ms Grace/Dr Grace and Mr Grace in respect of Sharander, Dutchie and Holdings, purporting to oust or prevent the other party or parties from control of the respective company by way of resolutions to remove that other party or parties as director(s) of the company and/or to transfer shares to another of the companies. Throughout this time, Mr Grace was excluded from company affairs.On 3 November 2006, Mr Grace applied to the court for an injunction restraining the convening of one of the directors' meetings. Following the court's order, further attempts made by Mr Grace to seek information about the affairs of the companies, and responses deemed by Mr Grace to be unsatisfactory, application for appointment of a provisional liquidator in respect of each of Holdings, Investments and Sharander or, alternatively, injunctive relief against them, Ms Grace and Dr Grace, pending final hearing of related proceedings, was made by Mr Grace.The orders claimed by Mr Grace in the related proceedings were that Ms Grace and Dr Grace transfer to him the shares in Holdings and Investments which he claimed entitlement to under his father's will, that orders be made under section 233(1)(c) of the Act regulating the affairs of Holdings, Investments and Sharander, or alternatively that those companies be wound up on oppression grounds (section 233(1)(a) of the Act) or on the 'just and equitable' ground (section 461(1)(k) of the Act).Throughout the above, the companies had engaged solicitors who appeared to be using company resources to protect the interests of Ms Grace and Dr Grace. The engagement had not been duly authorised and was only authorised by the companies by convening a directors’ meeting on short notice by Ms Grace and Dr Grace, the morning before an earlier step in court proceedings at which retention of the solicitors was to be challenged.**(c) Decision**Brereton J noted that a provisional liquidator will not automatically be appointed by a court, even where the company itself is the applicant. As a drastic intrusion into the company’s affairs, a provisional liquidator should not be appointed if other measures would be adequate to preserve the status quo. An applicant must establish that there is a reasonable prospect that a winding-up order will in the future be made, and that having regard to the whole of the circumstances and in particular the measures already in place, the assets of the company are in jeopardy such that they need to be put under the protection of a provisional liquidator pending trial.Where winding up is sought under section 233 or section 461(1)(k) of the Act, however, it is sufficient that there is a reasonable prospect that some form of relief under section 233 will ultimately be granted, even if not a winding up order, so long as the assets of the company are in jeopardy. This does not, however, negate the foregoing principle preferring other measures to the appointment of a provisional liquidator. In this context, relevant matters include the degree of urgency and need established by the applicant.Brereton J stated that he was prepared to appoint a provisional liquidator in respect of Holdings and Investments given the defendants' consent to final winding up orders in relation to those companies. As such, Mr Grace would either gain control of the companies (if shares in the companies were transferred to him pursuant to his claim) or the companies would be wound up. As such, there was a reasonable prospect that the companies would be wound up in the future.As to the potential jeopardy of the companies' assets, Brereton J stated that given the facts of the previous paragraphs, the inappropriateness of Ms Grace and Dr Grace retaining control of the companies in such circumstances, the risk that the companies' resources might be used to defend the interests of Ms Grace and Dr Grace, and the minimal detriment to the companies (which were not trading companies) in the circumstances in appointing a provisional liquidator, it was appropriate to allow the appointment of a provisional liquidator.As to Sharander, Brereton J was not prepared to appoint a provisional liquidator given that Mr Grace was to remain only a minority shareholder and the non-consent of the defendants to final winding up orders. While a buyout order was possible in respect of Mr Grace’s minority shareholding, it was unlikely, in the circumstances, that a winding up order would be made. Brereton J also noted that there was a lack of jeopardy to the company’s assets, save for the use of company resources to fund protection of Ms Grace’s and Dr Grace’s interests (which, in any event, could be quantified in the event of a buyout order).As to the injunctive relief, Brereton J stated it to be desirable that Mr Grace be involved in any further dealings by Sharander. As such, he granted injunctive relief requiring notice to be given to Mr Grace in respect of proposed dealings and allowing him, if desired, to object to them and/or to approach the court.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.4 Constitutional limits on the power to issue a summons for examination** (By Svetlana Zarucki, Clayton Utz)Highstoke Pty Limited v Hayes Knight GTO Pty Limited [2007] FCA 13, Federal Court of Australia, French J, 16 January 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/January/2007fca13.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/january/2007fca13.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**In 2003, Hayes Knight GTO Pty Limited ("Hayes Knight"), as trustee, appointed a receiver and manager to Performance Finance Limited ("Performance Finance"). In 2004, on application by certain debenture holders, Hayes Knight was removed as trustee and Highstoke Pty Limited ("Highstoke") appointed in its place. Highstoke commenced proceedings against Hayes Knight and the former auditors of Performance Finance and entered into a litigation funding agreement with IMF (Australia) Limited ("IMF").In 2005, Highstoke was informed that the insurers of Hayes Knight had denied indemnity. Highstoke applied to the Australian Securities and Investments Commission ("ASIC") for authority to make an application to the court for the issue of a summons for the examination of, among others, John Michael O'Brien, a director of Hayes Knight about the examinable affairs of Hayes Knight. In particular, the purpose of the examination was to determine whether, in light of Hayes Knight's professional indemnity insurance cover, any judgment on the damages claim was likely to be satisfied. ASIC granted the authorisation requested and, on application to the Court, a summons was issued.Hayes Knight and Mr O'Brien challenged the issue of the summons on the basis that the power to issue summonses under section 596A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act") is to be exercised only in relation to the examinable affairs of a corporation in some form of external administration. Hayes Knight was not under any form of external administration. Alternatively, if the power to issue summonses for examination extended to corporations not under any form of external administration then it was invalid because section 596A, as applied in this case, purported to confer administrative, rather than judicial, power on the Court in circumstances where the administrative power was not incidental to any judicial process. In doing so, section 596A, if applicable to the examinable affairs of corporations generally, would offend against the principle of separation of powers.After considering in detail the statutory framework of the Act, 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") and the legislative ancestry of the examination power, French J accepted that on its proper construction section 596A, under which the summons was issued, did not apply to the examinable affairs of a corporation not in external administration or otherwise subject to any of the processes for which Chapter 5 of the Act provides. It followed that the authority given by ASIC to Highstoke to apply to the court for the issue of the summons was beyond the proper purposes for which the issue of a summons could be made.**(b) Decision**French J noted that the source of ASIC's power to authorise a person as an eligible applicant to make an application under Part 5.9 arose from section 11(4) of the ASIC Act (there being no express provision in the Act for ASIC to authorise a person to make such an application in Part 5.9). His Honour identified the principal question as whether the application of the empowering provisions is limited to the examinable affairs of corporations under external administration.Given that the term external administration is not defined in the Act, his Honour's first resort was to look at the ordinary words of sections 596A and 596B and have regard to their context and purpose. French J held that the ordinary meaning of the words of both sections 596A and 596B would permit their application to the examinable affairs of any corporation whatever its status. However, his Honour noted that those sections were found in a Chapter dealing with arrangements and reconstructions, receiverships, administration with a view to execution of a deed of company arrangement, winding up in insolvency and otherwise. Whilst not all of these parts of Chapter 5 seemed to fall readily within the term external administration they were nonetheless processes subject to Court approval and supervision. The context in which Part 5.9 of the Act appeared, as a set of miscellaneous provisions in Chapter 5, strongly suggested to his Honour that the examination power was intended to be ancillary to the functions of the court and/or the functions of external receivers, controllers or liquidators of corporations for which Chapter 5 made provision. In so far as Chapter 5 validly conferred judicial functions on the court, the power to issue summonses for examination might be seen as incidental to such functions. French J held that, in his opinion, the context in which Part 5.9 operated was inconsistent with the propounded construction of sections 596A and 596B as conferring a general power on the court to issue summonses for the examination of persons about the examinable affairs of any corporation whether or not affected by other processes for which Chapter 5 provided. His Honour held that it was inconsistent also with the history of the legislation. The weight of authority considered by his Honour tended to support the proposition that sections 596A and 596B and their predecessors had been seen as provisions applicable to companies in one or other form of administration and not as applicable to companies at large.There was no suggestion that Hayes Knight itself was under any form of Chapter 5 administration or process. It had been removed by the court as trustee for the Performance Finance debenture holders under Chapter 2L of the Act. Therefore, in light of his Honour's construction of section 596A, there was no basis upon which a summons could issue under that section for the examination of any officers of Hayes Knight in respect of its examinable affairs. (That would not, of course, have prevented the issue of a summons for the examination of officers of Hayes Knight in respect of the examinable affairs of Performance Finance.) His Honour held that the summons issued was beyond the power of the Court to issue and should be discharged.In the event that his Honour had erred in his conclusions as to the construction of section 596A, he proceeded to consider the constitutional question raised by Hayes Knight. That constitutional question required a consideration of whether the power conferred on the Court by section 596A was judicial when applied to a corporation which was not under any form of external administration or judicial process under Chapter 5. French J held that, taken alone, a power to require a person to answer questions or produce documents in aid of an investigation was administrative in character; it neither leads to, nor is incidental to, a binding determination of rights or liabilities. His Honour noted that, divorced from association with a judicial proceeding, nothing about the examination power under the Act marks it as judicial in character. It lacks the core elements of the judicial process such as the finding of facts, the making of value judgments and binding determinations as to legal rights and obligations. However, French J acknowledged that there were functions which can be viewed as administrative or judicial depending upon the body that discharges them. The examination power taken alone is not an exercise of judicial power. Nor, taken alone, is it judicial when exercised by a court. French J held that it could only be accommodated within the exercise of judicial power if incidental to it or justified by historical usage. By way of example, his Honour noted that an examination ordered in aid of the implementation of a winding up order made by a court can be seen as incidental to the exercise of judicial power. On the other hand, an examination which is freestanding in the sense that it is exercised without reference to any pending proceeding does not fall within the scope of the judicial power unless it can be characterised as judicial on the basis that it is a function which Courts have long carried out. In his Honour's opinion, if the construction of section 596A for which Highstoke contended was correct, then section 596A purported to confer on the Court a power which was not capable of characterisation as judicial and which in its present application was not incidental to the exercise of judicial power. To that extent, section 596A exceeded the legislative power of the Commonwealth.It followed that, as Hayes Knight was not under any form of external administration of the kind referred to in Chapter 5 of the Act or otherwise amenable to the provisions of the Act, that fact was, at the very least, a mandatory relevant consideration to be taken into account by the ASIC delegate if not a factor defining the limits of the delegate's power. As the stated purpose for which authorisation was sought was for an application which on the proper construction of the relevant provisions would be beyond the power of the Court, ASIC's authorisation decision was quashed.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.5 Appointing a receiver to manage litigation** (By Mark Cessario, Corrs Chambers Westgarth)The University of Western Australia v Gray (No 6) [2006] FCA 1825, Federal Court of Australia, French J, 22 December 2006The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/december/2006fca1825.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/december/2006fca1825.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**In this case the University of Western Australia ("UWA") commenced proceedings against the Cancer Research Institute ("CRI"), an incorporated association, Sirtex Medical Ltd ("Sirtex") and Dr Gray. CRI entered into a settlement agreement with UWA, but questions were subsequently raised regarding CRI's capacity to enter into that agreement. There was also a purported change to CRI's board of management such that Dr Gray, his solicitor and his sister comprised that board. French J appointed a receiver to part of CRI's assets and gave the receiver power to investigate the enforceability of the settlement agreement. The receiver came back to the court and advised that he could not identify whether CRI had any members, and therefore could not assess the enforceability of the agreement. The receiver sought an expansion of his powers so that he could conduct the proceedings on behalf of CRI.French J found that he had power to appoint a receiver to conduct litigation on behalf of an incorporated association. He also found that the purported board of CRI were not appropriate persons to make decisions about CRI's conduct of the litigation with UWA, because of Dr Gray's role as a party in that litigation. Therefore, French J expanded the scope of the receiver's powers to allow him to conduct the litigation on behalf of CRI.**(b) Facts**CRI is an incorporated association established to support cancer research and education. CRI's principal asset is shares in Sirtex. Sirtex is a public company that purports to hold intellectual property rights said to have been developed by Dr Bruce Gray, formerly a Professor of Medicine and Head of the Department of Surgery at UWA.CRI was a respondent to litigation UWA commenced against it, Dr Gray and Sirtex. In that litigation, UWA alleged that it was entitled to the shares CRI held in Sirtex on the basis that the intellectual property rights held by Sirtex in truth belonged to the University.In July 2006 UWA agreed to settle its action against CRI. On 19 September 2006 the solicitor representing CRI informed the court that a question had arisen about CRI's legal capacity to settle the proceedings. Following that, on 27 September 2006, a new board was purportedly appointed to CRI comprising Dr Gray, Dr Gray's solicitor and Dr Gray's sister.French J expressed concerns about the extent to which CRI's affairs were being conducted in the pursuit of interests other than its stated purpose. On 5 October 2006 French J appointed, pursuant to section 57 of the [Federal Court of Australia Act 1976 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default) ("Federal Court Act"), a receiver to CRI's shares in Sirtex. The receiver was given power to exercise all of CRI's rights as a shareholder in Sirtex and to investigate the enforceability of the settlement agreement between CRI and UWA.The receiver formed the view that there were no current members of CRI and that the identity of the persons comprising its board of management remained unresolved. The receiver came back to court and sought an expansion of his powers so that he could conduct the proceedings on behalf of CRI, to determine the position that it should take in the proceedings, to instruct solicitors to appear and to file and serve any documents in the proceedings, and, subject to the approval of the court, to enter into and give effect to any agreement for the resolution of all or part of the proceedings so far as they affect CRI. **(c) Decision**French J considered all of the evidence in the proceedings and concluded that there was considerable room for debate about the membership of CRI, including whether or not it had any members and, if it did, who they were. In particular, the evidence included information obtained from CRI's membership records, which his Honour considered were incomplete and conflicting.French J also considered that the persons purporting to comprise the current board of CRI were not appropriate persons to make decisions about CRI's conduct of the litigation with UWA. This was because those persons were Dr Gray, who was also being sued by UWA in his personal capacity, his solicitor and his sister. In reaching that conclusion, French J referred to a letter Dr Gray sent to the shareholders of Sirtex in which he suggested that Sirtex should adopt a strategy in the litigation that would "marshal the collective resources" of him, CRI and Sirtex. His Honour considered that the letter suggested an inability for Dr Gray to distinguish between his own interests and those of CRI.French J considered section 57 of the Federal Court Act, which allows the court to appoint a receiver "in any case in which it appears to the court to be just or convenient so to do", and Order 26 rule 7 of the Federal Court Rules, which allows the court to authorise a receiver to do "any act or thing which the parties or any of them might do if of full age and capacity".His Honour relied on the decision in Vouros as Liquidator of Cadima Express Pty Ltd v Deputy Commissioner of Taxation (1993) 33 ACSR 527, in which Austin J accepted that there was power to "appoint a receiver in cases where it decides to permit proceedings to be commenced and prosecuted in the name of a company in liquidation by a person other than the liquidator".French J therefore concluded that "the court, in an appropriate case, may appoint a person as a receiver to an incorporated body to conduct or defend litigation on its behalf. That power may be exercised where the body is effectively paralysed by internal dissension or where for one reason or another those charged with its management are unable to be identified or, if identified, are unable to act for one reason or another".Given the difficulties his Honour found in identifying the membership of CRI and its governance difficulties, he concluded that the only reasonable course was to invest in the receivers the wider powers that were sought. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.6 Balance of convenience did not favour appointment of receiver** (By Adam Borowski, Blake Dawson Waldron)Vikas Rambal (as Trustee for the Vikas Rambal Family Trust) v Pankaj Oswal (as Trustee for the Burrup Trust) [2006] WASC 312, Supreme Court of Western Australia, Le Miere J, 22 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/December/2006wasc312.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/december/2006wasc312.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This application was made under sections 232 and 233 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) seeking relief on the basis that the actual and proposed acts or omissions of the defendants are contrary to the interests of the members of two companies, or are oppressive to, unfairly prejudicial to, or unfairly discriminatory against the plaintiff in his capacity as shareholder. The application was dismissed.**(b) Facts** Vikas Rambal (the plaintiff), holds 15% of the shares in the Burrup Holdings Pty Ltd (Holdings), the holder of 99.999% of the shares of Burrup Fertilisers Pty Ltd (BFPL). BFPL was building a new ammonia plant for the fixed cost of $US320 million. Paramount (WA) Ltd (Paramount) was contracted to do most of the construction work. It was a matter of dispute as to whether the plaintiff or one of the defendants and the majority shareholder in Holdings, Oswal, owned and controlled Paramount. In November 2005, the plaintiff was appointed managing director of BFPL and other related companies (the Companies). In May 2006, the plaintiff received a letter terminating his employment by the Companies. In previous applications to the court, the plaintiff had sought injunctions and orders to ensure that BFPL complied with certain provisions of the Shareholders Deed. The plaintiff also sought, and obtained, a court order allowing access to various books and records of the Companies.**(c) Decision** The first order sought by the plaintiff was for the appointment of interim receivers and managers of the assets, property and undertakings of the Companies. The proposed order also included an order that the Companies be restrained from performing any transactions in respect of all bank accounts. One of the three motivating factors behind the orders sought was that the plaintiff alleged that Oswal controlled Paramount and used his position in BFPL to transfer funds and obtain finance to Paramount so that Paramount could pay its creditors. The other arguments raised by the plaintiff include the mismanagement of BFPL such as to cause increased safety incidents and the denial of access to the plaintiff to the books and records of the Companies. The plaintiff relied upon section 25(9) of the [Supreme Court Act 1935 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15947" \t "_default) which empowers the court to appoint a receiver by interlocutory order where it is just and convenient to do so. **(i) Financial concerns**The plaintiff's allegations that the payments authorised by Oswal threatened the liquidity of BFPL were the subject of expert reports. The Court ruled that the evidence did not establish that BFPL was insolvent or likely to be insolvent at the time of trial. Therefore, a decision in relation to the financial stability was adjourned until the trial of the action.**(ii) Safety issues**Given this was an interlocutory application, the court only considered the risk of damage to the plant or injury to workers or neighbours as if the plant continues to be operated under its existing management rather than under managers answering to receivers. The court was not satisfied that were was an imminent risk to the safety of the plant or people in its vicinity. Additionally, the court dismissed the plaintiff's submissions that the plant was operated contrary to specifications or modified in ways that were not approved and this could prejudice BFPL's position under the deed to construct the ammonia plant. **(iii) Non-access to records**The plaintiff also alleged that the senior management of BFPL engaged in falsehoods and deceptions and failed to give the plaintiff proper access to the books and records of BFPL. The court held that the allegations of deception, falsehood and denied access are serious and are best dealt with at the trial of the action.Additionally, the court did not consider it necessary to make orders for independent accountants to be provided with books, records and information by the companies as the usual court practices provide for such disclosures.**(d) Conclusion**The court considered the very substantial loss and damage that the Companies could suffer as a result of the appointment of a receiver and held that the balance of convenience did not favour the appointment of a receiver.As an alternative, the plaintiff sought an order for an injunction restraining the Companies from operating the plant at levels in excess of its rated capacity, operating the business other than in their normal course and making payments in excess of $50,000. Having regard to the imminence of the trial (7 weeks from this application), the court considered such an order to be an unjustified intrusion into the affairs and management of the Companies.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.7 Interest in the resolution or matter other than as a member** (By Roger Ouk, DLA Phillips Fox)Southern Wine Corporation Pty Ltd (in liq) v Perera [2006] WASCA 275, Court of Appeal, Supreme Court of Western Australia, Steytler P, McLure JA and Pullin JA, 19 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/December/2006wasca275.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/december/2006wasca275.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The Appellant, Southern Wine Corporation Pty Ltd (in Liq), held 56% per cent of the units in the Fernvale Unit Trust Managed Investment Scheme ("Scheme") registered under section 601ED of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act"). The Appellant was also the responsible entity of the Scheme as defined in section 9 of the Act.The Appellant voted in favour of a special resolution which deleted from the Scheme's constitution the prohibition on transferring units if the transfer had the effect of reposing more than 5% of the issued units in any person.The issue was whether or not the Appellant had contravened section 253E of the Act which prohibits a responsible entity from voting its interest on a resolution where it has an interest in the resolution or matter other than as a member.The Court of Appeal stated that section 253E's purpose was to remove the potential conflict of interest and that the term "interest" referred to in this section was not confined to financial benefit. However, the Appellant was not prohibited from voting in a self-interest way so long as it had no interest in the resolution other than as a member. It was further held that the Appellant's interest, by wanting to maximise its returns on the sale of units held by it, arose only in its capacity as a member.The appeal was unanimously allowed.**(b) Facts**The Appellant, Southern Wine Corporation Pty Ltd (in Liq), was the responsible entity as defined in section 9 of the Corporations Act 2001 (Cth) ("Act") of the Fernvale Unit Trust Managed Investment Scheme ("Scheme"). The Appellant also held 56% of the issued units in the Scheme.In December 2004, the Appellant voted in favour of a special resolution put to unit holders at a general meeting. The special resolution, which was passed with 75.12 per cent of units voting in its favour, deleted clause 11.3 of a deed and its associated provisions which formed part of the Scheme's constitution. Clause 11.3 of the deed provided that no transfer of units in the Scheme was permitted if it would have the effect of increasing the interest of any person in units to greater than 5 per cent of the issued units.At trial, the Respondent, who voted against the special resolution submitted that the Appellant, which was in liquidation, was precluded from voting on the special resolution under section 253E of the Act, and therefore the special resolution was invalidly passed. Section 253E provides: "the responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member."The Respondent's contention was upheld by the trial judge on the grounds that the Appellant had an interest in the resolution other than as a member because it was in liquidation. The trial judge stated that the Appellant "had an interest in the resolution as a company in liquidation seeking to recover value by the sale of its unit holding, particularly in the interest of its creditors".The trial judge held that the "block of votes wrongly cast in favour of the special resolution" had to be removed "from the scales", and consequently, the resolution had not validly been passed.The Appellant submitted that the trial Judge erred in finding that because the Appellant was insolvent it had an interest in the resolution or matter other than as a member. The Respondent supported the finding of the trial Judge on the additional basis that:" ... the Appellant had an interest in the resolution other than as a member because the resolution, which was to facilitate the sale of the Appellant's 56% interest in the scheme, was a step taken in the process of winding up the Appellant which would inevitably lead to the cessation of the Appellant as Responsible Entity."**(c) Decision** Steytler P allowed the appeal with McLure JA and Pullin JA concurring.Having surveyed the legislative history behind section 253E, Steytler P concluded that there could have been no other purpose behind the provision than removing a potential conflict of interest. That is, to ensure that the responsible entity in voting on a resolution would not put its own interest arising independently of its membership of the scheme before other members' interests to their detriment.It was held that the term "interest" was not confined to financial benefit but encompassed "any direct or indirect benefit or advantage, other than as a member, arising out of passing the resolution". However, it was noted that Australian law has not developed to the stage where controllers have a fiduciary duty which prohibits them from exercising voting rights in a self-interested way, so long as they have no interest in the resolution other than as a member and do not contravene other sections of the Act. The Appellant voted in favour of the resolution because it wanted to maximise its returns on the sale of units held by it. Although the Appellant was held to have acted in a self-interested way, it was found that the Appellant's interest in the resolution arose only in its capacity as a member.This was because the desire to maximise a unit holder's return on the sale of its units, that is, achieving the best price for its units, arises as a member, regardless of whether the sale is for the benefit of creditors in the case of an insolvent company, or, in the case of a solvent company, its shareholders. Furthermore, the resolution operated equally among all unit holders and thus did not work any inequality between unit holders.The submission that the resolution was a "step taken in the process of winding up the Appellant" was rejected and considered irrelevant as the Appellant would have been wound up regardless of whether or not the resolution was passed.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.8 Civil jurisdiction - the Corporations Act and the Judiciary Act** (By Tim Downing, Mallesons Stephen Jaques)Gordon v Tolcher in his capacity as liquidator of Senafield Pty Ltd (In liquidation) [2006] HCA 62, High Court of Australia, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, 15 December 2006The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/high\_ct/2006/62.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/62.html%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**In this case the High Court considered the relationship between the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Corporations Act") and the [Judiciary Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "_default) 1903 (Cth) ("Judiciary Act") in respect of the vesting of federal civil jurisdiction in state courts.It specifically involved the 3 year time period set down by section 588FF(3) of the Corporations Act in which a liquidator may institute a proceeding for an order that a transaction or transactions were voidable under section 588FE of the Corporations Act, and, section 79 of the Judiciary Act which provides that State laws are binding on all courts exercising federal jurisdiction, unless the Constitution or a law of the Commonwealth "otherwise provides". The issue arose as proceedings instituted against the appellant by the respondents had been deemed to be dismissed in accordance with the [District Court Rules 1973 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11124" \t "_default) ("Rules"), but that deemed dismissal was rescinded and an extended time period granted by the New South Wales Court of Appeal ("Court of Appeal"). The High Court unanimously dismissed the appellant's appeal that the provisions of the Rules authorising the extension of time to the respondent's application could not apply on the basis that section 588FF(3) of the Corporations Act did otherwise provide, and as such, the extension of time granted to the respondents could not be sustained.**(b) Facts** The respondents had instituted proceedings against the appellant by statement of liquidated claim in the District Court of New South Wales ("District Court") in respect of certain alleged uncommercial transactions and insolvent transactions in breach of section 588FE of the Corporations Act. This claim was filed a matter of days before the 3 year time period for bringing an action in respect of section 588FE, set down in section 588FF(3) of the Corporations Act, had expired. However, the statement of liquidated claim was not served on the appellant, no notice of grounds of defence had been filed and no default judgment nor any order disposing of the proceeding had been made, such that a sufficient time period had elapsed for the proceeding to be "taken to be dismissed" under the Rules.The respondents unsuccessfully sought orders from the District Court to have the deemed dismissal rescinded; however, this was overturned by the Court of Appeal. The appellant then sought special leave to appeal to the High Court on the manner and exercise of the Court of Appeal's decision to rescind the dismissal under the Rules. Leave was denied, but, it was granted for the appellant to appeal on the issue of whether the Court of Appeal had erred in failing to hold that the provision in the Rules allowing for the extension of time by which the respondent's application be maintained, as applied by section 79 of the Judiciary Act, should not have been determined under the Rules because section 588FF(3) of the Corporations Act was a Commonwealth law which "otherwise provided" as contemplated by section 79.Section 79 of the Judiciary Act provides that "the laws of each State … including the laws relating to procedure … shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State… in all cases to which they are applicable". The Rules were laws relating to procedure made under the powers conferred by section 161 of the District Court Act 1973 (NSW).It was argued by the appellant that section 588FF(3) was a Commonwealth law which "otherwise provided" and as such the 3 year time period had expired, so the Rules could not apply to permit a time extension.**(c) Decision** In a unanimous decision, the High Court dismissed the appellant's case.**(i) Corporations Act v Judiciary Act**Their Honours referred to section 1337A of the Corporations Act in Division 1 of Part 9.6A, dealing with civil jurisdiction, and noted that it expressly states that the operation of the Judiciary Act was not limited, save for the exclusion of the operation of section 39B of that Act (which confers certain jurisdiction on the Federal Court). Hence, it recognises the operation of section 79 of the Judiciary Act. Further, section 39(2) of the Judiciary Act, providing for the investment of federal jurisdiction in the several courts of the States (including the appellate jurisdiction exercised by the Court of Appeal in this case), is expressly stated not to be limited.The High Court also stated that section 588FF of the Corporations Act does not concern the investment, or manner of exercise, of federal jurisdiction in any court. This is covered by Part 9.6A, hence, section 1337E of the Corporations Act confers federal jurisdiction on the District Court. As such, it was not possible for the appellant to sustain its argument that section 588FF of the Corporations Act so reduced the ambit of the Rules that it was irreconcilable with them, meaning the Corporations Act "otherwise provides" within the meaning of section 79 of the Judiciary Act, and the Rules could not have effect.In conclusion, the court said that the overall effect was that federal jurisdiction was conferred by Part 9.6A of the Corporations Act, but, subject to the operation of any other provision of the Corporations Act, after an application is instituted "the procedural regulation of the conduct of that matter is left for that particular State or territorial procedural law" which is picked up by the operation of section 79 of the Judiciary Act. As such, the Court of Appeal was able to give effect to the Rules and determine that the deemed dismissal of the proceeding be rescinded.Their Honours then said that while this was sufficient alone to dispose of the appeal, more needed to be said about section 588FF of the Corporations Act and its link with conferral of civil jurisdiction in Division 1 of Part 9.6A. **(ii) Section 588FF and the time requirement**Section 588FF(1) permits an application to a "court", being any court as defined by section 58AA of the Corporations Act, to be brought under which that court orders that the transaction in question is a voidable transaction. Section 588FF(3) allows for a separate and distinct application to be made for an extension to the 3 year time period in which the application in sub-section 1 must be instituted. Such an application may be made to "the court", which section 58AA defines to be the Federal Court or a State or Territory Supreme Court (i.e. a superior court). The effect of this was that the District Court could not have ordered an extended time period, which it did not, but the application to have those transactions deemed to be voidable transactions was able to be made to the District Court, which was what occurred.Their Honours also noted that the 3 year time stipulation was not merely a procedural requirement, it goes to the very essence of section 588FF of the Corporations Act, as has been evidenced by general and judicial commentary on this issue, in particular in relation to the importance of certainty for persons who may be "at risk" to exposure from a voidable transaction.It is concluded that the relationship between section 588FF of the Corporations Act and section 79 of the Judiciary Act is not such that 588FF "otherwise provides" and consequently prevents the operation of section 79 and its ability to permit the operation of the Rules as were relied on by the Court of Appeal in making the order to extend the time period.**(iii) Exhaustion of federal jurisdiction**Finally, the court commented that because the proceedings had been "taken to be dismissed", this did not mean that federal jurisdiction was then exhausted on the happening of that event. At all times, the District Court and the Court of Appeal were "seized" of a matter under which federal jurisdiction was being exercised.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.9 When are dividends "declared" for the purposes of section 254V of the Corporations Act?** (By Hayley Webb, Mallesons Stephen Jaques)Deputy Commissioner of Taxation v Bluebottle UK Limited [2006] NSWCA 360, New South Wales Court of Appeal, Mason P, Santow and Basten JA, 14 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/December/2006nswca360.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/december/2006nswca360.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The principal issue in this appeal was whether Virgin Blue Holdings Ltd (Virgin Blue), having declared but not yet paid a final dividend in favour of its two non-resident shareholders, Cricket SA (Cricket) and Virgin Holdings SA (Virgin Holdings) escaped application of section 255 of the [Income Tax Assessment Act 1936 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "_default) (ITAA) by the two non-resident shareholders agreeing to assign their dividend right to a third party, Bluebottle UK Limited (Bluebottle) before it was paid. Determination of this issue involved interpretation of the meaning of "declaration of dividends" in section 254V of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act).The NSW Court of Appeal overturned the decision of the NSW Supreme Court and held that section 255 applied and Virgin Blue was required to pay tax in relation to the dividend. The primary reasoning was that section 254V of the Corporations Act applied to the company with the effect that the debt was incurred when the dividend was declared, rather than when the directors determined. **(b) Facts****(i) Background** At the relevant time, Virgin Blue, a publicly listed company incorporated and resident in Australia, had two non-resident shareholders incorporated in Switzerland: Cricket and Virgin Holdings. On 11 November 2005 the directors of Virgin Blue resolved to pay a final fully franked dividend of 25 cents per ordinary share on 15 December 2005. On 12 December 2005 the Deputy Commissioner of Taxation (DCT) issued a notice to Virgin Blue, purportedly under section 255 of the ITAA stating that Virgin Blue was to retain funds to pay the tax due and payable by Cricket and Virgin Holdings. On 13 December 2005 Cricket and Virgin Holdings executed the deeds of assignment that purported to assign each shareholder's right, title and interest to receive the dividend to Bluebottle. Section 255 of the ITAA empowers the Commissioner of Taxation to require a person having control of money of or due to a non-resident:* to retain that money to the extent of tax due or to become due by that non-resident; and
* to pay that tax if so required by the Commissioner and be indemnified accordingly.

Although section 254U of the Corporations Act did not apply because all replaceable rules were expressly excluded in Virgin Blue's constitution, the court considered that section in the context of its consideration of the related section, 254V. Section 254U provides that the directors of a company may determine that a dividend is payable and fix the amount and the time and method for payment, and that a debt arises only when the time fixed for payment arrives. However, section 254V of that Act provides that if the company constitution provides for the declaration of dividends, the company incurs a debt when the dividend is declared. **(ii) Decision at first instance**At first instance, Gzell J applied sections 254U and 254V of the Corporations Act by reference to rule 63(a) of Virgin Blue's constitution. The relevant rule (rule 63(a)) incorporated in Virgin Blue's constitution empowered the directors to "from time to time determine that a dividend is payable" as well as entitling the directors to "fix the amount, the time for payment and the method of payment of the dividend". Because the constitution used the word "determine" rather than "declare" the trial judge concluded that there was no power in the constitution to declare a dividend, therefore section 254V was not applicable and the debt was not incurred when the dividend was "declared", rather it was incurred on the date determined by the directors (15 December 2005). Consequently, Gzell J found that the assignment of the dividend to Bluebottle prevailed over section 255 and Virgin Blue was not liable under section 255 for the non-resident shareholders' tax.**(c) Decision on appeal**On appeal the DCT challenged the trial judge's conclusion that the debt was incurred on the date the dividend was declared before the assignment of the dividend rights and that section 255 of the ITAA therefore applied to require payment or retention of the tax by Virgin Blue.On appeal, Gzell J's construction of Virgin Blue's constitution, section 254V of the Corporations Act and section 255 of the ITAA were not accepted. Mason P, Santow and Basten JA found that the use of the term "determine" in Virgin Blue's constitution included the declaration of a dividend and therefore section 254V of the Corporations Act applied. The Court of Appeal found, in accordance with section 254V(2), that the declaration gave rise to a debt payable by the company to the shareholders as at the date of the declaration of dividends. The company was liable to pay money to a non-resident and was therefore deemed to be a person having control of money belonging to the non-resident pursuant to section 255(2) of the ITAA. The Court of Appeal concluded that the notification received from the Commissioner on 12 December 2005 was sufficient to engage an obligation under s 255(1)(b) for Virgin Blue to retain so much of the dividend due to each non-resident as was sufficient to pay the tax.**(d) Conclusion**Despite the alternate wording of the company constitution, Virgin Blue was found to have incurred a debt under section 254V of the Corporations Act when the dividend was declared on 11 November 2005. Virgin Blue was therefore subject to section 255 of the ITAA and required to pay the tax associated with the declaration of the dividend in favour of two non-resident shareholders. In these circumstances the fact that the dividend was assigned to a third party on 13 December 2005 did not prevent section 255 from being applicable.This decision confirms that a company constitution can provide for the "declaration of dividends" for the purposes of section 254V of the Corporations Act even where alternate wording is used to give the directors the power to determine dividends are payable. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.10 Remedies for breach of trust – vesting orders, winding up and calculation of equitable compensation** (By Emily McConnell, Freehills)Hillig v Darkinjung Local Aboriginal Land Council [2006] NSWSC 1371, New South Wales Supreme Court, Barrett J, 12 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/December/2006nswsc1371.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/december/2006nswsc1371.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Trust money improperly invested in companies that became insolvent may be the subject of an order for equitable compensation in favour of the person in whose benefit the property was held on trust. The court should grant an order to wind up a company pursuant to section 461(1)(a) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) following a shareholder resolution unless there is unconscionable or inequitable conduct.**(b) Facts** The proceedings were brought by Darkinjung Local Aboriginal Land Council (DLALC) to retrieve money paid to Darkinjung Pty Ltd (DPL) pursuant to a trust instrument.DLALC, a local Aboriginal land council constituted under the [Aboriginal Land Rights Act 1983 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6630" \t "_default) ('ALR Act'), sold land to Mirvac Projects Pty Ltd for approximately $42 million. Approximately $25 million of this money was transferred to DPL as trustee under a trust instrument. In breach of trust DPL used some of the money received from DLALC to fund a number of other companies. These companies later became insolvent. At issue in the current proceedings was the calculation of equitable compensation awarded to DLALC, whether the court should order the vesting of property held by DPL on trust for DLALC and whether an order to wind up the relevant companies should be made pursuant to section 461(1)(a).**(c) Decision** **(i) Equitable compensation–assessment**The court indicated that equitable compensation should be assessed in a manner that takes account of the losses and the detriments that have resulted from the application of the money by the trust. In order to do so, the court must determine the total loss to the beneficiary without allowing for gains on assets purchased that have increased in value. **(ii) Equitable compensation – interest**Barrett J considered the rate of interest which should be allowed on the amount of equitable compensation – whether the interest should be allowed at the rate applicable to legacies or at a 'mercantile rate'.Had the money remained with DLALC, rather than been transferred to DPL, the ALR Act and [Aboriginal Land Rights Regulations 2002 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=65935" \t "_default) ('ALR Regulations') would apply and the money could only be invested in specified authorised investments. These investments pay interest that is at a lower rate than ordinary market rates. Accordingly, Barrett J ordered that the interest should be calculated on the basis of term deposits with the Commonwealth Bank of Australia (which is an 'authorised investment' for the purpose of the ALR Regulations) for the relevant period, including compound interest.**(iii) Vesting of property held by DPL on trust for DLALC**DLALC sought an order that an identified piece of land and all property and assets of DPL be vested in DLALC.Barrett J held that a vesting order should not be made for the following reasons:* a vesting order should specify with particularity the items of property with which it deals - while the order referred to a specific parcel of land, it did not describe the other property and assets with any particularity;
* a vesting order is an extraordinary remedy not intended to displace ordinary conveyancing and transfer mechanisms, it should only be made where the vendor 'refuses or declines to execute a transfer or is disabled from so doing': Chang v Registrar of Titles (1976) 137 CLR 177 at 175 per Mason J;
* a vesting order cannot be made until the value of the assets in the trust are certain. In this case, the trustee has a right to indemnity which has not yet been exercised.

Accordingly, Barrett J refused to make a vesting order, instead requiring that DPL transfer all its funds and assets to DLALC, after claims for costs and entitlements to indemnity.**(iv) Winding up on the ground of section 461(1)(a)**Section 461(1)(a) states:The court may order the winding up of a company if the company has by special resolution resolved that it be wound up by the court.Barrett J stated that three principles should be regarded as relevant to a case in which winding up is sought on the ground that the company has by special resolution resolved that it be wound up by the court:* the body of shareholders has a statutory right to decide that their company should be wound up by the court, being a right exercisable by whatever procedures are sufficient, in the particular circumstances, to cause a special resolution to be passed;
* section 461(1) grants the court a discretion to make a winding up order. However, the court should grant the order unless there is unconscionable or inequitable conduct in relation to the shareholders’ decision, or some aspect of the surrounding circumstances;
* the availability to the shareholders of the alternative of initiating voluntary winding up by special resolution does not represent any reason for declining to make a winding up order.

In the present case, Barrett J noted that there was no evidence of inequitable or unconscionable conduct and that a sole member is entitled to rely on the ground in section 461(1)(a) despite the fact that the sole member has the power to initiate voluntary winding up. Accordingly, Barrett J made the winding up order and an order appointing a liquidator of DPL.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif**5.11 Successful application by DCT to set aside personal insolvency agreement** (By Marina Barker-Edwards, Clayton Utz)Deputy Commissioner of Taxation v Blaikie [2006] FCA 1695, Federal Court of Australia, Branson J, 7 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/December/2006fca1695.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/december/2006fca1695.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned an application by the Deputy Commissioner of Taxation ("Deputy Commissioner") pursuant to section 222 of the [Bankruptcy Act 1966 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "_default) ("Act") to set aside the Personal Insolvency Agreement of Mr Blaikie, following a ruling by Mr Blaikie's Trustee that the Deputy Commissioner was ineligible to vote at a meeting of creditors. Branson J held that:* the Deputy Commissioner was entitled to vote at the creditors meeting;
* it was appropriate to set aside Mr Blaikie's Personal Insolvency Agreement.

**(b) Facts**Mr Blaikie was a director of a number of related companies, including Advantage Personnel Pty Limited ("Advantage"), Employment@Advantage Pty Ltd ("Employment"), and three other companies that together made up the "Advantage Group". Advantage was the source of income for all of the companies in the Advantage Group.On 16 August 2002 Mr Blaikie caused Employment to enter into a Payment Agreement with the Deputy Commissioner pursuant to section 222ALA of the [Income Tax Assessment Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "_default) ("ITAA"). Employment contravened the Payment Agreement when it failed to make a payment of $10,927.38 on 18 June 2004. The total unpaid amounts owed by Employment under the Payment Agreement therefore became payable to the Commissioner of Taxation in accordance with subsection 222ALA(5) of the ITAA. Upon contravention of the Payment Agreement, Mr Blaikie, as a director of Employment, became immediately liable to pay to the Commissioner of Taxation, by way of penalty, an amount equal to the balance payable under the Payment Agreement unless a defence under section 222AQD of the ITAA could be established. On 29 November 2004 Mr Blaikie signed an authority under section 188 of Part X of the Act authorising Geoffrey Reidy to call a meeting of Mr Blaikie's creditors and to take control of his property. At the meeting, the Deputy Commissioner voted against Mr Blaikie's proposed Personal Insolvency Agreement, the requisite majority was not obtained and Mr Blaikie's section 188 authority ceased to have effect.On 13 December 2005 Mr Blaikie executed another authority under section 188 of Part X of the Act, this time authorising Geoffrey McDonald to call a meeting of Mr Blaikie's creditors and take control of his property. At the meeting of creditors on 4 April 2006, Mr McDonald ruled that the Deputy Commissioner was not entitled to vote. Mr McDonald certified that a special resolution had been passed at the meeting and required Mr Blaikie to execute a Personal Insolvency Agreement. The Deputy Commissioner sought to set aside the Personal Insolvency Agreement in order to sequestrate Mr Blaikie. There were two questions before Branson J: first, whether the Deputy Commissioner was at all material times a creditor of Mr Blaikie and therefore entitled to vote; second, whether Mr Blaikie's Personal Insolvency Agreement ought to be set aside.**(c) Decision** **(i) Question one**Branson J found that the Deputy Commissioner was a creditor of Mr Blaikie and had been entitled to vote at the meeting of creditors.Her Honour determined this question having regard to the defences under subsections 222AQD(3) and (5) of the ITAA, namely, whether Mr Blaikie could establish that he:* took all reasonable steps to ensure that Employment complied with the Payment Agreement to the Deputy Commissioner; and
* had reasonable grounds to expect, and did expect, that Employment would comply with the Payment Agreement to the Deputy Commissioner.

Branson J accepted that Mr Blaikie did in fact expect that Employment would comply with the Payment Agreement to the Deputy Commissioner. However, Mr Blaikie had not proved that he had reasonable grounds to expect that Employment would or even could comply with its repayment commitments under its Payment Agreement. Since Employment relied on Advantage for its income Mr Blaikie ought to have anticipated key triggers to the financial demise of Advantage. These included the imposition of a significant fine by the Registry of the Industrial Relations Commission of NSW on Advantage in respect of an accident in 2002, the likely approximate cost to the Advantage Group of its compulsory workers compensation insurance in the calendar year 2003 and the likely outcome of a Zurich Workers Compensation Audit, matters that were not appropriately reflected in the weekly financials of the Advantage Group.Branson J was of the view that Mr Blaikie's expectation that Employment could comply with its Payment Agreement was based on his subjective confidence in the financial future of the Advantage Group, and that Mr Blaikie had failed to take steps reasonably open to him to objectively identify the possibility of non-routine financial demands being made against members of the Advantage Group. **(ii) Question two**Branson J exercised her discretion pursuant to section 222(1)(e) of the Act to set aside Mr Blaikie's Personal Insolvency Agreement since the requirements in section 204 of the Act that the agreement of the creditors be evidenced by a "special resolution" had not been satisfied at the meeting of creditors. A Personal Insolvency Agreement is intended to be a process available to a debtor only where the substantial support of his or her creditors can be obtained.Her Honour was also satisfied that Mr McDonald's decision not to allow the Deputy Commissioner to vote at the creditors' meeting meant that the Personal Insolvency Agreement had never been entered into in accordance with Part X of the Act.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20114%20February%202007_files/go_up.gif |
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