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| **Corporate Law Bulletin****Bulletin No. 110, October 2006**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities RegulationPublished by [Lawlex](http://www.lawlex.com.au/%22%20%5Ct%20%22default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Stock Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new), [Phillips Fox](http://www.phillipsfox.com/%22%20%5Ct%20%22_new).***Use the arrows to navigate easily across the bulletin***[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29.htm#top)= back to Brief Contents = back to top of current section |
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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 New Bill to enhance co-operation between ASIC and foreign regulators**On 17 October 2006, the Parliamentary Secretary to the Australian Treasurer the Hon Chris Pearce MP introduced the [Australian Securities and Investments Commission Amendment (Audit Inspection) Bill 2006](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=93056" \t "_default) into Parliament. The Bill will provide a legislative framework to empower the Australian Securities and Investments Commission (ASIC), with the consent of the Minister, to enter into cooperative audit arrangements with foreign regulatory bodies. The Bill will enable ASIC to enter into a cooperative audit arrangement with the US Public Company Accounting Oversight Board (PCAOB). The Bill will also enhance ASIC’s domestic and international audit inspection powers. This will clarify uncertainty about the scope of ASIC’s existing powers to review audit firms which the Financial Reporting Council identified in its 2004-05 Auditor Independence Report.Mr Pearce said the Government proposes to review the operation of the cooperative arrangement between ASIC and the PCAOB, after the first round of triennial PCAOB inspections in Australia in 2007, to assess whether the joint inspection process has met expectations.The Bill also contains a technical amendment to a transitional provision relating to auditing standards which will extend the current immunity against criminal liability under section 1455 of the Corporations Act 2001 to cover all financial reports ending on or before 29 June 2007.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.2 Trade Practices Act reform** On 19 October 2006 the Senate passed the [Trade Practices Legislation Amendment Bill (No 1) 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83207" \t "_default). The amendments represent some of the most significant changes to trade practices law in many years. The key changes include:* Much higher penalties will apply for contraventions of Part IV of the Trade Practices Act (TPA) – being the greater of (i) $10 million; (ii) three times the gain from the contravention; or (iii) 10% of the annual turnover of the company and its related bodies corporate (if the gain from the contravention cannot be ascertained).
* The court is given the power to disqualify a person who has breached the law from being involved in the management of companies for a period the court considers appropriate.
* There is a new voluntary merger clearance process designed to provide more certainty to merging companies under which the ACCC has 40 business days to determine an application to approve a merger (the ACCC can extend this period for another 20 days). The applicant can seek review of the ACCC's decision by the Australian Competition Tribunal. There is immunity from legal action (including third party actions) if clearance is granted.
* Merger authorisations will now be brought direct to the Tribunal which can only authorise the merger if a public benefit test is satisfied.
* As a response to concerns about the cost of the authorisation procedures for small business, there is a new notification process for collective bargaining by small businesses dealing with big businesses. Under this process small businesses notify the ACCC of the collective action and if the ACCC raises no objection at the end of 14 days the notifying business receives immunity for three years.

The government has foreshadowed further amendments to the TPA dealing with the introduction of criminal penalties for serious cartel conduct and strengthening the misuse of market power and unconscionable conduct provisions of the TPA.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.3 Extend of fraud involving Australian companies** The incidence of fraud suffered by Australian companies has doubled from 27,657 in 2004 to 65,000 in 2006, according to the latest findings of the 2006 KPMG Fraud Survey released on 16 October 2006. Forty-seven percent of the 465 organisations surveyed had experienced at least one fraud during the survey period with the average value of fraud reaching $714,000 per organisation. Sixty-three respondents reported single frauds with a value greater than $200,000. In 42 percent of major frauds none of the money or goods stolen was recovered.14 percent of employees involved in fraudulent conduct had a history of dishonesty with previous employers. The number one motive for fraud was greed and lifestyle considerations, these were responsible for 54 percent of the total value of fraud reported, followed by gambling, which accounted for 22 percent. In regard to the average value of fraud, gambling topped the list at almost $300,000 per incident. Of the frauds motivated by gambling, electronic gaming machines resulted in an average value of fraud of $1.4 million.Sixty-one percent of respondents who had operations in Asia suffered at least one incident of fraud during the survey period.**(a) Survey highlights*** Forty-seven percent of all respondents experienced at least one fraud during the survey period, which was up marginally from 45 percent reported in 2004.
* Total value of fraud reported was $154.9 million with an average value for each organisation of $714,000.
* Greed and lifestyle considerations, together with gambling, were the most common motivators of fraud.
* Seventy-five percent of respondents have a system for anonymous reporting of fraud.
* In 42 percent of major frauds none of the money or goods stolen was recovered.
* Fourteen percent of employees involved in fraudulent conduct had a history of dishonesty with previous employers, up from seven percent in 2004.
* Seventeen percent of major frauds involved the use or misuse of computers, computer networks or on-line banking facilities.
* Sixty-one percent of respondents believed identity fraud is a major problem for business.
* Respondents reported over 1000 cases of identity fraud with a total value of over $4.6 million.

**(b) Profile of the typical fraudster (for the survey period)**The typical fraudster in the survey period exhibited the following characteristics:* The offender was a non-management employee of the victim organisation with no known history of dishonesty.
* A male aged 38 years acting alone.
* Employed by the organisation for a period of five years and had held his current position for three years at the time of detection.
* Motivated by greed, misappropriating funds to an average value of $220,000.
* Detected by the organisation's internal controls 12 months after the commencement of the fraud, leading to the organisation recovering 36 per cent of the proceeds of the fraud.

http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.4 Pandemic planning guidance for financial sector** On 6 October 2006, the Australian Prudential Regulation Authority (APRA) released an information paper and prudential practice guide (PPG) to assist APRA-regulated institutions with their planning for a potential pandemic.The advice was released following consultation with industry and research into pandemic planning that is taking place around the world. While APRA's existing prudential standards cover business continuity planning requirements in the event of a major event or crisis, APRA's pandemic advice is designed to bring into focus specific planning for a pandemic scenario.APRA has been working on pandemic planning in recent months with larger institutions, industry associations, other financial regulators and the Government. The focus has been on highlighting good practice, identifying industry-level issues and assessing potential financial impacts on regulated institutions.The PPG documents do not impose any mandatory requirements on institutions but are intended to highlight and support the need to consider this emerging risk. APRA assesses pandemic continuity planning as part of its routine operational risk reviews. APRA is also currently conducting a survey of pandemic exposures across the life and general insurance industries to gauge the potential impact of a pandemic on these industries.The pandemic information paper and PPG are available on the [APRA website](http://www.apra.gov.au/%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.5 2006 US poxy season report** On 5 October 2006, Institutional Shareholder Services (ISS), released its final report highlighting key issues and voting statistics from the 2006 US proxy season. ISS reports that more companies are continuing to improve their governance practices. To date, ISS has issued withhold recommendations against 15% of director nominees at U.S. companies versus 17% in 2005 and 20% in 2004. The debate over majority voting in board elections continued to evolve as more than 180 companies adopted new election policies and bylaws. Most of these firms followed the example of Pfizer and adopted director resignation policies while maintaining a plurality standard. At more than 85 companies, the average level of support for majority vote shareholder proposals increased to 49%, compared to 44% at more than 55 company meetings last year. Despite governance improvements, investors showed strong concern over executive pay practices as evidenced through their votes on directors and shareholder proposals. In July, the Securities and Exchange Commission responded to investor concerns by approving new disclosure rules on executive compensation. Investors are also starting to show signs of displeasure over egregious option grant practices. More than 125 companies, prompted by inquiries from regulators, investors, and other industry constituents, started examining their stock option practices to determine if the timing of any grants was manipulated. In fact, results from ISS' 2006 Policy Survey show that the backdating of stock options was ranked by institutional investors as most problematic among pay practices. Additionally, a majority of survey participants (77.8%) thought the optimal remedy to the backdating of options would be to recoup the windfall associated with the backdating. Hedge funds also continued to demonstrate their rising influence by waging a greater number of proxy contests. ISS reports that 21 proxy contests have gone to a vote this year versus 18 in 2005 and 19 in 2004. The most prominent example was Nelson Peltz’s successful bid for representation at H.J. Heinz. There were also many settlements, including Time Warner’s accord with Carl Icahn. So far this year, proponents of corporate social responsibility won significant support for proposals seeking reports on political contributions, fair employment practices and sustainability. Outside the United States, notable developments included the increasing number of companies in Japan and France that have adopted takeover defences, the new German legislation to end share blocking, the revisions to the United Kingdom’s Combined Code, and the new corporate laws in Japan and China.The 2006 Postseason Report is available on the [ISS website](http://www.issproxy.com/proxyseasonreview/2006/index.jsp%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.6 Reforms to enhance the competitiveness of Canada’s capital markets** On 4 October 2006, the Task Force to Modernize Securities Legislation in Canada concluded its 16-month study with a set of recommendations to bolster the international competitiveness of Canada’s capital markets.The report, entitled 'Canada Steps Up', presents 65 recommended Canada-wide reforms that focus on:* creating more empowered, more informed, more financially literate investors;
* improving the speed and simplicity with which issuers can go to market; and
* enhancing both the effectiveness and fairness of enforcement on a Canada-wide basis.

Among the key recommendations in 'Canada Steps Up':* That investor education and financial literacy be made a national priority, with the creation of a National Coordinator of existing public and private sector investor education programs.
* A paperless revolution in compliance. Once IPO disclosure documents are issued, companies would no longer be required to produce hard copy annual reports, proxy circulars and other continuous disclosure documents for investors – instead, disclosure would be accomplished by electronic filings on SEDAR and the issuer's website.
* The creation of an innovative system for disclosure. The Task Force has funded a prototype, entitled MERIT (Model for Effective Regulatory Information Transfer). MERIT would be the next-generation, e-world disclosure system - an interactive, easy-to-use, standardized system of corporate disclosure that would also integrate audio and video elements - essentially transforming disclosure into information.
* Requiring insiders to give two business days advance notice before selling securities – to ensure greater transparency and fairness.
* A regulatory framework for hedge funds stressing comprehensive disclosure and transparency of all management and administration arrangements and fees, with full registration, including the registration of hedge fund managers.
* The creation of a new category of well-known seasoned issuers, with market caps of $350 million or more, with a more streamlined and rapid system for offerings.
* The elimination of hold periods for privately placed securities of reporting issuers.
* A co-ordinated, Canada-wide approach to enforcement to ensure the effective use of resources, the development and deployment of experts with strong commercial knowledge and backgrounds across the country, and the independence and accountability of the enforcement process.
* The creation of a new position, called Senior Independent Review Officer, in each RCMP IMET locale in Canada, to ensure quality control and good judgment in capital markets investigations, and to make the final call on prosecutions.
* The establishment of a separate, national Capital Markets Court with jurisdiction over both securities offences, and civil liability cases related to securities violations.
* The adoption of a policy ensuring that successful defendants in securities cases have their legal costs reimbursed, and more frequent court applications for restitution, damages or compensation for aggrieved parties.

The Task Force to Modernize Securities Legislation was established by the Investment Dealers Association of Canada (IDA) in June of 2005. The report is available on the [IDA website](http://www.ida.ca/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.7 Auditors' liability: European Commission study** On 4 October 2006, the European Commission published an independent study on the economic impact of current EU rules on auditors' liability regimes and on insurance conditions in Member States. The study analyses the structure of the auditing market and its possible development in the future, describes the existing limitations in the insurance market for international audits, examines the economic needs for limiting auditors' liability and compares several possible methods for limiting liability. It represents the first EU-wide economic study on this subject. The preparation of the study has been accompanied by the creation of an Auditors Liability Forum composed of market experts (see IP/05/1420).The four key issues identified in the study are:* The international market for statutory audits of large and very large companies is highly concentrated and dominated by the Big-4 networks. The likelihood of new entrants into this market is very limited in the coming years. Additionally, under the current circumstances, middle-tier firms are unlikely to become a major alternative if a Big-4 network fails.
* The level of auditor liability insurance available for higher limits has fallen sharply in recent years. The remaining source of funds to face claims may essentially be the income of partners belonging to the same international network. Constantly large claims might therefore put at risk an entire network.
* The failure of a network could lead to difficult consequences for the wider economy like a significant reduction in large company statutory audit capacity possibly creating serious problems for companies whose financial statements need to be audited.
* A limitation on auditor liability would reduce this risk. While there exist a number of variants of statutory audit liability limitation, the diversity of circumstances in terms of both audits and company size is such that it is unlikely that a one-size-fits-all EU-wide approach is the most useful.

The Commission will issue a report based on this study before the end of 2006.Stakeholders will be invited to give their views.Further information is available on the [EU website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1307&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.8 Updated international principles for effective banking supervision**At the International Conference of Banking Supervisors held in Mérida, Mexico, on 4–5 October 2006, bank supervisors from central banks and supervisory agencies in 120 countries endorsed the updated version of the Basel Core Principles for Effective Banking Supervision and its Methodology. The Core Principles were originally written and agreed in 1997, being one part of the global response to strengthen the international financial system in the wake of the financial crises that occurred during the 1980's and 1990's. The 25 Principles are globally agreed minimum standards for banking regulation and supervision, covering a wide range of aspects including areas such as licensing, ownership of banks, bank capital adequacy, risk management, consolidated supervision, ways to deal with problematic situations in banks, and the division of tasks and responsibilities between home and host authorities. The Core Principles Methodology, which was developed in 1999, provides further details and guidance to assist in the interpretation and assessment of the 25 Core Principles. The revision pays significantly more attention to sound risk management and corporate governance practices. A new "umbrella" principle covering all common aspects across different risk types has been added, and the criteria for assessing interest rate, liquidity and operational risks have been enhanced. The criteria dealing with money laundering and terrorist financing as well as fraud prevention have also been strengthened.In addition, cross-border and cross-sectoral trends and developments are reflected more comprehensively, as is the need for closer cooperation and information exchange between supervisors of different sectors and countries. The review also stresses the importance of the independence, accountability and transparency of bank supervisory authorities.Further information is available on the [BIS website](http://www.bis.org/index.htm%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.9 Draft prudential package released for life insurance industry** On 3 October 2006, the Australian Prudential Regulation Authority (APRA) released for consultation a package of draft prudential standards and guidance for the life insurance industry, including friendly societies.The package aims to establish APRA's minimum expectations for risk management and business continuity in the life industry and to bring a number of prudential requirements for life companies and friendly societies into line with other APRA-regulated industries.The package comprises:* a discussion paper;
* draft prudential standard and prudential practice guide on risk management;
* draft prudential practice guides on:
	+ asset and liability management;
	+ conflicts of interest under section 48 of the Life Act (duties of directors to policyholders);
	+ operational risk; and
	+ insurance risk and reinsurance management; and
* a draft prudential standard and prudential practice guide on business continuity management.

The prudential standards provide a set of principles-based requirements for risk management and business continuity management which are harmonised, where appropriate, with requirements applicable in other APRA-regulated industries.Further information is available on the [APRA website](http://www.apra.gov.au/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.10 Executive directors decline in number as FTSE boards shrink**The number of executive directors of FTSE companies has fallen by 20 per cent since 2002, as the 'Higgs effect' continues to rapidly change the structure of the UK plc boardroom, according to a report published on 2 October 2006 by Deloitte, the business advisory firm. Executive directors on main boards dropped by 6.5% this year, the fourth successive year of decline, as UK plc respond to the Higgs report by cutting the number of executives faster than they add non-executive directors. The number of non-executive directors remains unchanged from last year, and has only increased by 12% over the last four years. The demand for non-executive directors is stabilising although fees continue to increase albeit not as fast as last year with the overall median increase being 7.1% this year compared to 10% last year. There is still a significant gender imbalance in the boardroom. There has been no increase in the number of female executive board members, and only a 1% increase in the number of female non-executive directors. Women only make up 3% of executive directors and 10% of non-executive directors across the FTSE 350.Salaries for executive board members are up slightly, following a gradual decline in salary increases over the last five years. The median increase is now 6.8% compared to 6.5% last year. For a median FTSE 350 executive director on a salary of £350,000 this translates into an increase of £23,800. The increases may have steadied somewhat, but are still significantly ahead of increases in pay for the overall workforce where the increase in the seasonally adjusted average earnings index is 3.9%.Annual bonus payments have risen since last year, particularly in the FTSE 250 where the median payout was 60% of salary compared to 50% of salary last year. In FTSE 100 companies the median was 75% compared to 71% of salary last year. More companies have stopped granting share options to executives. Only 28% of FTSE 350 companies regularly grant options to executive directors compared with 79% three years ago. In most cases traditional share options have been replaced with performance shares and / or matching shares awarded on the deferral of bonus payments. There has also been a decrease in the number of companies awarding both share options and performance shares to executives in the same year with 27% of FTSE 100 companies doing this compared to 47% last year and 17% of FTSE 250 companies compared to 21% last year.The report is available on the [Deloitte website](http://www.deloitte.com/dtt/article/0%2C1002%2Ccid%3D131037%2C00.html%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.11 European Competition Network model leniency program** On 29 September 2006, the Model Leniency Program was introduced to further enhance the detection and punishment of cross-border cartels, and was approved by the heads of the competition authorities of the 25 EU Member States and the European Commission. These authorities have given a commitment to align their respective leniency policies to minimum standards set out in the Model Leniency Program. This will make it easier for companies to report cross-border cartel conduct by bringing about a greater harmonization of leniency policies across the EU. The Model Leniency Program was developed by the ECN Leniency Working Group. There are currently 20 different leniency program in operation across the EU. A copy of the ECN Model Leniency Program and related Q&As can be found on the [ECN website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1288&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.12 CEO cash pay rises outstrip shareholder gains** A study of CEO salaries in the top 100 Australian listed companies by the Australian Council of Superannuation Investors (ACSI) has revealed that the growth in the cash portion of executive pay has easily outstripped shareholder returns over a 5 year period. The study was published on 28 September 2006.Top 100 CEOs received an average 59% increase in base pay and short term bonus over a 5 year period, while total shareholder returns averaged 42%. Base pay increased by 73%. Over the same period, the consumer price index increased 10.9%, and average employee earnings 21.3%.**CFO Salaries in ASX 100 Companies**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Year | 2001 | 2002 | 2003 | 2004 | 2005 |
| Average Base Pay  | $888,407  | $984,045  | $1,361,769  | $1,416,877  | $1,533,231 |
| Yearly % Increase  |  | 11%  | 38%  | 4%  | 8% |
| 5 Year Increase  |  |  |  |  | 73%  |
| Total Average Cash Pay (inc bonus)  | $1,814,371 | $2,200,664  | $2,141,128 | $2,787,708 | $2,881,024  |
| Yearly % Increase  |  | 21%  | -3%  | 30% | 3% |
| 5 Year Increase  |  |  |  |  | 59% |

(All figures exclude stock option grants)The study of CEO pay in S&P/ASX 100 companies, commissioned by ACSI and conducted by ISS Australia, found that the average cash salaries for a CEO of a top 100 company had risen from $1.81 million in 2001 to $2.88 million in 2005. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.13 Responsibilities of providers and distributors of financial products** Providers and distributors of financial products have differing but interlocking responsibilities for treating customers fairly and need to work together to help avoid potential future detriment for consumers, according to a discussion paper issued on 28 September 2006 by the UK Financial Services Authority (FSA). In the paper, the FSA encourages providers to design their products with greater care, to provide higher quality information, to monitor distribution channels more effectively at a high level, and to undertake better post-sale analysis of the performance of products.The FSA also encourages the distributors to scrutinise more closely information they receive from product providers to ensure specific products are suitable for specific consumers. This should result in fewer cases of unfair outcomes for consumers for example where a distributor believes on the basis of information from a provider that a product is suitable for a customer. The paper is designed to help providers and distributors understand their respective responsibilities to consumers and help improve cohesion, confidence and efficiency in the combined distribution effort. The discussion paper is available on the [FSA website](http://www.fsa.gov.uk/pages/library/policy/dp/2006/06_04.shtml%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.14 Oversight review of New Zealand Exchange Limited** On 26 September 2006, the New Zealand Securities Commission published its first annual oversight review of the New Zealand Exchange Limited (NZX). The Commission's overall conclusion is that NZX is satisfying its obligation to operate its markets in accordance with its conduct rules. However, the Commission has made recommendations for improvement in several areas.The Commission reviewed NZX's performance of its regulatory functions as a registered exchange under the Securities Market Act 1988. This review focussed on NZX's arrangements in the 2005 calendar year for discharging its obligations.The Commission reports on NZX's performance in eight key areas:* conflict management;
* arrangements for supervision of Market Participants;
* arrangements for supervision of Listed Issuers;
* arrangements for release of market information;
* market operations and infrastructure;
* disciplinary arrangements and NZX Discipline;
* supervision of NZX as a Listed Issuer by the Special Division; and
* governance.

The Commission's report is available on the [Securities Commission website](http://www.sec-com.govt.nz/publications/documents/nzx%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.15 Report on personal liability for corporate fault** On 26 September 2006, the Corporations and Markets Advisory Committee (CAMAC) published a report titled 'Personal Liability for Personal Fault'. The report makes recommendations for a principled and consistent approach to the imposition of personal liability on individuals by reason of corporate misconduct. It aims to redress undue burdens on people involved in the governance of companies while maintaining appropriate levels of responsibility on their part. The Advisory Committee is concerned about the trend in regulatory legislation – particularly state and territory statutes – to impose criminal sanctions on directors and others for corporate breaches by reason of their position within the company unless they can establish a defence. It is not necessary to show that the individual was actually involved in some way in the offence. The Committee also draws attention to considerable variation in the form of personal liability provisions used in legislation across Australia and to consequential complexity and lack of clarity in regard to responsibilities for compliance. The report includes a review of the treatment of corporate officers in environmental protection, occupational health and safety, hazardous goods and fair trading statutes in the various jurisdictions. While not exhaustive of statutes containing personal liability provisions, those categories were focused on because of their significance to the commercial operations of many businesses. The Committee considers that liability for breach of a legal requirement by a company should fall in the first place on the company itself. In addition, an individual who has personally helped in or been privy to the misconduct should be punishable as an accessory in accordance with ordinary principles. The Committee acknowledges that, in some circumstances, it may be appropriate to make a designated individual responsible for compliance with a particular requirement or to extend ordinary notions of accessorial liability to cover reckless or negligent disregard of a company's relevant conduct. However, the Committee considers that the presumption of fault in many provisions that currently apply to company officers is objectionable in principle and unfairly discriminates against those individuals compared with the way other people are treated under the law. While those provisions may be well-intentioned to encourage corporate compliance they are not well suited to the practicalities of governance of many firms. Moreover, inconsistencies and lack of harmony in the standards of responsibility and defences available under the statutes that apply to various aspects of a company's operations can be counter-productive. A standardised as well as principled approach would reduce complexity and aid understanding.It would assist efforts to promote effective corporate compliance and risk management while providing more certainty and predictability for the individuals concerned.The Committee recommends a basis for a more consistent approach and steps at an inter-governmental level to achieve that goal. The subject matter of the report was also referred to by the Regulation Task Force in its report earlier this year "Rethinking Regulations: Report of the Task Force on Reducing Regulatory Burdens on Business". That report recommended that the Council of Australian Governments initiate reviews to achieve more nationally consistent regulation of various matters, including personal liability of company directors and officers for corporate fault, following the completion of the Advisory Committee review.The report is available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.16 Global corporate governance ratings** On 18 September 2006 GovernanceMetrics International (GMI), the corporate governance research and ratings agency, announced new ratings on 3800 global companies, including for the first time 321 emerging market companies from 25 countries. Thirty-eight companies achieved GMI’s highest rating of 10.0. They include firms from Australia, Canada, the United Kingdom and United States. As a group, the average rating of all 321 emerging market companies was 4.3, which GMI characterizes as below average. Only two emerging market companies achieved ratings that were above average on a global basis. GMI compared the characteristics of emerging market companies to those of all industrialized market companies and found that only 35% of emerging market companies have a majority of independent directors, compared to 75% for companies in industrialized markets. Fully 27% do not disclose the presence of an audit committee, compared to only 13% for all industrialized companies. Where audit committees are disclosed among emerging market companies, only 29% are composed solely of independent directors, compared to 70% at all industrialized companies covered by GMI. Further, half of the emerging markets companies have no compensation committee whereas 86% of companies in the developed markets have such committees. Lastly, 22% of the emerging market companies have shares with unequal voting rights, slightly above the 21% in developed markets. The discrepancies are even starker when comparing emerging market companies to Australian, Canadian, UK and US companies, which as a group consistently rate higher than others in corporate governance practices. The chart below shows these comparisons.

|  |  |  |  |
| --- | --- | --- | --- |
|  | EM  | Developed: UK/US | Developed: Aus/Can |
| Has a majority of independent directors | 35% | 75% | 93%  |
| Has an audit committee  | 73% | 87% | 99% |
| Audit committee of independent directors | 29%  | 70% | 90%  |
| Has a compensation committee  | 50%  | 86%  | 98%  |
| Unequal voting rights  | 22%  | 21% | 9% |

At the same time, not all emerging markets are equal. South African companies had better governance practices on average than the average for German, Singapore, Spanish or Swedish firms. After eliminating countries with only a handful of companies reviewed, the country whose companies had the lowest average ratings was South Korea, with a rating of 2.3 (51 companies examined), slightly below Greece where the average rating was 2.5 (24 companies examined). Of those companies that scored GMI's lowest rating of 1.0, two thirds were located in emerging markets. The country tally of the lowest scoring companies was: South Korea with 12, Greece with 8, China with 7, Brazil with 3, France with 2 and one each in Belgium, Chile, Egypt, Japan and Portugal. The companies selected for GMI’s emerging markets universe are those constituents of the MSCI Emerging Markets index with free float market capitalizations of at least US$750 million. The 321 companies represent approximately 40% of the total number of companies included in the MSCI Emerging Markets index but account for almost 90% of the total index market capitalization. **Ratings changes and stock performance**The GMI ratings system relies on approximately 400 individual metrics and subjective analysis. As a result, there must be some substantial change to a company’s governance profiles before a rating change of more than a point occurs. GMI examined the effects of significant ratings changes on total shareholder returns over a three-year period and found evidence suggestive of a relationship. GMI examined S&P 500 companies whose GMI rating as of June 2003 had either increased or decreased by three points or more - a significant swing. Companies whose GMI rating improved by three points or more over the period both outperformed the index as a whole and had total shareholder return out-performance of 13.54% over those whose ratings declined by 3 points or more over the period. Time frame tested: 1 July 2003 – 30 June 2006: Companies whose overall rating increased by 3 or more points returned 12.85%.The S&P 500 Index returned 11.63%. All S&P 500 companies rated by GMI in 2003 that still traded in 2006 returned 9.96%. Companies whose overall rating decreased by 3 or more points returned -0.69%. The performance measure used was average annualized TRS with dividends reinvested. While not considered conclusive, according to GMI the results suggest there may be a linkage between significant changes in governance relative to a large peer group and medium-term shareholder returns. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.17 CEO pay in the Top 100 Australian companies** ISS Australia and the Australian Council of Superannuation Investors have published a study of CEO pay in the Top 100 listed Australian companies for the 2005 financial year. Of the 80 CEOs included in the survey, average total pay was $3.77 million in 2005, up from $3.56 million in 2004. The median top 100 CEO pay also increased, from $3.07 million in 2004 to $3.09 million in 2005. While this increase in the median was only 0.6%, the increase in the median over the two years 2003 to 2005 was a substantial 33.9% (from $2.31 million to $3.09 million). (The numbers have been standardised for the departure of News Corp from the index.)Average annual fixed remuneration for a top 100 company CEO increased again between 2004 and 2005, from $1.42 million to $1.53 million, or 8.2%.The average short-term incentive (STI) received by a top 100 company CEO again increased substantially between 2004 and 2005, from $1.29 million to $1.41 million, a 9.3% increase. This followed a 17.3% average increase between 2003 and 2004. The median STI also increased sharply, from $900,000 in 2004 to $1,000,000 in 2005, an increase of 11.1%.There was relatively little change in the CEOs who made up the top 10 highest paid CEOs in 2005 compared with 2004, especially when the departures of News Corporation from the sample and retirement of Michael Chaney from Wesfarmers are excluded. Of the eight CEOs in the 2004 top 10 who were still Top 100 company CEOs in 2005, six were again part of the top 10. The other two CEOs from the 2004 top 10 were ranked 11th and 14th in the 2005 study. Of the eight top 10 CEOs in the 2004 survey still part of the 2005 study universe, five saw their remuneration in 2005 increase, by amounts ranging between 4.4% and 55.1%. The three top 10 2004 CEOs who saw their remuneration decrease experienced falls ranging from -6.9% to -16.7%.To be part of the top 10 CEOs in 2004, a CEO had to earn $6.12 million or more; in 2005 the threshold for entry increased to $6.49 million, although the remuneration of the highest-paid CEO of a top 100 company actually fell, from $29.71 million to $18.55 million (due to the departure of News Corp from the S&P/ASX 100). If News Corp is excluded from the 2004 sample, the total remuneration of the highest-paid CEO of a top 100 company rose between 2004 and 2005, from $14.69 million (Westfield’s Frank Lowy) to $18.55 million (Macquarie’s Allan Moss).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.18 Study of impediments to proxy voting in Asian countries** In September 2006, the Asian Corporate Governance Association (ACGA) published a report on impediments to proxy voting in Asia. It covers 11 Asian markets and three benchmark markets—Australia, UK and US. The material in this report is based on original research by ACGA and a survey of major institutional investors actively voting their shares in the region.The respondents to this survey manage in excess of US$3 trillion globally.**(a) Key findings—by market*** Hong Kong emerges as the clear leader in Asia, several percentage points ahead of Singapore. Yet Hong Kong still scores well below Australia, UK and US.
* Japan and Taiwan are rated as having the weakest voting systems, with Korea not far behind.
* Most South-east Asian markets fall in the middle of the regional ranking tables.
* Due to the limited accessibility of China’s A-share markets in Shanghai and Shenzhen, hence limited voting experiences among respondents, ACGA chose not to include the China score in the main regional ranking but to put it below the other markets for reference purposes only.

**(b) Key findings—by issue*** Proxy voting systems in Asia are, by and large, seriously antiquated and in need of improvement. Investors are being disenfranchised.
* The top-five areas of concern included: Lack of independent audit of vote results; lack of publication of vote results; insufficient information on which to vote; no confirmation that vote has been received; and the prevalence of voting by show of hands rather than by ballot/poll.
* Removing the many impediments to proxy voting would, ACGA believes, contribute to stronger and more efficient capital-market development in Asia.

The report can be found [ACGA website](http://www.acga-asia.org/public/files/ACGA_Asian_Proxy_Voting_Report_2006.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.19 State of the internal audit profession: study** PricewaterhouseCoopers conducted its second annual state of the internal audit profession study in the first quarter of 2006 and the results have now been published. The 2006 study includes findings from over 400 audit executives surveyed and builds upon the results of the 2005 study. Objectives of the annual survey include:1. Capturing a "snapshot" of the internal audit profession2. Sharing insights and observations from PricewaterhouseCoopers about major issues, trends and changes reshaping internal auditing today3. Collecting benchmarking data to help organizations compare and contrast their internal audit processes and procedures4. Providing a baseline to measure ongoing changes in the professionThe 2006 survey identified several key trends that continue to reshape the practice of internal auditing:1. Continuous auditing gains momentum2. Commitments to quality vary significantly3. Sarbanes-Oxley demands lessen, freeing resources for other priorities4. Internal audit faces a continuing shortage of qualified talent5. Most internal audit groups now include overall ratings or conclusions in audit reportsThe report is available on the [PricewaterhouseCoopers website](http://www.pwcglobal.com/servlet/pwcPrintPreview?LNLoc=/extweb/pwcpublications.nsf/docid/1981A92E13DEE3CF8525718B006DE802" \t "_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.20 Decline in US securities fraud lawsuits** The annualized number of "traditional" US securities fraud class actions filed from January through June 2006 decreased 31 percent compared to 2005 levels, falling from 179 filings to an annualized estimate of only 123, based on 61 filings through June 30, 2006, according to a report published by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research. According to the report, the number of filings in the first half of 2006 is at the lowest level for any six month period since 1996, and on an annualized basis is 36 percent below the 1996-2005 historical average of 194. The study also compared the number of filings over the first six months of 2006 to the average number of filings over all semi-annual periods beginning in January 1997. A t-test indicates that the number of filings over the first six months of 2006 is lower than the average during 1997 to 2005 and the difference is statistically significant at a 5% confidence level.The mid-year study also finds a large decline in market capitalization losses related to all securities fraud class action lawsuits filed so far in 2006. The Disclosure Dollar Loss (DDL) decreased 55 percent on an annualized basis from US$100 billion in 2005 to US$22 billion (US$45 billion on an annualized basis) in the first half of 2006. The maximum dollar loss (MDL) decreased 44 percent on an annualized basis from US$456 billion in 2005 to US$127 billion (US$255 billion on an annualized basis) in the first half of 2006.The decreases in total DDL and MDL are reflective of the lower number of filings and lower market capitalization losses associated with the average/median filing. Despite the recent wave of public attention surrounding the alleged backdating of options at more than sixty publicly traded companies, the impact of the scandal has not been as large as some might expect. In fact, only eight federal class actions had been identified alleging illegal backdating behaviour by 30 June 2006. There are several reasons why class action complaints in backdating situations are not more common:1. Many disclosures relating to allegations of backdating are not accompanied by statistically significant stock price declines.2. The alleged options backdating activities occurred so long ago that the statute of limitations defence may be effective.3. In some situations, the uncertainties associated with the application of appropriate accounting principles may cause potential plaintiffs to recognize that they will have difficulty alleging that there was an intention to commit fraud.4. Most of the litigation is being filed in state court through derivative actions because these actions do not, as a practical matter, require significant stock drops as a predicate to filing, and it may be easier to allege a violation of a fiduciary duty in many of these cases than to demonstrate a wilful fraud. The report is available on the [Clearinghouse website](http://securities.stanford.edu/%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.21 Internal controls in Australia** The issues of internal controls and corporate governance have attracted an enormous amount of attention and debate in recent years. On behalf of PwC, the Economist Intelligence Unit undertook research on internal controls and corporate governance within the Australian corporate community. The research results are summarised as follows:* There is a general feeling of "governance fatigue" within the Australian corporate community;
* Companies continue to be concerned about maintaining and improving their internal controls regimes;
* The quality of internal controls information is patchy; and
* There is interest in third-party information on "softer" issues such as governance, culture and sustainability.

Further information is available on the [PricewaterhouseCoopers website](http://www.pwcglobal.com/Extweb/onlineforms.nsf/docid/D0270C72704ACB80CA2571F1000C5FBF%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.22 Hedge fund activism** In a new study of hedge fund activism, April Klein and Emanuel Zur of New York University Stern Business School examined 155 initial Schedule 13D filings by hedge funds, which the SEC requires for investors acquiring a 5% or greater stake in a publicly-traded firm, during the period 1 January 2003 to 31 December 2005. In each of the filings, the hedge fund professed an intention to influence the firm's future strategy or corporate governance structure. Most targeted firms traded on the Nasdaq, NYSE and AMEX. Unlike mutual and pension funds, unregulated investors like hedge funds can and do have a significant, intended impact on redirecting management's efforts. Study findings show: * Hedge funds had a 100% success rate in replacing the CEO, a 73% success rate in achieving seats on a firm's board of directors and a 56% success rate in preventing a merger. There were all objectives stated in their initial 13D filings.
* Targeted firms earned on average 10.3% abnormal stock returns during the period surrounding the initial 13D filing, and dividends per share approximately doubled in the year following the initial stake.
* Hedge funds used the "threat" of proxy solicitation as a major weapon, which was sufficient in achieving their goals. In 39% of the cases, the hedge fund either initiated or threatened to initiate a proxy fight.
* Hedge funds are more likely to target profitable, cash-rich, healthy firms, even though other activists targeted poorly performing firms.
* The hedge fund's activism does not improve the accounting performances of their targets, as evidenced by the decline in earnings per share, return on assets and return on equity in the year following the 13D filing.

The study is available on the [New York University Stern Business School website](http://w4.stern.nyu.edu/accounting/research.cfm?doc_id=3268" \t "_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.23 Public lecture – Independent directors in family controlled public companies** Melbourne Law School 2006 WE Hearn Lecture - Guests at the table? Independent directors in family controlled public companiesSpeaker: Professor Deborah DeMottWednesday 6 December 2006, 6pm for 6.30pmMelbourne Law School185 Pelham Street, CarltonLight refreshments will be offered following the lectureRegistrations by 29 November 2006Email: law-rsvp@unimelb.edu.au (Hearn in heading please)Telephone: (03) 8344 1153This is a free public lecture (please rsvp to the email address above). The lecture is sponsored by Clayton Utz.The roles and duties of directors in public companies are under greater scrutiny than ever before. In Australia and the United States, public company boards must include directors who are independent. When a public company is controlled by a family or in some way identified by an association with its founder’s family, the meaning of independence becomes more complex, as does the position of directors. This is especially so when questions arise concerning management succession, a major shift in the company’s business activities, or a potential change in control.Deborah DeMott is the David F. Cavers Professor of Law at Duke University. Since 1995 Professor De Mott has served as the Reporter for the American Law Institute's Restatement (Third) of Agency. Between 2000 -2002, she held a secondary appointment as Centennial Visiting Professor in the Law Department of the London School of Economics. Along with numerous other publications, Professor DeMott is the author of a treatise, Shareholder Derivative Actions, published in 1987 and a casebook, Fiduciary Obligation, Agency and Partnership (1991).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**1.24 The Melbourne Law School 2007 graduate law program**Commercial and corporate law provides the framework for business transactions. The Melbourne University Graduate Law Program offers diversity, quality and the opportunity to specialise in key areas of law including Commercial and Corporate Law and Banking and Financial Services Law.Highlights of the 2007 program include: more than 120 subjects, 20 of which are completely new, 35 interlinked coursework degrees and diplomas, expert tuition blending theory and practice, 26 visiting international Faculty, a stimulating graduate student cohort and maximum use of information technology.80% of the 2006 subjects are taught on an intensive basis (offering a high level of convenience for interstate and overseas based students).Some of the 122 subjects offered in 2007 are:**Finance*** Consumer Banking
* Financial Sector Regulation
* International Financial System: Law and Practice
* International Securities Regulation
* Law of Secured Finance
* Managed Investments Law
* Project Finance
* Securitisation

**Corporate and General Commercial*** Accounting for Commercial Lawyers
* Corporate Governance and Directors’ Duties
* Corporate Insolvency and Reconstruction
* Equity and Commerce
* Governing Not-for-Profit Organisations
* Principles of Corporate Law
* Shareholders’ Remedies

**Competition Law*** Competition Law and Intellectual Property
* Competition Regulation of Mergers
* Market Power and Competition Law

**Construction*** Advanced Construction Contracts
* Construction Contracts
* Construction Dispute Resolution
* Construction: Principles into Practice
* Design and Construct: Specialised Construction Contracts
* Rights and Liabilities in Construction

**Dispute Resolution*** Advanced Evidence
* Advanced Litigation
* Alternative Dispute Resolution
* Class Actions
* International Commercial Arbitration
* Transnational Commercial Litigation

**e-Law*** Cybersecurity Law
* Dispute Resolution in the Cyberspace Era
* Electronic Commerce Law

**Energy, Resources and the Environment*** Environmental Law: Science and Regulation
* Infrastructure Delivery A: Principles and Practice
* Infrastructure Delivery B: Public Private Partnerships
* International Petroleum Transactions
* Petroleum Law
* Regulation and the Law
* Resources Joint Ventures
* Trade and Environment
* Transnational Oil, Gas and Mineral Law
* Water Law

**Insurance*** Insurance Litigation

**Intellectual Property*** Copyright Law
* Designs Law and Practice
* Intellectual Property in the Digital Age
* Intellectual Property Law and Development
* International Issues in Intellectual Property
* Interpretation and Validity of Patent Specifications
* Licensing Law and Technology Transfer
* Patent Law
* Patent Practice
* Trade Mark Practice
* Trade Marks and Unfair Competition

**International Economic Law*** Free Trade Agreements
* International Sale of Goods
* International Trade Law
* Law and Economic Reform in Asia
* Principles of WTO Law
* WTO Dispute Settlement
* WTO: Dumping, Subsidies and Safeguards

**Legal Organisations Management*** Managing Knowledge in Legal Services

**Media*** Communications Law
* Entertainment Law

**Sports Law*** Racing Industry Law and Regulation
* Sport, Commerce and the Law
* Sports Marketing Law

**Taxation*** Asian Comparative Tax Law Systems
* Capital Gains Tax: Problems in Practice
* Corporate Taxation (Companies and Consolidation)
* Corporate Taxation (Shareholders, Debt and Equity)
* Goods and Services Tax Principles
* International Taxation: Principles and Structure
* Taxation of Business and Investment Income A
* Taxation of Intellectual Property
* Taxation of Small and Medium Enterprises
* Taxation of Superannuation
* Transfer Pricing: Practice and Problems
* UK Taxation: Principles and New Developments

**Qualifications available include:*** Master of Laws
* Master of Commercial Law
* Graduate Diploma in Corporations and Securities Law

Individual subjects may also be taken with or without assessment.Further informationTel: +61 3 8344 6190Email: law-postgrad@unimelb.edu.au[http://graduate.law.unimelb.edu.au/](http://graduate.law.unimelb.edu.au/%22%20%5Ct%20%22_new)http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif |
| **2. Recent ASIC Developments** |
| **2.1 ASIC examines disclosure in speculative sectors and releases report on small and mid-cap miners**On 5 October 2006, the Australian Securities and Investments Commission (ASIC) emphasised the importance of listed entities providing timely and accurate announcements to the market, following the release of a report on small and mid-cap miners. The report identified potential concerns about the effectiveness of disclosures by these companies to the market.ASIC is reviewing disclosure patterns and practices in a number of speculative market sectors. ASIC is concerned that some entities may be making announcements for promotional purposes rather than as a means of informing investors, and that this could potentially result in investors being misled. The Australian Stock Exchange (ASX) Guidance Note 8 'Continuous Disclosure: Listing Rule 3.1' states that the Company Announcements Platform (CAP) ‘should not be used for promotional purposes’ and that '[a]nnouncements must be balanced and truthful'.ASIC's initial review, which focussed on mining companies, aimed to detect entities that demonstrated a pattern of very frequent disclosure alongside significant share price increases, as this could be indicative of poor disclosure practices.In particular, entities should:* provide information in an easily understandable manner;
* give due prominence to any associated risks and uncertainties;
* avoid overstating the significance of new information or underemphasising negative information; and
* avoid unnecessary repetition of previously disclosed information.

These issues are particularly relevant in industries with speculative characteristics, like mining, energy and biotechnology. ASIC's recent review involved an analysis of the disclosure patterns of over 400 small and mid-cap miners (market capitalisation of $500 million or less) listed on the ASX. The review looked at the number and type of market announcements, as well as share price movements, during the 2006 financial year for these miners.ASIC may also conduct reviews of energy and biotechnology companies. Biotechs, in particular, have been the subject of several ASIC actions in the past year relating to market disclosure. Two of the five infringement notices issued to date by ASIC were to biotechs, and a biotech was also the subject of a court-ordered civil penalty fine.ASIC may also examine other situations where patterns of announcements and share price movements may suggest poor disclosure practices, for example, entities with large share price movements but a minimal number of announcements.Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**2.2 ASIC’S approach to superannuation clearing houses and other electronic payment facilities** On 4 October 2006, the Australian Securities and Investments Commission (ASIC) provided details of its approach to the regulation of providers of superannuation clearing houses and other electronic payment facilities. A superannuation clearing house is a service provided to an employer where the provider distributes or forwards the superannuation contributions from the employer to the employees’ chosen superannuation fund. Typically, this service includes distribution to more than one superannuation fund on behalf of an employer.An electronic payment facility provides a means for the transfer of money, usually through an electronic or online facility. Examples of electronic payment facilities include bill payment facilities, payroll services, and pre-paid debit cards.ASIC will continue to consider applications for relief on a case-by-case basis under its general policy on non-cash payment facilities in ASIC Policy Statement 185 Non-cash payment facilities [PS 185]. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**2.3 Appointment of member of ASIC** On 3 October 2006, the Treasurer, the Hon Peter Costello MP, announced that following consultation with the members of the Ministerial Council for Corporations, it is the Australian Government’s intention to recommend to the Governor-General that Mr Tony D'Aloisio be appointed as a full-time member (Commissioner) of the Australian Securities and Investments Commission (ASIC) for three years.Mr D'Aloisio has extensive public and private sector experience and has been involved in business policy and regulation. He has most recently held the position of Managing Director and Chief Executive Officer of the Australian Stock Exchange Limited and, prior to that, was Chief Executive of a major Australian law firm having also extensively practised in corporate law with that firm.It is the Australian Government’s intention to recommend the appointment on 1 November 2006, with a view to the proposed three year term based in Sydney commencing on 22 November 2006. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**2.4 ASIC issues report on relief applications decided between April to June 2006** On 29 September 2006, the Australian Securities and Investments Commission (ASIC) released a report outlining its recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) between 1 April and 30 June 2006. The report '‘Overview of Decisions on Relief Applications (April to June 2006)', provides an overview of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers, from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act. The report also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report. **Background** ASIC is vested with powers to exempt or modify the Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act. ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where business can be facilitated without harming other stakeholders.ASIC publishes a copy of most of the exemption and/or modification instruments issued in the ASIC Gazette. Further information on is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new). http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif |
| **3. Recent ASX Developments** |
| **3.1 ASX review of corporate governance reporting by listed trusts**On 24 October 2006, the supervisory subsidiary company of ASX – ASX Markets Supervision published its review of corporate governance reporting by listed trusts. The review formed part of its examination of compliance by listed entities with ASX Listing Rules and the ASX Corporate Governance Council’s Principles of Good Corporate Governance and Best Practice Recommendations.The results show that in most cases corporate governance reporting by listed trusts compares favourably with corporate governance reporting by listed companies.* The overall reporting level (being the aggregate of the levels of adoption of the Recommendations and the levels of 'if not, why not?' reporting against the Recommendations) for the listed trust sector in 2005 was 86% compared to 88% for listed companies;
* 10 out of 28 Recommendations had reporting levels over 90% (compared to 14 out of 28 for listed companies);
* An additional 14 out of 28 Recommendations had reporting levels over 80% (compared to 9 out of 28 for listed companies); and
* The overall reporting level for listed trusts reviewed in the top-500 was 92%.

The key differences between listed trusts and listed companies were in relation to:* Principle 2 – Structure the board to add value; and
* Principle 9 – Remunerate fairly and responsibly.

The results are based on a review of the annual reports of 89 listed trusts having a 30 June 2005 balance date.The 2005 Analysis of Corporate Governance Practice Disclosure by Listed Trusts is available on the [ASX website](http://www.asx.com.au/about/pdf/analysis_2005_corporate_governance_disclosures_listedtrusts.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**3.2 ASX integrated trading system** The migration of the Australian Stock Exchange's Cash Markets (Equity market) from the Stock Exchange Automated Trading System (SEATS) to the Integrated Trading System (ITS) was completed successfully on the first weekend in October. These markets went live on Monday 2 October 2006.The system is the first truly integrated trading platform in a top 10 securities exchange.Changes to the ASX operating rules to take account of the different functionality of the new trading platform have been in place for some time. These new rules are now effective across all ASX markets.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**3.3 Update of market stabilisation arrangements-green shoe option** The ASX market stabilization letter, which is required to obtain ASIC no-action relief for market stabilization arrangements, has been updated to take account of the migration from the Stock Exchange Automated Trading System (SEATS) to the Integrated Trading System (ITS).ASIC may grant a no-action letter to permit market stabilization arrangements in an offering of securities on the ASX market. Market stabilization arrangements involve the underwriter being provided with an option to buy additional shares from the issuer equivalent to up to 15% of the total number of shares being made available under the offer. This is known as a 'green shoe option'. Following the close of the offer the underwriter can allocate more shares to investors than were made available under the original offer, up to the number of securities covered by the green shoe option. In the first 30 days after the shares are listed, if the market price falls below the final price as determined under the book build process the underwriter or a stabilization broker acting for the underwriter may buy shares on market in the terms set out in the ASIC no-action letter. If the underwriter does not buy sufficient shares on the market to cover its short position it may exercise the green shoe option (ASIC Information Release 00-31 - ASIC Interim Guidance on Market Stabilization).In order to obtain no-action relief the issuer must apply for, and comply with, a stabilization letter from ASX setting out the terms on which ASX will issue stabilization privilege to the stabilization broker. This letter covers the circumstances in which stabilization bids may be made and the way in which those bids must be entered. The letter also covers the information to be disclosed to ASX in relation to the stabilization arrangements.The ASX stabilization letter previously referred to the entry of bids on SEATS. Following the migration from SEATS to ITS the stabilization letter has been updated to take account of changes to the trading system, including changes to order types and session states. However, the basic principles concerning when stabilization bids are permitted remain the same.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Azumah Resources Limited – Panel makes declaration of unacceptable circumstances**On 18 October 2006, the Takeovers Panel (Panel) advised that it had made a declaration of unacceptable circumstances in relation to the affairs of Azumah Resources Limited (Azumah) following an application (Application) from Azumah dated 26 September 2006.The Panel decided that unacceptable circumstances exist as a result of the inadequate disclosure contained in Azumah's prospectus and the substantial holding notices and tracing notices in relation to the shareholders, controllers and beneficial owners of Bluesky Resources Limited (Bluesky), Trailstar Limited (Trailstar), Redstar Resources Limited (Redstar), Bluestar Resources Limited (Bluestar) and Falconsand Limited (Falconsand) (Vendors) in respect of their holdings in Azumah. The Vendors, in total, hold more than 35% of the voting shares in Azumah.The Panel decided that the inadequate disclosure in the notices constituted unacceptable circumstances because, in the Panel’s view, it constituted, or gave rise to, a contravention of section 671B and 672B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act). However, the Panel considered that the evidence presented to it did not establish that all of the Vendors were associated or that there had been a contravention of section 606 of the Act as submitted by Azumah.The Panel has sought submissions from the parties in relation to possible orders that it may make following the declaration of unacceptable circumstances.Further information is available on the [Panel website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif |
| **5. Recent Corporate Law Decisions** |
| **5.1 Misleading conduct in relation to financial products**(By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)Australian Securities & Investments Commission, in the matter of Money for Living (Aust) Pty Ltd (Administrators Appointed) v Money for Living (Aust) Pty Ltd (Administrators Appointed) (No 2) [2006] FCA 1285, Federal Court of Australia, Finkelstein J, 29 September 2006 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1285.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1285.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 Australian Securities and Investments Commission (ASIC) commenced proceedings against two companies for alleged breaches of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and [ASIC Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) regarding misleading conduct in relation to financial products and financial services. ASIC also implicated the company directors by alleging that they were knowingly involved in the breaches. ASIC sought declarations that contraventions had occurred and injunctions restraining future contraventions. Finkelstein J found that some of the orders sought, which were by consent, were not justified by the facts. Accordingly his Honour made his own findings as to what misleading conduct had occurred. **(b) Facts**Money for Living (Aust) Pty Ltd (MFL) and MFL Property Holdings Pty Ltd (MFLP), through its directors, promoted a scheme that enticed home-owners, mainly retirees or pensioners, to sell their homes in return for a "guaranteed" income and a "guaranteed" right to live in their former home for life. The scheme was marketed by radio, television and newspaper advertisements and an internet site. Interested persons were provided with a brochure that featured photographs of and sentences attributed to Paul Cronin and Dawn Fraser, two well known Australian celebrities. Participants of the scheme had their houses valued and entered into a number of agreements with MFL and/or MFLP. In most instances, the contract for sale operated so that the purchase price was payable by a deposit and monthly installments over many years, the period determined by actuarial life tables. A deed was also entered into that set out the leasing arrangement between vendor and purchaser, and provided that the purchaser could sell the property to an investor, and that such a sale would be subject to the leasing arrangement.The scheme collapsed and MFL or MFLP, which purchased the homes, were declared insolvent and administrators were appointed. Many of the investors who purchased homes from MFL or MFLP were also impecunious and did not make the relevant payments for the balance of the purchase price.ASIC commenced proceedings under: * s 1041H of the Corporations Act 2001 (misleading or deceptive conduct in relation to financial services); and
* ss 12DA (misleading or deceptive conduct in relation to financial services), 12DB (false or misleading representations in relation to the supply or promotion of financial services) and 12DC (false representations in relation to financial products that include an interest in land) of the ASIC Act 2001.

**(c) Decision**Finkelstein J held that the way in which the scheme was marketed to the vendors involved misleading and deceptive conduct by the companies and their directors, namely:* The vendors were mislead into believing that the scheme had been set up by experts with many years’ real estate experience when in truth it had been established by people with little or no knowledge of the industry;
* The vendors were mislead into believing that the payments due to them were secure in the sense that the monthly installment payments would be made on time for the remainder of their lives;
* The vendors were mislead by a contractual promise made by MLF and/or MLFP to make the payments which implicitly represented that MLF and/or MLFP had the capacity to meet the obligation, which they clearly did not.

Finkelstein J refused to find that the representations made to the vendors about "guaranteed tenancy" and "guaranteed lifetime tenancy" were misleading. Turning to Torrens legislation, his Honour determined that the tenancy arrangements could not be defeated by MFL, MFLP or any person claiming through them, so long as the clients continued to pay annual rent and did not vacate their homes.However, to be satisfied that contraventions of the Corporations Act 2001 and the ASIC Act 2001 were established, his Honour had to consider whether the misleading conduct concerned a “financial product”, which required that the sale by the vendor of their home be a “financial investment”. Whilst accepting that the definition of “financial investment” was intended to cover the situation when a person lays out money or capital for the purpose of getting a return, he accepted that the relevant provisions should be construed broadly. His Honour found that the sale by the vendors could be construed as a financial investment due to the benefits that the sale generated, which included tax free payments and a leasing arrangement based on anticipated life expectancies for rent which was less than market value (only $1.00 per annum).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.2 The tort of malicious prosecution does not extend to administrative proceedings and cannot be maintained by a corporate entity; statements of claim that fail to establish a reasonable cause of action will be struck out** (By Kate Clennett, Mallesons Stephen Jaques)Chapel Road v ASIC [2006] NSWSC 1014, Supreme Court of New South Wales, Associate Justice Harrison, 29 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1014.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1014.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 plaintiff, Chapel Road Pty Ltd, claimed damages on the grounds that ASIC's revocation of its securities dealer’s licence constituted the torts of malicious prosecution and misfeasance in public office. The plaintiff’s statement of claim was struck out for failing to disclose a reasonable cause of action. The defendant raised two arguments in relation to the tort of malicious prosecution: first, the tort does not apply to administrative proceedings; second, the proceedings complained of were not terminated in the plaintiff’s favour. The Australian and United Kingdom authorities suggest that the tort of malicious prosecution should not be extended to administrative proceedings. The reason for this is that such an extension would necessitate radical legislative reform and is a decision for Parliament and not the Judiciary. The dissenting judgment of Schiemann LJ in Gregory v Portsmouth City Council (1997) 96 LGR 569 supports the extension of the tort to disciplinary proceedings and does not consider that it would be a momentous step forward. Harrison AsJ reasoned that irrespective of whether the tort of malicious prosecution is applicable to administrative proceedings, the tort can only be maintained by a natural person and not a corporate entity such as the plaintiff company. Harrison AsJ concluded that it was arguable that the proceedings complained of were terminated in the plaintiff’s favour but this was irrelevant given that her Honour decided that the plaintiff, being a corporate entity, was not able to maintain the tort of malicious prosecution in any event.The plaintiff failed to establish the tort of misfeasance in public office as Harrison AsJ held that it was within ASIC’s power to revoke the securities dealer’s licence and ASIC’s actions did not involve an invalid or unauthorised act. **(b) Facts****(i) Background**Chapel Road Pty Ltd was issued a securities dealer’s licence subject to nine conditions on 14 October 1996. On 29 September 1999, ASIC wrote to Chapel Road regarding its non-compliance with its securities dealer’s licence, as identified in surveillance of Chapel Road conducted by ASIC in September 1999.On 27 November 2000, ASIC served a notice of hearing upon Chapel Road pursuant to section 837 of the former Corporations Law which stated that ASIC was concerned that the plaintiff:(a) may have contravened a provision of a securities law (section 826(1)(c));(b) may have contravened a provision of the licence (section 826(1)(d));(c) may not have performed efficiently, honestly and fairly the duties of the holder of a dealer’s licence (section 826(1)(j)); and(d) will not perform efficiently, honestly and fairly the duties of the holder of a dealers licence (section 826(1)(k)).Section 837 provided that before ASIC could make an order revoking a licence, it must give the licensee an opportunity to appear at a hearing, give evidence and make submissions. Chapel Road made written submissions to ASIC which constituted a hearing for the purposes of section 837. Chapel Road's dealer's licence was revoked on 26 April 2001 by an ASIC delegate. The delegate stated that he considered suspending the licence but given he held the view that Chapel Road would not conduct its business efficiently, honestly and fairly following suspension, he deemed it in the interests of the public that the dealer’s licence be revoked. Chapel Road appealed the delegate’s decision and the appeal was heard by the Administrative Appeals Tribunal on 14 July 2003. **(ii) The decision of the Administrative Appeals Tribunal**The Tribunal set aside the delegate's decision and remitted the matter to ASIC with the direction that Chapel Road's securities dealer's licence be reinstated subject to appropriate conditions pursuant to section 786(1). The reason for the Tribunal's decision was that there was evidence Chapel Road had made significant improvements to its compliance regime by the time of the delegate's decision. **(iii) Chapel Road’s submission - tort of malicious prosecution**The plaintiff argued that the defendant’s conduct satisfied the following four elements of the tort of malicious prosecution:(1) that the proceedings complained of were instituted or continued by the defendant;(2) that the defendant instituted or continued the proceedings maliciously;(3) that the defendant acted without reasonable and probable cause; and(4) that the proceedings were terminated in the plaintiff’s favour. Damage is a necessary ingredient of the tort. **(iv) ASIC’s submission - tort of malicious prosecution**The defendant submitted that there were two fatal flaws in the pleading of malicious prosecution that cannot be cured. The perceived flaws were first, the tort of malicious prosecution does not apply to administrative decisions and second, the proceedings were not terminated in Chapel Road’s favour. **(v) Chapel Road’s submission - tort of misfeasance in public office**The plaintiff pleaded that the defendant’s conduct also amounted to the tort of misfeasance in public office. The elements of this tort are:(1) there is a public officer;(2) who owes a public duty (including to the plaintiff as a member of the public);(3) which the public officer has breached;(4) the breach of duty has caused loss or damage to the plaintiff; and(5) the public officer breached the duty with the intention of causing harm to the plaintiff or with the knowledge that he or she was acting in excess of his or her powers.**(vi) ASIC’s submission - tort of misfeasance in public office**ASIC submitted that even if the intention of ASIC was to punish Chapel Road, such an intention is not improper. ASIC's powers are punitive as well as protective and preventative in nature and can be exercised accordingly (Rich v ASIC [2004] HCA 42).**(c) Decision****(i) Tort of malicious prosecution****Is it arguable that the tort of malicious prosecution applies to administrative proceedings?** Harrison AsJ examined the relevant case law and academic criticism in Australia, the United Kingdom and the position in the United States. The Queensland Court of Appeal in Beach Club Port Douglas Pty Ltd v Page [2005] QCA 475 followed the Court of Appeal in Gregory v Portsmouth City Council (1997) 96 LGR 569 and concluded that if the tort of malicious prosecution should be extended to administrative proceedings it is a decision for Parliament and not the Judiciary. Unlike the position in Australia and the United Kingdom the tort of malicious prosecution extends to all civil and administrative proceedings in the United States. Harrison AsJ examined the three approaches taken by the courts in the United Kingdom to the tort of malicious prosecution: the historical approach, the alternative approach and the Consonant Approach. His Honour concluded that the historical and alternative approaches did not provide useful guidance to the present case. Harrison AsJ focussed his analysis on the Consonant Approach. The Consonant Approach was proposed in the dissenting judgment of Schiemann LJ, in Gregory v Portsmouth City Council (1997) 96 LGR 569. Schiemann LJ concluded that the tort of malicious prosecution should be available to any proceedings where an individual has suffered damage by being maliciously subjected to proceedings brought without any justification and the type of damages that are compensable are physical or mental injury, loss of standing and reputation in the world and financial loss ("the Consonant Approach").The reason why the tort of malicious prosecution has only applied to criminal proceedings and certain civil proceedings such as bankruptcy cases is that in most civil proceedings the "poison" and the "antidote" are presented simultaneously (Buckley LJ in Wiffin v Bailey & Romford Urban District Council [1915] 1 KB 600 at 607). The publicity of the proceedings (the poison) is accompanied by the refutation (the antidote) of the unfounded charge. If there is no scandal, danger of loss of life, limb, or pecuniary damage, there can be no action for damages. In Little v Law Institute of Victoria (No 3) [1990] VR 257 a claim for malicious prosecution in civil proceedings was allowed to be maintained because there was a requirement for an advertisement in the newspaper prior to the hearing and the hearing was open to the public and so the poison and the antidote were not presently simultaneously. Harrison AsJ ultimately concluded that even if it could be argued that malicious prosecution should be available to proceedings before a delegate, the rationale for doing away with the poison/antidote approach to damages applied in Little is not applicable. In this case there is no publicity relating to these proceedings, there is no poison and therefore no antidote is required. There is no damage. Her Honour noted that even if she conceded that the Consonant Approach was at least arguable, there is no authority which suggests that the tort of malicious prosecution may be extended to a corporate entity. Harrison AsJ held that while it may be arguable that the tort of malicious prosecution could be applied to administrative proceedings, it is clear that a company cannot maintain a claim for malicious prosecution.**Was there a termination of proceedings in the plaintiff’s favour?** Her Honour concluded that the proceedings complained of may arguably have been terminated in Chapel Road’s favour. The argument is supported by the fact that the Tribunal concluded that ASIC’s decision was "not appropriate" or alternatively the "conviction" no longer stands (Commonwealth Life Assurance Society Limited v Brian [1935] HCA 40). **(ii) Tort of misfeasance in public office****Whether ASIC holds a public office**Harrison AsJ decided in light of Dunlop v Woollahra Municipal Council [1982] AC 158, that it is arguable that ASIC holds a public office because it is a statutory corporation carrying out statutory functions at the time it revoked Chapel Road’s dealer’s licence. **Act beyond power or invalid act**Section 836 of the former Corporations Law empowered a delegate to revoke a licence after the licensee had an opportunity to appear at the hearing, give evidence and make submissions. Harrison AsJ concluded that there was nothing to suggest that the delegate’s actions involved an invalid or unauthorised act. The tort is missing an essential element and therefore the claim for the tort of misfeasance of public office is untenable and should not be permitted to go to trial.Her Honour concluded that the plaintiff's pleadings for the torts of malicious prosecution and misfeasance in public office were "hopeless" and accordingly the statement of claim was dismissed. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.3 Application to set aside a statutory demand; issue of corporate authority** (By Megan Esson, Blake Dawson Waldron)Dr Andrew Roberts-Szudzinski Pty Ltd v .au Domain Administration Ltd [2006] NSWSC 950, New South Wales Supreme Court, Barrett J, 28 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc950.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc950.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**An application was made under section 259G of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) for the setting aside of a statutory demand served on the plaintiff by the defendant for an alleged debt of $268,125, representing the release fees payable for the acquisition of 325 domain names. Barrett J held that the test to be applied when considering an application for the setting aside of a statutory demand, is whether there is a "genuine dispute" as to the existence of the debt. The Court's role is not to decide whether the debt claimed is owing, due or payable.His Honour held that there was ample evidence on the facts to support the finding that there was a dispute as to the existence of a debt which involved "a plausible contention requiring investigation". Accordingly, his Honour ordered that the statutory demand be set aside and that the defendant pay the plaintiff's costs.**(b) Facts** The plaintiff operated a medical practice at which one of the directors of the plaintiff, Dr Andrew Roberts-Szudzinski, practised as a cosmetic surgeon. The other director of the plaintiff was the surgeon's wife. Their son, Mariusz Szudzinski was at the relevant time, the company secretary of the plaintiff.During June and July 2005, Mariusz Szudzinski had several contacts and dealings with Melbourne IT, which may have been a representative or agent of the defendant. During July and August of the same year, Melbourne IT conducted a ballot for domain names consisting of names of various towns in Australia.For some time prior to the ballot being held, the plaintiff had a business relationship with Melbourne IT in relation to its "cosmeticmedical.com.au" website, for which Mariusz Szudzinski had responsibility. The defendant contended that correspondence with Mariusz Szudzinski at the Cosmetic Medical Centre evidenced dealings between Mariusz Szudzinski and Melbourne IT on behalf of the plaintiff.Evidence was tendered by the defendants which indicated that Melbourne IT had sent emails addressed to "Mariusz" to "fabryka@cosmeticmedica.com.au" on a number of occasions in July and August 2005, in relation to the ballot. The first of these emails on 31 July acknowledged receipt of a ballot application for two domain names relating to Woolloomooloo. The second, on 25 August, contained a notification that he had won the ballot for 323 names and provided details in relation to the $995 payable to secure each domain name. A letter followed on 1 September containing a tax invoice for $321,385. The letter was sent to the registered office of the plaintiff and the home address of Mariusz Szudzinski and his parents. On 13 September of that year, the defendant sent a further email demanding immediate payment.Evidence was produced by the defendant in relation to the email address "fabryka@cosmeticmedia.com.au" which showed that the "Primary Contact Person" was Mariusz Szudzinski. This email address, together with the domain name “cosmeticmedical.com.au”, was registered under the same account, for which the "account user name" was "FABRYKA".The plaintiff sought to have the statutory demand set aside on the ground that there existed a genuine dispute as to the existence of the debt (section 459H(1)(a), the Act). The plaintiff denied the allegation by the defendant that when entering the ballot for 325 geographic domain names, Marisuz Szudzinski was acting with the actual, ostensible or implied authority of the plaintiff, which was framed as follows: * the defendant was entitled to rely on the assumption in section 129(2)(b) of the Act that Mariusz Szudzinski had actual authority;
* section 128(1) estopped the plaintiff from asserting that assumption was incorrect;
* the defendent was entitled to assume Mariusz Szudzinski had ostensible authority to enter into the dealings in relation to the domain names; and
* the defendant was entitled to rely on the indoor management rule (Royal British Bank v Turquand (1856) 6 E & B 327) and therefore entitled to assume that all provisions regulating internal management were complied with by Mariusz Szudzinski in his role as company secretary.

**(c) Decision** Barrett J was prepared to accept that Mariusz Szudzinski submitted the application for the domain name ballot and the communications from Melbourne IT referred to above were to an email address of the plaintiff. His Honour noted that the key question raised by the correspondence was whether it was Mariusz Szudzinski on his own account, or the plaintiff, who had dealings with Melbourne IT. Given that company employees often use company email for personal purposes, his Honour found that the fact that email communications had been sent to Mariusz Szudzinski at the plaintiff's email address was "equivocal". Further, his Honour noted that in the communications, Mariusz Szudzinski had not been identified as the plaintiff's company secretary. His Honour held that the two-fold test to be applied by the Court in deciding whether or not to set aside a statutory demand is: * whether there is a "genuine dispute" as to the existence of the debt, that is "whether the assertion of dispute is such as to involve 'a plausible contention requiring investigation' (Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 at 787); and
* whether the grounds of dispute alleged can be seen to be 'real and not spurious, hypothetical, illusory or misconceived'" (Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452).

In discussing the submissions made by the defendant as to the authority of Mariusz Szudzinski, Barrett J noted that whilst the defendant was justified in raising sections 129(2)(b) and 128(1), the key question was what powers and duties a secretary of a "similar company" would "customarily" exercise and perform. His Honour did not answer this question but noted that it would need to be determined if the defendant sued the plaintiff for the alleged debt and wished to rely on these sections. Similarly, his Honour indicated that there would be debate as to what the company secretary's role is in determining the scope of their ostensible authority. Barrett J noted further, that on the evidence presented, it was not clear how the defendant could show that Mariusz Szudzinski had "purported to act" as the plaintiff's secretary, which would need to be established in order to rely on the indoor management rule.His Honour noted that another significant issue which would need to be resolved was whether Melbourne IT was in fact acting as a representative or agent of the defendant in its communications and dealings with Mariusz Szudzinski. Barrett J held that in the circumstances, the test outlined above as to whether or not there was a "genuine dispute" had been "amply satisfied" on the facts. His Honour ordered that the statutory demand be set aside and that the defendant pay the plaintiff's costs.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.4 Statutory derivative action application fails for want of good faith** (By Warwick Taylor, Phillips Fox)Chahwan v Euphoric Pty Ltd [2006] NSWSC 1002, New South Wales Supreme Court, Barrett J, 28 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1002.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc1002.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 plaintiff, a member of Bycoon Pty Ltd ('Bycoon') and sole director of Bycoon from 2002 until its winding up in 2005, applied for leave under section 237 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('Corporations Act') to bring a statutory derivative action against the defendant on behalf of Bycoon. The plaintiff sought a declaration that the defendant, which held a mortgage over property owned by Bycoon, held that interest on trust for Bycoon.The defendant had received its interest as a result of the actions of Bycoon's then director, Mrs Ayoub, which the plaintiff claimed were in breach of her duties to Bycoon. Mrs Ayoub is the plaintiff's sister.Barrett J refused the plaintiff's application on the grounds that the plaintiff was not acting in good faith. The plaintiff, as sole director of Bycoon from 2002, had previously had opportunities to bring the action and had not done so, but had instead waited until after his sister had become a bankrupt and thus was effectively insulated from the proceedings.**(b) Facts**The defendant had sold fuel to a company controlled by Mrs Ayoub's husband. That company owed almost $300,000 to the defendant. Mrs Ayoub, as sole director of Bycoon, caused Bycoon to assume the debt and granted a mortgage over Bycoon's property in favour of the defendant.The defendant successfully pursued an action against Mrs Ayoub and Bycoon in the District Court to recover that debt and additional debts incurred by Bycoon. Mrs Ayoub became a bankrupt after the conclusion of those proceedings.In 2002, the plaintiff became the sole director of Bycoon. In November 2005, Bycoon was placed in liquidation by the Court.These proceedings commenced in March 2005. This particular judgment relates to the plaintiff's application, in June 2006, for leave to bring a statutory derivative action against the defendant on behalf of Bycoon, under section 237 of the Corporations Act. The plaintiff sought a declaration in favour of Bycoon that the defendant, which held a mortgage over property owned by Bycoon, held that interest on trust for Bycoon. The plaintiff claimed that the defendant took its interest in the property in knowledge of Mrs Ayoub's breach of duty.**(c) Decision** **(i) Whether defendant's submissions should be considered**Barrett J first considered the issue of whether the defendant's submissions in relation to the application should be considered. The plaintiff submitted that the defendant should not be heard, as the question whether or not to grant leave to bring a statutory derivative action is 'a matter of domestic concern' within the company. Barrett J did not accept this argument in this case, and distinguished between cases where existing proceedings established a legitimate expectation on the part of the 'substantive defendant' that it would have an opportunity to argue the question (as in this instance) and cases where an application is made in advance of the initiation of any proceedings. The fact that the plaintiff had served the present notice of motion on the defendant was also relevant in this instance.Barrett J held that the defendant's submissions should be heard. **(ii) Serious question to be tried**The court must grant leave to bring a statutory derivative action if an applicant has standing and the conditions set out in section 237(2) of the Corporations Act are satisfied. The defendant contested three of those conditions, arguing:* that there is no serious question to be tried (section 237(2)(d));
* that granting leave is not in Bycoon's best interests (section 237(2)(c)); and
* that the plaintiff is not acting in good faith (section 237(2)(b)).

The defendant argued that there was no serious question to be tried on the basis that, among other things, the question was not raised in the District Court proceedings. The defendant argued that this gave rise to an Anshun estoppel (following Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589), which would prevent Bycoon from raising the argument at a later date.Barrett J held that there was no Anshun estoppel as the District Court had no jurisdiction to grant relief under the Corporations Act and had only limited equitable jurisdiction to rule on the issue of accessorial liability in respect of breach of directors' duties.**(iii) Best interests of Bycoon**Barrett J considered whether a rebuttable presumption had arisen that granting leave would not be in Bycoon's best interests under section 237(3) of the Corporations Act. This presumption will arise if, for example, Bycoon had decided not to bring the proceedings and the directors who participated in the decision were properly informed and had acted rationally, in good faith and without improper purpose or material interest.The defendant argued that the presumption had in fact arisen as the plaintiff was the only person who could have made the decision to bring the proceedings and did not do so in the District Court proceedings.Barrett J did not accept this argument, on the bases that:* there is a significant difference between the action not being brought and deciding not to bring the action; and
* the District Court proceedings were not necessarily the correct venue for the proceedings in any event.

**(iv) Good faith**The defendant successfully argued that the plaintiff was not acting in good faith. Barrett J held that the onus is on the plaintiff to establish that he is acting in good faith, and that in this case the plaintiff's actions were 'strongly indicative of improper motive and purpose.' The fact that the plaintiff became aware of the mortgage in 2001, but did not bring any action against Euphoric after he became the sole director of Bycoon, was a determining factor in Barrett J's decision. Barrett J held that, although the District Court proceedings were not necessarily the correct venue in which to bring the claim against Euphoric, the plaintiff could have initiated Supreme Court proceedings. As the plaintiff did not bring the proceedings until his sister had become a bankrupt - and was therefore effectively insulated against the claim - Barrett J held that the plaintiff's motive was questioned to such an extent as to preclude the necessary finding of good faith.**(d) Order**Barrett J refused the application to grant leave, and ordered the plaintiff to pay the defendant's costs. http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.5 Restraining a former employee from working for a competitor and using confidential information** (By Jonathan Stewart, Blake Dawson Waldron)John Fairfax Publications Pty Limited v Birt [2006] NSWSC 995, New South Wales Supreme Court, Brereton J, 25 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc995.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc995.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) Facts**This case involves a former employee of John Fairfax Publications Pty Limited (Fairfax Publications), Mr Jeremy Birt. Birt was employed as General Manager Sales Development, Real Estate and Motors New South Wales. He gave the required three month's notice to terminate his employment on 30 May 2006 and sought to commence employment with the Federal Publishing Co Pty Limited (Federal Publishing) on or about 1 September 2006 in the role of Publisher, City Publications. Birt was to assist in managing Federal Publishing's publication of the free Sydney suburban newspapers: the City Weekly, Central and 9 to 5. Fairfax Publications bought these proceedings against Birt and his new employer seeking an injunction to enforce restraints of trade clauses in Birt's employment contract with Fairfax Publications. The proceedings involved three restraints against Birt: * restraining Birt from being employed by a business which is in competition with the Fairfax Group until 1 December 2006;
* restraining Birt from using any confidential information of Fairfax Publications, its products or clients for personal gain or revealing it to others (eg, Federal Publishing); and
* restraining Birt from approaching any employee, agent or customer of Fairfax Publications to entice them away from Fairfax Publications until 1 March 2007.

Fairfax Publications also sought an injunction restraining Federal Publishing (and its associated entities) from inducing or requiring Birt to engage in any of the activities he was restrained from.**(b) Decision****(i) Approach to constraints**Brereton J observed that at common law a restraint of trade is contrary to public policy and therefore void unless it is sufficiently justified in the circumstances in which it is to be imposed. However, as Brereton J observed, the effect of the [Restraints of Trade Act 1976 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4206" \t "_default) is that restraints of trade are valid to the extent to which they are not against public policy. Accordingly, in assessing whether the restraint should be enforced against Birt, Brereton J focused on whether the alleged breach does or will infringe on the terms of the restraint and whether the restraints were not contrary to public policy. **(ii) Restraint in relation to employment by a competing business**The restraint in the contract of employment was framed as a restraint from being employed by a competitor of the "Fairfax Group". There was some argument about the scope of the restraint. Firstly, the "Fairfax Group" was not defined. Brereton J held that the reference was to the corporate newspaper group of companies (of which John Fairfax Holdings Ltd is the holding company) as the term was clearly not intended to be limited to just Fairfax Publications. Secondly, Birt argued that the magazines he was to assist with for Federal Publishing could not be said to be in competition with the national publishing business that the "Fairfax Group" operates. However, Brereton J held that, as the relevant Federal Publishing magazines seek to attract the same advertisers and circulate in the same areas as some of the publications of the Fairfax Group, then Federal Publishing was a business that competed with the Fairfax Group (even though it was a smaller scale business). Brereton J held that restraining an employee from working for a competitor for a 3 months period was not excessive.**(iii) Restraint in relation to confidential information**The restraint against disclosing confidential information was upheld as Brereton J held that Birt had possession of certain confidential information of Fairfax Publications (such as commercial strategy and business information) which he ought not to disclose to his new employer or use that information for the benefit of his new employer. Brereton J commented that there can be "no objection" to the claim that Fairfax Group is entitled to protect the confidential information.**(iv) Restraint in relation to soliciting employees, agents and customers**Brereton J held that the restraint in relation to soliciting employees was valid and enforceable on the basis that Fairfax Publications had a justifiable interest in ensuring that Birt did not exercise his influence over his staff to procure those staff to follow him to his new employer. However, Brereton J held that the restraint against soliciting agents was not valid as there was no evidence which suggested that Fairfax Publications had any relevant connection with its agents which justified protection by restraint. Similarly, Brereton J held that the restraint against soliciting customers was not enforceable as there was no confidential information in relation to customers that justified the restraint on customer solicitation.**(v) Outcome**Brereton J held that it was "plain" that there was a threatened or actual breach of the restraint against employment with a competing business and also that there was a sufficient apprehension of a breach in relation to the confidential information restraint. Brereton J held that discretionary considerations did not mitigate against the granting of the injunction sought by Fairfax Publications, despite the evidence of the hardship to Brit of that decision; Brit was the "author of his … own misfortune". Accordingly, Brereton J held that the balance of convenience was in favour of granting the injunctions sought by Fairfax Publications against both Brit and his new employer (other than in relation to solicitation of agents and customers of Fairfax Publications).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.6 Legal professional privilege**(By Emilios Kyrou, Mallesons Stephen Jaques)AWB Ltd v Cole (No 5) [2006] FCA 1234, Federal Court of Australia, Young J, 18 September 2006The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1234.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1234.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 is significant because it adopts a wide view of when investigation documents created by lawyers for the purpose of preparing legal advice can be privileged and when such privilege is impliedly waived in the event the substance of the legal advice is subsequently disclosed to a third party. The case also discusses the scope of the so-called "crime or fraud exception" to privilege in the context of sham transactions.**(b) Facts and issues**The Commonwealth established the Cole Inquiry under the [Royal Commissions Act 1902 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8039" \t "_default) to investigate and report on (among other things) whether AWB Ltd ("AWB") or any person associated with it committed a breach of any Australian laws in connection with the United Nations Oil for Food Program for Iraq. Commissioner Cole issued summonses requiring AWB Ltd to produce various documents. AWB refused to produce a large number of documents on the ground that they were protected by legal professional privilege. AWB sought declarations before Young J of the Federal Court that the documents were privileged. The Commonwealth opposed the granting of the declarations, as Commissioner Cole announced he would not participate in the proceeding. Initially, 1,450 documents were in issue. Ultimately, only 900 documents required consideration by the court, as AWB withdrew its claim for privilege in respect of some documents and the Commonwealth conceded that some documents were privileged.The key documents in issue were generated by AWB and its legal advisers in connection with two internal investigations into AWB's dealings with Iraq during the Oil for Food Program. The first was known as "Project Rose" and involved AWB's lawyers reviewing AWB's documents and interviewing AWB's staff for the purpose of advising on whether AWB had breached UN resolutions which prohibited the making of certain payments to Iraq, or engaged in any other wrongdoing. The second was known as "Project Water" and involved AWB's lawyers reviewing AWB's documents for the purpose of advising on whether a transaction involving AWB, The Tigris Petroleum Corporation Ltd ("Tigris") and the Grain Board of Iraq ("GBI") breached UN resolutions or involved any other wrongdoing. The transaction allegedly involved AWB inflating the price of two contracts for the supply of wheat to the GBI in order to extract funds from the UN escrow account to repay a debt that GBI allegedly owed to Tigris and to provide AWB with funds to enable it to make a rebate payment to GBI for the previous supply of allegedly contaminated wheat.The case is lengthy and deals with a large number of complex issues. This note discusses the following key issues:* claims for privilege for documents created in the course of an investigation conducted by lawyers for the purpose of providing legal advice;
* implied waiver of privilege for associated documents arising from disclosure of the substance of a privileged document; and
* the crime or fraud exception to privilege.

**(c) Privilege for investigation documents**Young J held (at [45]-[57]) that factual documents generated by a lawyer in the course of conducting an investigation for the dominant purpose of using those documents to provide legal advice on the subject matter of the investigation are privileged. Accordingly, summaries, chronologies, witness statements, notes of interviews and notes relating to transaction documents prepared by the lawyer during his or her investigation can be privileged. Very helpfully, Young J also held (at [57]) that where a lawyer is engaged to advise in relation to a transaction, generally all documents created by the lawyer as part of a continuum for the purposes of the advice will be privileged, without the need to establish that each document contains specific legal advice. These are very significant findings, as the extent to which privilege attached to investigation documents was previously uncertain. The case provides a clear basis for claiming privilege for documents generated in the course of an investigation by a company’s lawyers into a particular event, incident or transaction, where the dominant purpose is to provide legal advice on the event, incident or transaction. **(d) Implied waiver for associated documents**In the course of Project Rose and Project Water, AWB's lawyers provided to AWB legal opinions, slide presentations and other documents which concluded that they had not found evidence that AWB had breached UN resolutions or engaged in any other wrongdoing. On several occasions, AWB disclosed to third parties (including in interviews with the UN’s Independent Inquiry Committee, in meetings with Commonwealth Government officials and in evidence before the Cole Inquiry) that AWB had received independent legal advice that there was no evidence that AWB had breached UN resolutions or engaged in any other wrongdoing. In addition, AWB had voluntarily provided to the Cole Inquiry copies of some of the written legal opinions it had received.Young J held (at [178]) that AWB’s deliberate disclosure of the gist or substance of the legal advice it had received to third parties so as to advance its own commercial interests resulted in an implied (or, as his Honour preferred to describe it, imputed) waiver in the legal advice on the basis that such disclosure is inconsistent with the maintenance of confidentiality in the advice: Mann v Carnell (1999) 201 CLR 1. However, his Honour went further and held (at [198]-[205]) that the disclosure also resulted in an implied waiver of privilege in all associated privileged documents, including the documents which the lawyers took into account in reaching their conclusions or which influenced those conclusions. These documents included investigative material such as summaries, chronologies, witness statements and other analytical documents.In doing so, his Honour relied on the principle of associated material waiver, namely that disclosure of legal advice on an issue or transaction results in an implied waiver of all privileged documents relevant to that issue or transaction. His Honour relied on cases such as Attorney-General (NT) v Maurice (1986) 161 CLR 475 and Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation (No 2) [1981] Com LR 138 in arriving at this conclusion. He declined to follow the case of British American Tobacco Australia Services Ltd v Cowell (2002) 7 VR 524 which held that express waiver in a privileged document results in waiver of privilege in associated documents only where this is necessary to properly understand the first document. He said (at [167]) that Cowell expressed the principle of associated material waiver too narrowlyThis aspect of Young J's decision is very controversial because it significantly extends the principle of associated material waiver. Previously, the legal profession understood the principle as applying along the lines of the Cowell case. Thus, for example, where a party discloses counsel’s legal opinion and thereby waives privilege in it, this was not regarded as waiving privilege in previous legal opinions or the contents of counsel’s brief unless the disclosed opinion discussed their contents in such a way to require waiver in order to ensure a proper understanding of the disclosed opinion. However, it appears from Young J's decision that disclosure of counsel’s opinion on an issue or transaction will result in a waiver of counsel’s previous advice on the same issue or transaction and all the contents of counsel’s brief, even if the disclosed opinion does not refer to these other documents. If this approach is correct, it makes any disclosure of any privileged document to a third party very hazardous.**(e) Crime or fraud exception**The Commonwealth submitted that privilege was not attracted for legal advice relating to the proposed rebate to GBI because the advice was in furtherance of an improper or dishonest purpose. Young J accepted this submission (at [225]-[229]). In doing so, Young J stated (at [214], [226] and [228]) that privilege will be denied even though the conduct in question does not constitute a crime or fraud under Australian law, even though neither the client nor the lawyer believed they were committing a crime or fraud and even though the intended transaction does not take place due to an intervening event (in this case, the invasion of Iraq). Young J said (at [211]-[212]) that the “crime or fraud exception” to privilege encompasses a wide species of fraud, criminal activity or actions taken for illegal or improper purposes and extends to trickery and shams. His Honour also held (at [218]) that the party impugning the claim of privilege must adduce prima facie evidence of the alleged fraud or other improper conduct.**(f) Outcome and implications**Ultimately Young J held that, of the 900 documents in issue, 25 were not privileged because they were not created for the dominant purpose of requesting or providing legal advice, 316 were the subject of a waiver in full and 19 were the subject of a waiver in part. His Honour held that 10 of the 316 documents which were the subject of waiver also fell within the crime or fraud exception.As a result of this case, great care is required when a client is considering the disclosure of legal advice to a third party, as even a one-sentence summary may lead to an implied waiver of privilege in not only the entire advice but also all associated privileged documents. The case also highlights that the courts are prepared to apply a flexible approach to the "crime or fraud exception" as a means of rejecting claims for privilege where the subject matter of the advice does not pass the judicial smell test.From a lawyer’s perspective, it is prudent to seek clarification of any aspect of a proposed transaction which appears questionable, in order to avoid subsequent allegations that the lawyer's advice was in furtherance of a crime, fraud or other improper conduct.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.7 Fixed or floating? Characterising a charge over company assets** (By Hardi Nagreh, Freehills)Australian Securities & Investments Commission, In the Matter of Richstar Enterprises Pty Ltd ACN 099 071 968 (No 9) v Carey [2006] FCA 1242, Federal Court of Australia, French J, 15 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1242.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1242.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 Federal Court considered an application to vary a freezing order affecting the assets of Bowesco Pty Ltd (Bowesco), a company associated with the Westpoint Group and being investigated by ASIC.The variation was sought by receivers appointed by a lender to Westpoint Corporation Pty Ltd (Westpoint Corp) under a charge over, among other things, an option to purchase land which had originally been granted to Westpoint Corp. Westpoint Corp had subsequently assigned the option to Bowesco for a nominal amount. The lender had held a fixed and floating charge over Westpoint Corp’s undertaking and property as security at all relevant times, but had not been given notice of, nor had it consented to the assignment of the option to Bowesco.After reviewing the case law relating to characterisation of company charges as fixed or floating, the Court held that the option was affected by a fixed charge in favour of the lender, and varied the freezing order to enable the lender’s receivers to exercise their receivership rights in respect of the option.**(b) Facts** On 20 April 2006, ASIC had obtained freezing orders under section 1323 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) restraining Bowesco from disposing or dealing with its assets, as a protective measure pending ASIC's investigations into Bowesco and other companies associated with the Westpoint Group.In this case, receivers appointed by Perpetual Nominees Ltd as custodian of The ING Mortgage Pool for ING Funds Management Ltd, as the Responsible Entity of The ING Mortgage Pool (ING), a secured lender to Westpoint Corp (the Receivers) applied to the court to vary the section 1323 orders to enable the Receivers to enforce their powers relating to the option held by Bowesco.The option had been originally granted by Westpoint Management Pty Ltd (Westpoint Management) to Westpoint Corp on 31 August 1999 and related to the purchase of certain land occupied by the Warnbro Fair Shopping Centre. The purchase price for this property was payable on exercise of the option. The option was due to expire on 20 October 2006.As security for a $45,294,000 loan facility provided by ING to Westpoint Corp, Westpoint Corp entered into a deed of charge (the Charge Deed) on 28 September 2005 which granted ING a charge over its property (the ING Charge). The ING Charge constituted a fixed charge over certain defined property classes, and a floating charge over all of Westpoint Corp’s "present and future undertaking, property and assets".By a deed dated 7 October 2005 between Westpoint Management, Westpoint Corp and Bowesco, Westpoint Corp assigned the option to Bowesco in consideration for $100. ING was not given notice of and did not consent to the assignment of the option. The option appeared to have a significant market value, with the evidence disclosing a third party offer on 23 December 2005 to purchase the option for $1 million.The Receivers claimed that the option held by Bowesco was subject to the fixed charge component of the ING Charge at its creation, and that Bowesco had knowledge of the existence of the ING Charge. If this was so, Bowesco would be holding the option as a constructive trustee for ING. Bowesco maintained that ING had no interest in the option. It claimed that the ING Charge only operated as a floating charge over the option, and that Westpoint Corp’s assignment of the option to Bowesco was not a breach of the ING Charge as it was undertaken as part of the ordinary course of Westpoint Corp’s business. **(c) Decision** **(i) Submissions**The key issue in this case was whether the ING Charge operated as a fixed charge in relation to the option or as a floating charge, at the point when the charge was created.If it was a floating charge, then the charge did not attach to the option until a crystallising event had occurred. Until such an event, under the general law Westpoint Corp was free to deal with the option in the ordinary course of its business and did not need ING’s consent in doing so.The Charge Deed stated that a fixed charge arose over any interest of Wespoint Corp in land. French J, referring to Barba v Gas & Fuel Corporation of Victoria (1976) 136 CLR 120, noted that an option to purchase land gave the option holder an equitable interest in the land. However Bowesco submitted that the designation of a charge as a fixed charge in the Charge Deed was not conclusive of the question of whether it was fixed or floating. Bowesco relied, among other authorities, on the Privy Council’s decision in Agnew v Commissioner of Inland Revenue [2001] 2 AC 710. The Privy Council had held:* The question of whether a charge is fixed or floating is not merely one of construction. A court must instead engage in a two-stage process.
* At the first stage, the court must examine the charge instrument to determine the intentions of the parties from the language used, not to determine whether the parties intended to create a fixed or a floating charge, but to determine the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets.
* Once this has been determined, the court could then embark on the second stage of the process – categorising the charge as a matter of law. If the parties’ intention as determined from the language of the charge instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge despite how the parties may have chosen to describe the charge in the charge instrument.

Bowesco also referred in particular to the decision of Romer LJ in Re Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284 in which it was said that a charge is a floating charge if:* it is a charge on a class of assets of a company present and future;
* the charge is one which in the ordinary course of the business of the company would be over assets which are normally charged from time to time; and
* by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets.

Bowesco argued that creation of a fixed charge over the option was inconsistent with an aspect of Westpoint Corp’s long-standing ordinary course of business. This was the practice of choosing special purpose vehicles within the Westpoint Group to implement property development projects in order to take advantage of certain financial and accounting benefits.The Westpoint Group business plan relating to the Warnbro Fair Shopping Centre had foreshadowed assigning the option to a special purpose vehicle for undertaking financing and development of the Warnbro Fair Shopping Centre. The evidence indicated that Westpoint Corp had identified Bowesco as a “non-Westpoint Corporation related party” and under accounting standards to be introduced in 2006, any fee profits earned by other Westpoint Group companies for providing services to the development to be conducted by Bowesco, could be accounted for as they were earned (rather than after the project was completed as required if the development was to be undertaken by a related party). Consequently, exercise of the option by Bowesco rather than Westpoint Corp would create a significant advantage to the Westpoint Group, enabling consistent earnings to be shown on its profit and loss account.In light of this background, Bowesco submitted that the prohibitions arising from creating a fixed charge over the option would be inconsistent with Westpoint Corp’s ordinary course of business.**(ii) Key principles**French J rejected Bowesco’s argument. There are essentially two strands of reasoning for this finding.Firstly, French J focussed on whether a transfer of the option was within the ordinary course of Westpoint Corp’s business.The terms of the fixed charge component of the ING Charge prohibited Westpoint Corp from transferring, leasing or otherwise disposing of or dealing with any property subject to the fixed charge, or to allow any person to acquire any interest except a permitted encumbrance in any property subject to the fixed charge. French J held that although this prohibition prevented Westpoint Corp from transferring or otherwise dealing with the option, it did not prevent Westpoint Corp from exercising the option. He formed the view that the exercise of an option was "not a dealing in the Option". French J appeared to focus on what forms of use of an asset would constitute a necessary aspect of the conduct of a chargor’s ordinary business. French J found that the ability to exercise the option over land would constitute such an aspect in the case of Westpoint Corp. This use was not prohibited by the terms of the fixed charge, based on his interpretation of those terms.However French J did not accept that a transfer of an option to a special purpose vehicle for land development was a necessary aspect of the conduct of Westpoint Corp’s ordinary business. Accordingly, creating a fixed charge over the option was not inconsistent with the ordinary course of Westpoint Corp’s business. Secondly, French J focussed on certain aspects of the drafting of the Charge Deed. In the Charge Deed, although the fixed charge was stated as applying to Westpoint Corp’s debts from time to time, there was a requirement for ING to permit Westpoint Corp to collect such debts.French J noted that much of the case law relating to characterising company charges concerned their effects on book debts. In these cases, the courts grappled with the issues arising from a fixed charge being attributed to a company’s book debts, which affected the company’s ability to collect and dispose of the proceeds of those debts. French J concluded that by providing for Wespoint Corp's book debts in this way, the Charge Deed had specifically provided for a class of property that Westpoint Corp necessarily had to be able to deal with on an ongoing basis without a requirement for ING's consent. By expressly providing for the book debts, French J reasoned that the parties intended, by way of deliberate omission, to provide for a fixed charge in respect of Westpoint Corp’s interests in land.French J also held that Bowesco, through an effective controller which it had in common with Westpoint Corp, had knowledge of the presence of the ING Charge over the property of Westpoint Corp. As a result, Bowesco took the option subject to ING’s interests in it, and held it as constructive trustee for ING.The freezing order was varied as sought by the Receivers.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.8 Application for interim injunction to restrain a defendant from managing corporations until a final determination of the proceeding** (By Peter Mordue, Phillips Fox)ASIC v Christopher John Mapstone [2006] NSWSC 993, New South Wales Supreme Court, White J, 14 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc993.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc993.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 required the court to determine whether it had the power to grant an interim injunction pursuant to section 1324 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act) restraining the defendant from managing corporations until a final determination of the proceedings. The court held that it did not have the power to grant an interim injunction in the circumstances of case, and even if it did, an interim injunction was not appropriate.**(b) Facts**Between 27 August 1997 and 5 November 2002, the defendant was the sole director and secretary of Tri-State (a company wholly owned by the Hong Kong company Topwell International Oil & Trading Limited). He was also the sole signatory to the company's bank accounts.Tri-State received a tax refund of $608,366.94 on 5 February 2002 which was paid directly into a National Australia Bank account. Over the next 7 months, there were numerous withdrawals from the account until the balance was $492.59.The defendant was removed as the director and secretary of Tri-State on 5 November 2002 and replaced by a Mr George Jack.Tri-State commenced proceedings against the defendant on 5 May 2004 and ASIC received a complaint in relation to the defendant's conduct on 25 August 2005. The proceedings being discussed here were commenced on 21 July 2006.**(c) Decision** The relevant powers to disqualify a person from managing corporations in the above circumstances are sections 206C and 206E of the Act.* Section 206C of the Act requires a declaration under section 1317E of the Act that the defendant has contravened a civil penalty provision and the court has to be satisfied that the disqualification is justified.
* Section 206E requires that the person has at least twice contravened the Act and the court has to be satisfied that the disqualification is justified.

During the course of the proceedings the defendant did not provide an explanation or any evidence regarding the purpose for the majority of the withdrawals from the account in question. The court therefore considered that there was a serious question to be tried, that the defendant had contravened section 182 of the Act and as a result a declaration may be made under section 1317E of such a contravention.The plaintiff (ASIC) relied on the same alleged contravention of section 182 of the Act as being one of at least two contraventions to be established pursuant to section 206E of the Act. The other contravention on which it relied was a contravention of section 475(1) of the Act, for which the defendant was convicted on 20 April 2005.The application before the court was for an injunction to stop the defendant managing corporations until the proceedings under sections 206C and 206E were decided. The power for the court to issue an injunction is found in section 1324 of the Act. The relevant parts of the section are:(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:(a) a contravention of this Act; …the court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing.(4) Where in the opinion of the court it is desirable to do so, the court may grant an interim injunction pending determination of an application under subsection (1).(6) The power of the court to grant an injunction restraining a person from engaging in conduct may be exercised:(a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; and(b) whether or not the person has previously engaged in conduct of that kind; and(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind. (8) Where ASIC applies to the court for the grant of an injunction under this section, the court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.”With regards to sections 1324(1), (6) and (8) the court held that there was no evidence that the defendant had contravened the Act by managing corporations, as distinct from his having engaged in particular conduct which allegedly contravenes the Act, in failing to account for moneys received by the company. The court also considered there was no evidence that the defendant proposed to continue as a director, or otherwise to manage corporations, if he was disqualified to do so under the Act. Therefore the Court held there was no basis upon which it could grant the injunction sought.The court also held that section 1324(4) aids an application under section 1324(1), not applications brought under other provisions of the Act. Therefore as the court did not consider there was a serious question to be tried in the absence of evidence that the defendant had in the past, or proposed to manage corporations whilst disqualified under the Act in the future, it would not be proper to grant an interim injunction under section 1324(4) of the Act.White J stated that if his view was incorrect regarding the power under section 1324(4) to grant the interim injunction sought in this case, he would not exercise that power in any case because of the delay in the making of the application, and the lack of evidence as to any jeopardy faced by persons dealing, or proposing to deal, with corporations which the defendant was managing.The court therefore held that it did not have the power to grant an interim injunction and, even if it had the power to grant an interim injunction, it would not exercise that power as the circumstances did not warrant an injunction.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.9 Winding up an unregistered managed investment scheme-basis for distribution of remaining assets** (By Justin Fox, and John O’Grady, Corrs Chambers Westgarth)ASIC v Tasman Investment Management [2006] NSWSC 943, New South Wales Supreme Court, Austin J, 14 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc943.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc943.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 2004, the New South Wales Supreme Court found the Queen Victoria Project (QVP) was an unregistered managed investment scheme being operated in contravention of section 601ED of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) and appointed a receiver to wind up QVP. The receiver subsequently applied for a direction supporting the final distribution of the remaining assets of QVP to the investors of QVP on a pro rata basis according to each of the investors’ amount of investment. The court found the receiver would be justified to take such action and would not be able to be held liable if he distributed the funds accordingly. The court stopped short however of approving the proposed distribution as to do so might alter the proprietary rights of those involved and would go beyond the powers conferred on the court under section 601EE(2) of the Act.**(b) Facts** QVP was created for the purposes of developing a nursing home and retirement village on a property acquired in Wentworth Falls. QVP raised $4,660,000 from over 70 investors to fund the development.In 2004, the Australian Securities and Investments Commission (ASIC) applied for orders that QVP was an unregistered managed investment scheme being operated in contravention of section 601ED of the Act and that QVP be wound up pursuant to section 601EE of the Act. The court made such orders and appointed an independent receiver, Mr Stephen Parbery, to wind up QVP.Following his appointment, Mr Parbery sold the only known remaining asset of QVP, the property at Wentworth Falls. On the completion of the sale, QVP’s total net assets were $895,335.Mr Parbery subsequently sought the following orders from the New South Wales Supreme Court (the court):* an order directing him to make payment by way of a final distribution to the investors in proportion to the amount of money those investors had invested (approximately 19.2 cents in the dollar); and
* that once the distribution is paid and the final accounts are settled, the winding up will be complete.

In the alternative, Mr Parbery sought directions from the court as to what should be done with the remaining assets and whether any legal action (such as against the manager of QVP) should be instituted.**(c) Decision** Under section 601EE(2) of the Act, the court is empowered to "make any orders it considers appropriate for the winding up" of an unregistered scheme. Mr Parbery submitted that this entitled the court to make the orders sought. Mr Parbery further submitted that the court should sanction the proposed distribution of the surplus assets of QVP to investors on a pro rata basis, by analogy with the winding up of a company. The court noted that the Act did not provide a mechanism for the winding up of an unregistered managed investment scheme (and contrasted this situation to the comprehensive regime which exists in relation to companies). In the absence of specific guidance, the court considered its power to make orders regarding the winding up of a scheme under section 601EE to be flexible. Austin J accepted Barrett J’s comments in ASIC v Commercial Nominees of Australia Ltd [2002] NSWSC 576 in this regard that:"… the court has jurisdiction to settle or prescribe any aspect or element of the basis for winding up or the winding-up process which it is necessary to supply because that element cannot be obtained from any other source."Austin J cautioned however against any “unreflective application of company law ideas” to managed investment schemes and found that, although the court has broad powers under section 601EE of the Act, the court does not have the power to make orders that depart from the proprietary rights of the scheme’s participants. Accordingly, the court found that it could not authorise a distribution of surplus assets of an unregistered scheme otherwise than to those entitled to the assets in proportion to their entitlements.However, the court went on to find that the power to make orders under section 601EE did allow the court to sanction the proposed distribution for the limited purpose of protecting Mr Parbery from liability. Notably the court identified the fact that unlike with the winding up of a company, no entities (ie potential defendants to any causes of action by investors or ASIC) would be dissolved. Therefore, the court only needed to decide whether Mr Parbery’s proposal had a sufficiently reasonable basis such that the court could exonerate him from liability for implementing the proposal. In this context, the court reviewed whether Mr Parbery’s report and affidavits provided sufficient evidence such that Mr Parbery was justified in distributing the funds as he intended. The court found there was a good arguable case for the view that the investors were the beneficial owners of the Wentworth Falls property and as a consequence found sufficient foundation for Mr Parbery to be absolved of legal liability if he distributed the remaining net assets to the investors on a pro rata basis. The court made it clear however that in giving those orders, it was not purporting to alter the rights of any person entitled to share in the distribution. The court also considered whether Mr Parbery should use some or all of the remaining net assets to pursue legal claims for breach of fiduciary duties (and other relevant legal causes of action) against those responsible persons. The court relied upon Mr Parbery’s view that the remaining net assets would be best used by distributing the funds to the investors. The court did note that if the court did grant the orders Mr Parbery sought, then any rights or causes of action available to ASIC, or anyone with standing to take proceedings, would not be diminished or extinguished.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.10 Circumvention of pre-emptive rights by upstream transfer – how far does the term “subsidiary” apply?** (By Simon Haddy, Freehills)Beaconsfield Gold NL v Allstate Prospecting Pty Ltd (subject to deed of company arrangement) [2006] VSC 320, Supreme Court of Victoria, Hargrave J, 8 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/september/2006vsc320.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/september/2006vsc320.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 related to a dispute over pre-emptive rights in the joint venture agreement for the ill-fated Beaconsfield Gold Mine, and in particular to the application of the term “subsidiary” to provisions regulating "upstream" changes of control. Hargrave J in the Victorian Supreme Court found that:* the accepted meaning of the term "subsidiary" included, in relation to a company, not only those companies which it directly owned, but also companies indirectly owned by it (ie owned via other of its subsidiaries, or by subsidiaries of those subsidiaries etc);
* while the specific inclusion of "indirect" ownership in the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) definition of subsidiary was helpful in reaching this determination, his Honour’s conclusion would not have differed in the absence of this provision; and
* when considering the appropriate breadth of change of control provisions in joint venture agreements, a wide interpretation was justified because such provisions are essentially anti-avoidance mechanisms designed to prevent parties circumventing pre-emptive rights.

In addition to providing comfort that a commonsense and commercial approach should be taken to provisions of this type, the case highlights the complexities which can arise out of "change of control" provisions, the difficulties in their application to unanticipated events during the life of the agreement, and the need to ensure that such provisions accurately and clearly capture the intentions of the parties.**(b) Facts** The dispute amongst the Beaconsfield joint venturers arose out of the proposed sale of a majority interest in Allstate Explorations NL (“Allstate Explorations”), the 100% owner of two of the joint venturers who together owned approximately 51% of the joint venture (“Allstate Venturers”). Another of the joint venturers, Beaconsfield Gold NL, alleged that the proposed transfer of a majority interest in Allstate Explorations would trigger a clause of the joint venture agreement which provided that:"Where a Joint Venturer is, at any time a subsidiary of another corporation and, by reason of any transaction or event, ceases to be a subsidiary of that corporation, the Joint Venturer must, within thirty days of the transaction or event, offer to sell its percentage Interest to the other Joint Venturers pro rata to their respective Joint Venture Interests…"The provision sat alongside usual pre-emptive rights which applied if a joint venturer wished to transfer its interest in the joint venture, subject to limited exceptions for transfers to "related corporations".The term "subsidiary" was not defined, and was not used elsewhere in the agreement. However, the term "related corporation" was defined by reference to the Corporations Law (as it then was).The definition of "subsidiary" in the Corporations Law at the time of entry into the joint venture agreement was the same as that currently found in section 46 of the Corporations Act, namely:"A body corporate (in this section called the "first body") is a subsidiary of another body corporate if, and only if: (a) the other body:(i) controls the composition of the first body's board; or(ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or(b) the first body is a subsidiary of a subsidiary of the other body."**(c) Decision** Hansen J found that the Allstate Venturers were subsidiaries of the majority owner of Allstate Explorations, and accordingly that pre-emptive rights would apply to a change of majority ownership of Allstate Explorations. The key reasons for this conclusion were as follows:* The generally accepted meaning of "subsidiary" included not only immediate subsidiaries, but also companies owned indirectly through other subsidiaries.
* The inclusion, through several decades of corporate statute, of an explicit reference to "subsidiaries of subsidiaries" in the definition of this term was helpful in coming to this conclusion. However, even in the absence of this extra wording, the reference in the “core” subsidiary definition to the ability to "control the composition of the [alleged subsidiary's] board" also contemplated application to indirect upstream owners.
* The reference to the statutory definition of "related corporation" (which in turn relied on the statutory definition of "subsidiary") elsewhere in the pre-emptive right provisions (being the obligation to unwind exempt transfers where the transferor and transferee ceased to be related corporations) gave weight to the argument that the wide statutory definition of “subsidiary” should also be used for other elements of the pre-emptive right regime.
* The purpose of "upstream change of control" provisions in situations such as this was to ensure the efficacy of pre-emptive rights mechanisms. The parties clearly saw commercial value in the ability to control the identity of their counterparties and to have the opportunity to increase their investment if another party wished to exit. Accordingly, it was appropriate to give these "anti-avoidance" provisions a sufficiently wide meaning so as to ensure that they fulfil their intended purpose. A more limited definition of the term “subsidiary” would render the provision impotent as a mechanism for supporting the operation of the pre-emptive rights.

http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.11 Voting procedures in a managed investment scheme** (By Patrick Reynolds, Clayton Utz)Perera v Reilly [2006] WASC 200, Supreme Court of Western Australia, Murray J, 7 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc0200.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc0200.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 second defendant (Mr Reilly) was the liquidator of the first defendant (SWC). He sought to sell SWC's 56% interest in the Fernvale Unit Trust Managed Investment Scheme ("FUTMIS"), a managed investment scheme ("MIS") governed by Chapter 5C of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act"). The relevant trust deed prohibited such a sale and, accordingly, a special resolution was proposed and passed at a general meeting of FUTMIS's members to remove the relevant provision.Murray J held that the special resolution was invalid because SWC was the "responsible entity" for FUTMIS under the Act thus was prohibited by section 253E from voting because it had an interest in the outcome other than as a member - that being a company in liquidation seeking to recover value by the sale of an asset. However, Murray J declined to find that the Defendants had contravened any of sections 601FC(1)(c), 601FD(1)(c) or 601FC(1)(n) - all civil penalty provisions. In making these findings, Murray J also found that section 253G (which required challenges to voting entitlements to be made at the meeting and provided that the chairperson's decision was conclusive) did not deprive the Court of jurisdiction where section 253E was concerned. Further, Murray J held that the Court had an inherent jurisdiction to grant declaratory relief in relation to any real issue in dispute.**(b) Facts** Clause 11.3 of the trust deed, which was incorporated into the constitution of FUTMIS, limited the sale of units in FUTMIS by providing that:"No transfer other than a transfer to or by the Initial Unit Holder shall be permitted which shall have the effect of increasing the interest of any Person (together with any other Persons who, in the opinion of the Trustee, are associates of such Person as defined in the Corporations Law) in Units to greater than 5% of issued Units."The trust deed could only be amended by a special resolution passed at a duly convened general meeting of the members. Clause 1.1 defined a special resolution as one passed by a three-quarters majority of the votes cast by those present in person or by proxy, and voting on the resolution.Clause 11.3 applied to the intended sale of SWC's shares because it was not the Initial Unit Holder as defined by the trust deed. Therefore a general meeting was held to consider a special resolution to amend the trust deed by deleting clause 11.3. The special resolution was passed, with 75.12% of the votes being cast in favour of the special resolution. Mr Reilly chaired the meeting and, as liquidator, voted SWC's 56% unit holding in favour of the special resolution.Mr Perera, a unit holder, commenced proceedings against the Defendants to obtain a declaration that any sale of units in FUTMIS in reliance upon the special resolution was invalid and/or unlawful. He further sought an injunction under section 1234 of the Act to restrain any sale of units pursuant to the special resolution, and requiring the records of FUTMIS to be rectified.**(c) Decision** **(i) Whether the defendants were entitled to vote on the special resolution**Murray J held that SWC was not entitled to vote on the special resolution and therefore the special resolution was invalid:* the definition of "special resolution" in the trust deed should be regarded as having been written consistently with the Act, which provided for a regime whereby the resolution must be passed by at least 75% of the votes cast by members of the MIS entitled to vote on the resolution (sections 9 and 601GC(1));
* the responsible entity of a registered scheme and its associates are not entitled to vote their interest if they have an interest in the resolution or matter other than as a member (section 253E). SWC 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 interests of its creditors. This was an interest in the subject of the resolution other than as a member; and
* whether the proposal was beneficial to the other members via increased liquidity was irrelevant because the issue was whether SWC was entitled to vote rather than whether the proposal was commercially desirable.

**(ii) Whether the defendants breached sections 601FC(1)(c) and 601FD(1)(c)**Murray J found that the defendants did not breach sections 601FC(1)(c) and 601FD(1)(c) (both civil penalty provisions):* the responsible entity must act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests (section 601FC(1)(c));
* an officer of the responsible entity has a duty in precisely the same terms as that imposed upon the responsible entity itself (the term "officer" being defined in section 9 as including a liquidator) (section 601FD(1)(c));
* it was argued that these duties were breached when SWC, through Mr Reilly, voted in favour of the special resolution because the purchaser would not be subject to the same duties as the responsible entity; and
* Murray J concluded that this proposition was not correct. He was not persuaded that for SWC to vote its unit holding so as to enable it to divest itself of its units was necessarily to fail to act in the best interests of the members, or on the ground of conflict of interest, to fail to give priority to the members' interests.

**(iii) Whether SWC breached section 601FC(1)(m)**Murray J also concluded that there was no breach of section 601FC(1)(m), another civil penalty provision:* section 601FC(1)(m) requires the responsible entity to carry out or comply with any other duty not inconsistent with the Act that is conferred on the responsible entity by the scheme's constitution;
* it was argued that since clause 10 of the FUTMIS constitution requires meetings to be held in accordance with the provisions of the trust deed and Part 2G.4 of the Act (which contains section 253E), a breach of section 253E was a failure to carry out a duty under the FUTMIS constitution; and
* Murray J rejected this argument on the basis that section 253E, rather than the FUTMIS constitution, was the source of the disentitlement to vote.

**(iv) Whether section 253G deprived the court of jurisdiction**Murray J also found that section 253G did not deprive the court of jurisdiction:* section 253G provides that a challenge to a right to a vote at a meeting of members of a registered scheme may only be made at the meeting and must be determined by the chair, whose decision is final;
* Murray J held that section 253G was designed to ensure that a challenge to the exercise of a right to vote was taken at the meeting and when determined by the chairperson the decision is final at that point. Section 253E was a provision of a more fundamental character than one concerned with procedural irregularity in the exercise of voting power. It disentitled the responsible entity from the exercise of voting rights which the interest, as a member of the scheme, would otherwise carry. The responsible entity did not have the right to vote in relation to the resolution and the chairperson could have no power, rightly or wrongly, to confer such a right.

**(v) Whether the court had jurisdiction to grant declaratory relief**Murray J also concluded, on the basis of the High Court decision in Ainsworth v Criminal Justice Commission (1992) 175 CLR 574 at 581-582, that superior courts have inherent power to grant declaratory relief in relation to real questions in dispute. Further, section 25(6) of the [Supreme Court Act 1935 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15947" \t "_default) prohibited any objection on the basis that merely a declaratory judgment was being sought.Murray J therefore made a declaration that the special resolution was invalid.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif**5.12 The scope of the court’s power to accept and enforce undertakings** (By Jessica Huntington, Mallesons Stephen Jaques)Australian Competition and Consumer Commission v Auspine Limited [2006] FCA 1215, Federal Court of Australia, Besanko J, 7 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1215.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/september/2006fca1215.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 examines the Federal Court’s power to accept undertakings and the requirements for undertakings. It involved an application made by the Australian Competition and Consumer Commission ('the ACCC') to the Federal Court alleging that the six respondents engaged in conduct that contravened the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) ('the Act'). The parties to the proceedings agreed to settle in negotiations. However, doing so required the respondents to accept and comply with a number of undertakings that were the subject of this proceeding. The question before the court concerned its power to accept undertakings proffered by the respondents and whether it was appropriate to accept the undertakings. The court held that its ability to grant an undertaking is subject to the same limitations placed upon it when granting injunctive relief. Further, any undertakings must be couched in clear and unambiguous terms which prohibit an unrestrained delegation of power enabling a third party to stipulate major obligations.**(b) Facts**The ACCC brought proceedings against three corporations, Auspine Limited, Geo J Bone & Sons Pty Ltd and JAG Timber Products Pty Ltd and claimed accessorial liability against three individuals, Francis Gerald MacDonald, Andrew Howard Bone and Gary Gordon Daniel. The ACCC claimed relief under section 45 of the Act on the basis that the conduct of the respondents 'has the purpose or is likely to have the effect, of substantially lessening competition.'Each corporate entity and individual (comprising employees, agents, directors and shareholders) was involved in carrying on a business which, amongst other things, supplied timber and ancillary services, including estimating services and/or associated quotations for truss and wall framing to the South Australian market between 1 July 2001 and June 2003. Prior to 1 January 2003 it was the regular practice of each of the corporate respondents to absorb the estimating charges as part of their business overheads and not to specify an estimating charge when providing a quotation or invoice to its customers.The ACCC alleged that representatives of Auspine, Bone Timber and JAG Timber made an arrangement, or arrived at an understanding, containing provisions that Auspine, Bone Timber and JAG Timber would no longer provide estimating services without charge but rather pass any charges incurred onto the customer. The ACCC claimed that the three entities procured, attempted to procure or induce, other timber suppliers to make an arrangement, or alternatively, to arrive at an understanding containing a provision to the same effect. Further, it was alleged that such conduct has the likely effect of fixing or controlling the prices of estimating services supplied by parties to the respective arrangements or understanding in competition with each other. The relevant sections of the Act that formed the basis of these allegations include sections 45, 45A being a provision of the Act referred to in sections 76 and 80.The ACCC asserted that following discussions between Bone Timber and Auspine representatives in early November 2002, a letter was sent on behalf of the Timber Truss and Wall Frame Association of South Australia and signed on behalf of Auspine to timber suppliers advising them of their intentions of charging for estimates. The letter asked the recipients for their support and advised that they would send out the attached notice as a ‘consolidated front.’ Subsequent communications took place in support of the initiative amongst the corporate respondents and other timber suppliers in the industry. It was alleged that the respondents and a number of other timber suppliers wrote letters to their clients indicating that they would pass any future estimating charges onto them.**(i) The court’s power to accept undertakings and its exercise of that power**The court made some general observations about its power to accept undertakings. Citing Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150 as authority, Besanko J held that an undertaking is subject to the same limitations that apply to the court’s power to grant an injunction. An undertaking to the court is given in lieu of an injunction and the remedies for breach of an undertaking are the same as those for breach of an injunction. The court considered its power to grant an injunction under section 80 of the Act and specifically under section 80 (1AA) because in this case, the contravening conduct was neither admitted nor proven. Emphasis was placed on the importance of framing an injunction and undertaking in clear and unambiguous language. It was noted, however, that in the context of compliance programmes (as is applicable here), it is neither practicable nor useful to describe the content of such programmes in minute detail. An undertaking that requires the fulfilment of objectives was regarded as too uncertain to be enforceable. Citing French J in ACCC v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79 (‘REIWA case’), the court suggested that this uncertainty may be overcome by making the obligation a best or reasonable endeavours obligation. Besanko J highlighted the need to establish a nexus between the injunction or undertaking and the alleged or established contravening conduct. Moreover, his Honour acknowledged that an injunction or undertaking cannot simply be framed in terms of restraining a repetition of contravening or alleged contravening conduct. To accommodate future conduct, an injunction or undertaking must be couched in broad terms. He examined further case law and cited French J at paragraph 88 in the REIWA case, stating that in determining whether there is a sufficient nexus between the order sought and the contravention alleged, there must be an evaluative judgment. A final consideration before the court was the scope of the court's power to make an order or accept an undertaking requiring an external audit of a compliance programme and the appropriateness of doing so. Besanko J was resolute in his opinion that an order or undertaking which leaves the definition of major obligations, or decisions as to whether there has been a breach, to a third party, would involve an impermissible delegation of the court's power. **(ii) The proposed undertakings**Five undertakings were proffered by the respondents. The first undertaking was proffered by the corporate respondents and the second by the individual respondents. Both undertakings restrained conduct which would involve, or assist in, a contravention of the Act. The court found that it was within its power to grant an injunction in such terms and was appropriate for the court to do so.The third undertaking was proffered by Auspine in which it agreed to implement the recommendations contained in a Trade Practices Compliance Report prepared by Watchdog Compliance Pty Ltd. Besanko J had two difficulties with this undertaking:* The compliance programme on which the undertaking was based extended beyond the provision of sections 45, 45A and Part IV of the Act. His Honour suggested overcoming this by linking the recommendations to the provisions in Part IV of the Act; and
* The second difficulty related to whether it was within the court’s power to impose an obligation simply to consider doing something. Ultimately, his Honour held that the court did not have the power to accept this undertaking and that it would be inappropriate to do so.

The fourth undertaking was proffered by Bone Timber and JAG Timber requiring the two respondent entities to implement a Trade Practices Corporate Compliance Program. Besanko J was concerned with the terms of the undertaking because major aspects of the programme were not defined and the formulation of the programme was left to the respondent and the external consultant. His Honour was amenable to an independent external consultant reviewing the question of compliance, on the condition that major aspects of the programme were defined and provided that the question of whether there has been a breach of the programme is not dependent on the consultant’s opinion. His Honour cited the possibility that the programme may be changed from time to time as a further problem. In light of these difficulties, his Honour held that the court did not have the power to accept the undertaking and that it would be inappropriate to do so.The fifth undertaking required the individual respondents to attend a Trade Practices Compliance Seminar addressing the provisions of Part IV of the Act. Besanko J held that there was a sufficient nexus between the alleged contravening conduct and the subject matter of the proposed seminar. **(iii) Decision**On the facts before the court, Besanko J held that three out of the five undertakings that were proffered by the respondents were within the court’s power to accept. Given the intermediate stage at which the settlement was at, no orders were made and the proceedings were adjourned to enable the parties to consider the reasons and make any further applications regarding undertakings which are within power and which are appropriate.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20110%20October%202006%20%282%29_files/go_up.gif |
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