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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 UK consultative paper on company security interests**On 18 August 2004, the Law Commission for England and Wales published Consultation Paper No 176, Company Security Interests, together with draft legislation. The Consultation Paper is available from [the Commission's website](http://www.lawcom.gov.uk/%22%20%5Ct%20%22_new).In July 2002 the Commission published Consultation Paper No 164, Registration of Security Interests: Company Charges and Property other than Land, where the Commission set out provisional proposals for the introduction of an electronic 'notice-filing' scheme for security interests created by companies to replace the current company charge registration system. The responses the Commission received to that paper encouraged the Commission to continue its work on this area. Several consultees asked to see the scheme set out in legislative form, and the Commission has therefore been working on the production of draft regulations to enable the scheme to be assessed in detail.             Consultative Paper 176 sets out the Commission’s provisional recommendations for a scheme of attachment, perfection and priority of security interests created by companies, including electronic notice-filing. The Commission makes provisional recommendations for extending that scheme beyond traditional securities to  cover 'quasi-securities' such as sales of receivables and title-retention devices, as well as in relation to the scheme containing a 'statement' of the rights and remedies of the parties on default. There are special rules proposed for financial collateral. Although the scheme has initially been constructed for security interests created by companies, the Commission makes general recommendations concerning its extension to businesses of all types. However, the Consultative Report does not discuss or make any provisional recommendations with respect to extending the scheme to consumers, although the Commission hopes that its Final Report will address this issue.**1.2 Australian Government response to report on governance of statutory authorities****(a) Summary of Australian Government response** On 12 August 2004, the Minister for Finance and Administration, Senator Nick Minchin, released the Government’s response to the report on the review of corporate governance of statutory authorities and office holders. The review was carried out by Mr John Uhrig, in consultation with Ministers, statutory office holders, departments, and the wider community including business and consumer groups. Senator Minchin said the objective of the review was to identify issues surrounding existing governance arrangements and provide options for the Government to improve the performance of statutory authorities, their office holders and their accountability frameworks.The report recommends two templates designed to ensure good governance exists: one where governance can best be provided by ‘executive management’, and the other where it can best be provided by a ‘board’. Both templates detail measures for ensuring the boundaries of responsibilities are better understood and that the relationship between Australian Government authorities, Ministers and portfolio departments is clear.Senator Minchin stated that the Government has endorsed the governance principles and templates developed by Mr Uhrig and as a result Ministers will assess statutory authorities and other bodies within their portfolios against these principles. All portfolio bodies, of which there are around 170, including those which have regulatory functions, will be assessed by Ministers and any necessary improvements implemented. The Government will clarify its expectations of statutory authorities by issuing public Statements of Expectations and authorities will respond with Statements of Intent. These measures will give clients greater certainty in their dealings with agencies and greater confidence to raise issues of concern. Senator Minchin stated that the Government has decided not to establish an Inspector-General of Regulation (IGR) to investigate the systems and procedures used by regulatory authorities. (Recommendation 4) The assessment of all Australian Government agencies against the templates is expected to be completed by March 2006. **(b) Details of Australian Government response** The Government will implement the governance templates recommended in the report to assist in establishing effective governance arrangements for statutory authorities and achieving clarity in roles and responsibilities. As the templates are generic in nature they will also be applied to a wide range of public sector bodies. Ministers will assess the statutory authorities and similar bodies within their portfolios against the governance templates. Selection of the appropriate template, whether ‘executive management’ or ‘board’ will be based, as recommended in the report, on the degree to which each body has been delegated full power to act. As noted in the report, in applying the templates, consideration will be given to any unique factors that may require an adaptation of the relevant template. The Government’s response to the specific recommendations of the report is as follows: **Recommendation 1:** The Government should clarify expectations of statutory authorities by Ministers issuing Statements of Expectations to statutory authorities; by statutory authorities responding with Statements of Intent for approval by Ministers; and by Ministers making public Statements of Expectations and Intent. Statements of Expectations would need to take into account the nature of the independence of each statutory authority and may not be necessary where the existing governance framework provides for a comparable arrangement (for example, as is the case in respect of government business enterprises). **Government Response:** Endorsed. **Recommendation 2:** The role of portfolio departments as the principal source of advice to Ministers, should be reinforced by requiring statutory authorities and office holders to provide relevant information to portfolio secretaries in parallel to that information being provided by statutory authorities and office holders to Ministers. **Government Response:** Endorsed. **Recommendation 3:** Governance boards should be utilised in statutory authorities only where they can be given the full power to act. **Government Response:** Endorsed. **Recommendation 4:** The Government should establish an Inspector-General of Regulation to investigate, where necessary, the systems and procedures used by regulatory authorities in administering regulation. **Government Response:** Not endorsed. All portfolio bodies, including those having regulatory functions, are to be assessed against the governance templates and any necessary improvements implemented. In addition, there will be greater clarity about the values and standards all bodies aim to uphold in their relationships with clients as a result of public Statements of Expectation and Statements of Intent (Recommendations 1 and 7). These measures should afford clients greater certainty in their dealings with all bodies and greater confidence to raise any issues of concern. There are existing alternatives for clients to raise issues of concern, including through the relevant Minister and other independent oversight bodies. **Recommendation 5:** The Government should allocate a function to a centrally located group to advise on the application of appropriate governance and legislative structures when establishing or reviewing statutory authorities. **Government response** : Endorsed. **Recommendation 6:** Financial frameworks generally be applied based on the governance characteristics of a statutory authority, that is:         The [Financial Management and Accountability Act 1997](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12266" \t "default) be applied to statutory authorities where it is appropriate they be legally and financially part of the Commonwealth and do not need to own assets. (Typically, this would mean Budget-funded authorities.)          The [Commonwealth Authorities and Companies Act 1997](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12062" \t "default) be applied to statutory authorities where it is appropriate they be legally and financially separate from the Commonwealth and are best governed by a board. **Government response:** Endorsed. **Recommendation 7:** Statements of Expectations and Intent should include those values central to the success of the authority, including those relating to its relationships with outsiders. **Government response:** Endorsed. The report is available at: [http://www.finance.gov.au/governancestructures](http://www.finance.gov.au/governancestructures/%22%20%5Ct%20%22_new)**1.3** **Sarbanes- Oakley compliance cost estimates increase 62% since January 2004**Complying with section 404 of the United States Sarbanes-Oxley Act will cost public companies an average 62 percent more than previously anticipated, according to a survey released on 11 August 2004 by Financial Executives International (FEI), the professional organization serving Chief Financial Officers (CFOs) and other senior financial executives. The increase in Section 404 compliance costs stems from a 109 percent rise in internal costs, a 42 percent jump in external costs and a 40 percent increase in the fees charged by external auditors.In July 2004, FEI surveyed 224 public companies with average revenues of US$2.5 billion to gauge Section 404 compliance cost estimates. Results showed the total cost of compliance is now estimated at US$3.14 million, or 62% more than the US$1.93 million estimate identified in FEI’s January 2004 survey. The companies surveyed expect to pay their auditors US$823,200 in fees for attestation of their internal controls, in addition to the annual audit fees. This compares to the US$590,100 companies expected auditors would charge for attestation in January 2004. As part of management’s attestation process, the survey showed that companies are documenting internal controls for 92% of total revenue. The estimates on the cost of complying with Section 404, in terms of hours and dollars, have steadily risen over the last six months. Looking to the employee hours needed to be Section 404 compliant, public companies expect to spend an average of 25,667 internal hours (vs. 12,265 estimated in January) and 5,037 external hours (vs. 3,059). Companies also expect to spend an additional US$1,037,100 on software and IT consulting. Section 404 of Sarbanes-Oxley requires each company’s annual report to contain:   a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and          management's assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal control structure and procedures for financial reporting.          Section 404 also requires the company's auditor to attest to and report on management's assessment of the effectiveness of the company's internal controls and procedures for financial reporting, in accordance with standards established by the PCAOB (Public Company Accounting Oversight Board).The study is available on the [FEI website](http://www.fei.org/%22%20%5Ct%20%22_new).**1.4 Accounting profession reviews Professional Statement on Independence**In light of the successful passage of CLERP 9 legislation, on 11 August 2004 Australia’s two leading professional accounting bodies, the Institute of Chartered Accountants in Australia (ICAA) and CPA Australia, issued an exposure draft on ‘Professional Independence’ to their members to maintain the robustness of the standard and ensure the practical implementation of CLERP 9. The revised Professional Statement provides accountants with clear guidelines on how to identify, assess and manage risk to professional independence, specifically in the provision of assurance services. It also addresses where members are obliged to reject and cease engagement with clients. The new information will complement the professional statement’s pre-existing content on best practice and key recommendations outlined in the Ramsay report such as mandatory rotation, waiting periods before a retired auditor of a client can become a director of the client, and the ban on providing certain non-audit services. The exposure draft is available on the [CPA website](http://www.cpaaustralia.com.au/%22%20%5Ct%20%22_new) and the [ICAA website](http://www.icaa.org.au/%22%20%5Ct%20%22_new).**1.5 IOSCO issues consultation report on outsourcing for the securities industry** On 4 August 2004, the International Organization of Securities Commissions Standing Committee 3 on Market Intermediaries (IOSCO SC3) published for public consultation a Consultation Report on Principles on Outsourcing of Financial Services for Market Intermediaries. The Consultation Report is now posted on the [IOSCO website](http://www.iosco.org/%22%20%5Ct%20%22_new). The public is invited to submit comments on this Consultation Report by 20 September 2004. The Consultation Report sets out a set of principles that are designed to assist regulated entities in determining the steps they should take when considering outsourcing activities. The Consultation Report also contains some broad principles to assist securities regulators in addressing outsourcing in their regular risk reviews of firms. Some members of IOSCO's Standing Committee on Market Intermediaries will be surveying industry participants in their respective jurisdictions for information regarding current outsourcing practices. The Consultation Report will be revised and finalized after consideration of all comments received from the public and all information gathered through the surveys conducted by IOSCO members. The form of the survey also is available on the [IOSCO website](http://www.iosco.org/%22%20%5Ct%20%22_new).The Joint Forum also released on 4 August 2004 a report for public consultation entitled Outsourcing in Financial Services. The Joint Forum report was prepared in coordination with the IOSCO Consultation Report. It examines the growth in outsourcing in the financial sector and the trends that have accompanied this growth. It also spells out the potential risks that outsourcing activities can pose to financial sector firms, while recognising the substantial benefits that outsourcing can provide.The Joint Forum's principles are high level and aimed collectively at the banking, insurance and securities sectors. They are designed to provide a minimum benchmark against which all financial institutions can gauge their approach to outsourcing. The Joint Forum report is available on the websites of [IOSCO](http://www.iosco.org/%22%20%5Ct%20%22_new), the [Bank for International Settlements](http://www.bis.org/%22%20%5Ct%20%22_new), and the [IAIS](http://www.iaisweb.org/%22%20%5Ct%20%22_new).The Joint Forum and the IOSCO Technical Committee will continue working together on their respective reports during the comment process by sharing comments received and information collected and by consulting with each other in order to achieve an appropriate level of consistency across their reports. In addition, the IOSCO Technical Committee is in the process of consulting with the emerging market regulators about the Consultation Report through the IOSCO Emerging Market Committee's Working Group on Financial Intermediaries.After the consultation process, the IOSCO Technical Committee's Standing Committee on Market Intermediaries will submit a final report on Principles on Outsourcing of Financial Services for Market Intermediaries to the IOSCO Technical Committee for approval.**1.6 Australian Bankers Association releases fact sheets on banking industry**On 3 August 2004, the Australian Bankers’ Association (ABA) released five fact sheets to assist in public policy discussions on the banking industry. According to the ABA, the facts sheets demonstrate that Australia’s banks fulfil an important role for their customers, employees and society as a whole. The information provided shows that the Australian banking system is strong and stable, affordable, and provides convenient services that can be accessed even from home.The main findings of the fact sheets are:         banks provide extensive basic account banking to the community - there are around 90 accounts offered which don’t attract an account keeping fee and allow six free transactions a month;         around 40 - 60% of customers pay no account fees whatsoever, depending on their bank;         the number of banking service outlets offered by banks has expanded from 27, 000 in 1990 to 460,000 today;         every year, community organisations receive more than $90 million of direct support from banks;         Australian banks are among the best capitalised in the world - Australia leads in holdings of capital plus reserves, expressed as a ratio to total balance sheet assets, with 11.5%. The comparable figure for the USA is 9.1% and for the UK 5.1%; and         the Australian banking sectors’ profit margin is consistently robust by world standards. At 1.3%of assets, Australian banks’ profit ratio sits in the middle to upper range on the international league table.The five fact sheets are available from the [ABA website](http://www.bankers.asn.au/%22%20%5Ct%20%22_new).**1.7 New York Stock Exchange proposes amendments to director independence definition for purposes of corporate governance rules**On 3 August 2004, the New York Stock Exchange (NYSE) filed with the United States Securities and Exchange Commisson (SEC) proposed amendments to the NYSE’s corporate governance rules set out in Section 303A of the NYSE Listed Company Manual. The NYSE has requested that the SEC approve the filing on an expedited basis. The amendments will not be effective until approved by the SEC.**(a)** **Purpose of the amendments**On 4 November 2003, the SEC approved Section 303A of the Listed Company Manual. Section 303A sets out the Exchange’s corporate governance requirements applicable to listed companies. Since the date that Section 303A was approved, the Exchange staff has received numerous phone calls and email requests for clarification and interpretations of these standards. Many of the questions and interpretive requests focused on similar issues or specific language that was causing confusion. Most have related to Section 303A.02(b), which establishes five bright line tests that directors must satisfy in order to be eligible to be deemed independent for purposes of board and committee membership.On 29 January 2004, the Exchange posted a series of Frequently Asked Questions (“FAQs”) relating to Section 303A on the [Exchange's website](http://www.nyse.com./%22%20%5Ct%20%22_new). The Exchange subsequently updated these FAQs on 13 February 2004, to provide further clarification and additional interpretations.Based on the FAQs and the NYSE’s experiences in working with listed companies and their legal counsels on issues and questions related to Section 303A, the Exchange has noted several issues which need clarification or, in one case, change.The following outlines the amendments proposed to be made to Section 303A.**(b) Section 303A.02 – Independence definition**The Exchange proposes to amend Section 303A.02(a) to clarify that companies are required to identify which of their directors have been deemed independent. The Exchange has been of the opinion that the existing language strongly implied that obligation, but believes it is appropriate to make the language explicit to remove any ambiguity.The Exchange proposes to amend Section 303A.02(b)(i) to add a definition of the term “executive officer.” The Exchange also proposes to make minor cleanup changes throughout Section 303A to provide consistency when utilizing this term. The Exchange is also amending the commentary to Sections 303A.02(b)(i) and (ii) to clarify that service as an interim executive officer (and not just an interim Chairman or CEO, as currently provided) will not trigger the look-back provisions in those sections.The Exchange proposes to amend Section 303A.02(b) to reformulate the wording of the bright line independence tests to more accurately reflect how the applicable look-back periods should be applied. The Exchange also believes the reformulated language is considerably easier to read and understand. One of the most significant language difficulties presented was in Section 303A.02(b)(ii), which precludes independence where a director or family member receives more than $100,000 in direct compensation. The wording suggested that under certain circumstances the look-back period might be as long as four years. The revised formulation will make clear that the period should not be read to be longer than 36 months.The Exchange is proposing a change to the substance of Section 303A.02(b)(iii), which precludes independence where a director or family member is employed by or affiliated with a present or former internal or external auditor. A number of companies are finding directors precluded from independence because of past personal or family member affiliation with an auditing firm, even though the person involved never worked on the listed company account. The Exchange notes that the Nasdaq Stock Market and the American Stock Exchange standards are more narrow than the current NYSE standard. For example, the Nasdaq and Amex standards implicate only former partners or employees of the audit firm who worked on the company’s audit. Accordingly, the Exchange proposes to revise its standard so that it will cover any director or immediate family member who is a current partner of the audit firm, any director who is a current employee of the audit firm, any immediate family member who is a current employee of the audit firm participating in the firm’s audit, assurance or tax compliance (but not tax planning) practice, and any former partner or employee of the audit firm who personally worked on the listed company’s audit during the past three years. Finally, to avoid what many believed to be the overbroad definition of “immediate family member” in connection with this standard, the definition of that term for purposes only of Section 303A.02(b)(iii), will be revised to parallel the description of family member utilized by the SEC in Exchange Act Rule 10A-3(e)(8).As a result of the proposed change to Section 303A.02(b)(iii), there is a category of person that would not have been impacted by existing Section 303A.02(b)(iii) that will be precluded from independence under the revised standard, namely, a director with a family member who is a current partner of the audit firm. Under the existing standard, such a family member did not impact the director’s independence if the family member did not act in “a professional capacity” at the audit firm. Under the revised standard, any family member who is a current partner of the audit firm will preclude the director from being considered independent. To avoid suddenly changing the status of a current director, the Exchange will give companies until their first annual meeting after 1 January 2005 to replace a director who was independent under The Exchange’s existing rule but not under the revised rule.**(c) Section 303A.05 – Requirements for compensation committees**The Exchange proposes to revise Section 303A.05(b)to clarify that the non-CEO compensation on which the compensation committee should focus is that of the executive officers. The Exchange also proposes to make clear that the board has the ability to delegate its authority to approve non-CEO executive officer compensation to the compensation committee.**(d) Section 303A.07 – Duties of the audit committee**The Exchange proposes to revise Section 303A.07(c)(iii)(B) to clarify that the audit committee must meet to review and discuss the company’s financial statements and must review the company’s specific Management’s Discussion and Analysis disclosures.**(e) Sections 303A.09 and 10**The Exchange proposes to amend these sections to specify that the disclosure must be in the annual proxy statement (or, if the company does not file a proxy statement, then in the Form 10-K), in order to be consistent with the other disclosure requirements of Section 303A.**(f) Section 303A.11**The Exchange proposes to amend Section 303A.11 to clarify that foreign private issuers are required to provide disclosure of the significant differences between the Section 303A requirements and the actual corporate governance practices of the foreign private issuer, as opposed to the general corporate governance practices of the foreign private issuer’s home country.**(g) Section 303A.12**The Exchange proposes to amend the language of Section 303A.12 to clarify that any qualifications to the annual CEO certification must be specified and disclosed. The Exchange also proposes to add Section 303A.12(c) to specifically require that companies submit Annual and Interim Written Affirmations to the NYSE. This clarifies the Exchange’s intention to carry forward the written affirmation requirement currently found in Section 303. **1.8 UK Office of Fair Trading report on auditors’ liablity**On 2 August 2004, the United Kingdom Office of Fair Trading (OFT) published a report on auditors’ liability. It is stated in the report that the OFT has not found compelling arguments to support claims that a cap on auditors' liability would have pro-competitive effects on the audit market. It is likely that allowing audit caps would be competitively neutral overall. The OFT was asked to look at the case for capping auditors' liability by the UK Department of Trade and Industry on 30 June 2004. The report examined – but did not find compelling – claims that a cap would:         reduce barriers to entry and growth facing smaller audit firms          maintain competition between larger audit firms          reduce the risk of collapse of one of the Big Four firms.According to the OFT, some forms of cap design could distort competition, so it will be important to ensure that there are no anti-competitive effects if scope for caps is allowed.The report is available on the OFT website at [http://www.oft.gov.uk/News/Press+releases/2004/118-04.htm](http://www.oft.gov.uk/News/Press%2Breleases/2004/118-04.htm%22%20%5Ct%20%22_new)**1.9 Financial Sector Advisory Council review of the outcomes of the financial system inquiry**On 2 August 2004, the Commonwealth Treasurer, the Hon Peter Costello MP, released the Review of the Outcomes of the Financial System Inquiry 1997 by the Financial Sector Advisory Council (FSAC).The Government established FSAC as part of the financial sector reforms responding to the 1997 Financial System Inquiry. The Council is a non-statutory body that brings together a broad range of views from the financial sector. It reports directly to the Treasurer on policies that will maintain an efficient, competitive and dynamic financial sector, consistent with the objectives of fairness, financial stability and prudence, and promotes dialogue between the private sector and the Government in support of the development and growth of Australia’s financial sector.In its Charter, the Treasurer specifically tasked FSAC with conducting a detailed evaluation of the financial sector reforms flowing from the Financial System Inquiry (which were announced on 2 September 1997) five years after their commencement. FSAC has now completed the review as it is just over five years since those reforms began, including the establishment of the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission. The Council’s usual role is to provide confidential advice to the Treasurer and the Government on appropriate policies for the financial sector. However, given the very specific nature of FSAC’s commitment to review the Financial System Inquiry Reforms the Treasurer has decided to release it publicly.Overall, FSAC is confident that Australia’s financial system and its regulation are on a firm footing and compare favourably with the rest of the world. As such, the Council notes that the Australian economy, and its financial system, has proven resilient in the face of considerable world economic and political turmoil.FSAC sees globalisation, convergence and technological change to be three important forces that will continue to drive the evolution of the financial system and identifies the importance for policy development and regulatory structures to keep pace with these forces. FSAC finds that the Australian regulatory system is fundamentally well placed to meet these challenges.The Review also identifies certain areas where the Council considers that regulatory challenges remain and the Treasurer has stated that the government will take into account its views when considering future options.The Review can be found on the Financial Services page of the Treasury website at [http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=860](http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=860" \t "_new)**1.10 Fees and charges disclosure in superannuation and other managed investments** (By Jason Denisenko Clayton Utz) How fees and charges should be explained to consumers acquiring superannuation and managed investment products has been an ongoing challenge in financial services reform. This article reviews the latest steps in the evolution of fee and charge disclosure in product disclosure statements (PDS), dollar disclosure, ASIC fee disclosure models, and the boxed consumer warning.**(a) Single fee amounts and dollar disclosure**After months of wrangling over the right model, the Federal Government recently announced a package of fee disclosure initiatives, which included a Single Fee Comparison Table which is intended to give consumers a clear snapshot of the bottom line cost of the product over a single year. Contribution and management fees will be set out as percentage ranges and in dollars using a prescribed example. Management fees are proposed to be calculated using the total expense ratio recently published by the International Organisation of Securities Commissions. Underneath the table will be the establishment, withdrawal and termination fees, again in dollar terms with worked examples. Excluded, however, will be additional fees such as switching fees because these are considered optional services. Benefit and fee projections will not be required at all (but see below for boxed warnings). The table will work in conjunction with ASIC's fee model (see below).Although the thinking underlying the single fee amount is that a single amount will be clearer for consumers, commentators such as Professor Ian Ramsay have previously noted the potential for this to mislead, as a single figure may not really be meaningful in comparing two products with often very different fee and charge structures (particularly as establishment and exit fees are footnotes to the table).At the same time, the new [Corporations Amendment Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78112" \t "default) (known as Batch 8) have been made, requiring dollar disclosure in PDSs (they also apply to Statements of Advice and periodic statements). They come into effect between 1 January and 1 July 2005.Instead of the "reasonably practicable" threshold for dollar disclosure, product issuers will now be required to make disclosures in dollar terms in PDSs unless ASIC makes a determination that for compelling reasons, dollar disclosure is, broadly speaking,:         not possible;          unreasonably burdensome; or          contrary to client interests.**(b) Boxed warnings come to PDSs**In conjunction with the proposed introduction of the Single Fee Comparison Table, and instead of requiring benefit/fee projections, product issuers will be required to insert a boxed consumer advisory warning into their PDSs. The warning is intended to:         emphasise the importance of considering a product's value for money;          indicate that small differences in investment performance or fees can significantly affect returns in the long term;          encourage consumers to shop around and negotiate lower fees if possible; and          provide information about ASIC's website.**(c) ASIC's fee disclosure model**On 16 June, ASIC released a revised version of its fee disclosure model. The big change is a single table which (like the Government's table above) is intended to provide consumers with information relating to all fees and charges at a glance. Important additional information must be included in the fees section of the PDS, including:         worked examples showing the effect of a range of fees on different investment amounts and, if relevant, different fee options;          incidental fees (eg special request fees);          transaction costs such as brokerage and buy-sell spreads. Descriptions (ASIC encourages the development of industry standard terminology), amounts or estimates, and recovery method should also be included;          details regarding adviser remuneration; and          if fee negotiation is available, details of with whom and how should be provided.ASIC's table is to be used with other comparability and comprehension tools (such as its superannuation calculator), but the onus remains on the product issuer to get disclosure right; use of the fee model in itself doesn't mean you are complying with the law. The revised model is being road-tested with consumers, with a proposed transition period of one year, although ASIC suggests that it be included in any PDS currently being prepared for the first time or which is being replaced.The Investment and Financial Services Association has recently made a submission to Treasury in relation to a number of aspects associated with the package of fee disclosure initiatives outlined above and, as has been the experience to date, it will be necessary to maintain a watching brief on these initiatives as they evolve.**1.11 UK companies making slow progress in complying with Combined Code**One year on from the publication of the Revised Combined Code, which lays down company corporate governance recommendations, a survey by the Audit Committee Institute (ACI) sponsored by KPMG has found that many of the FTSE 100 are yet to implement some of its key recommendations. The survey was published on 26 July 2004 while many companies still have time - as the Code needs to be adopted for reporting years beginning on or after 1 November 2003 - some of them are likely to have to make some significant changes if they are to comply in full. The survey of the Corporate Governance statements issued by the UK’s top 100 listed companies in their annual reports (published up to the end of May 2004) found that only a slim majority of firms have disclosed that they have started to actively deal with the Code’s demands. Nearly a half either do not refer to the Code at all or say they will not be commenting on their compliance with the new code until the next reporting year. One of the chief areas under the spotlight is the composition of the Board. The Code recommends that the balance of the Board should be roughly half executive and half independent non-executive directors. However, over a quarter of the FTSE 100 (29%) still fall short of the provision and do not have a 50:50 ratio. This indicates that some Boards will have to make changes over the coming months if they are to report compliance in their next annual report. Of course, companies have the option of explaining any non-compliance from the Code where sound reasons for non-compliance exist. Another area that many companies will be keen to address is the role of the company chairman. If compliance with the Code is to be achieved, it is no longer acceptable for the chairman to sit on either the audit or the remuneration committee – but the ACI/KPMG survey found that the chairman still sits on the audit committee in 21 cases and the remuneration committee in 35 cases. The survey found that the top 100 listed companies have on average 12 board members with 9 board meetings per annum. **1.12 New guide advises investors on addressing financial risks and opportunities from global warming**On 23 July 2004, an investor guide was published which outlines specific strategies for addressing the financial risks and investment opportunities posed by global warming. The guide identifies actions that pension plans, fund managers and companies can take to address climate risk, and also recommends that investors support government action to reduce investor and business uncertainty on global warming.The Investor Guide to Climate Risk was commissioned by Ceres, a coalition of investment funds and environmental groups, and written by the Investor Responsibility Research Centre, an investor advisory firm. The Guide is intended to help investors implement the recommendations of the Investor Call for Action on Climate Risk signed by investor leaders including public pension, labour pension fund, and foundation endowment trustees representing over US$800 billion in assets. According to the author of the Guide, emerging limits on global warming pollutants (carbon dioxide and other greenhouse gas emissions), both in US states and worldwide, are creating new pressures to reduce emissions and are opening new markets for cleaner technologies—creating both risks and opportunities for companies and their investors.The Guide identifies three core actions to address climate risk: assessing the risks, disclosing the risks, and investing in solutions, such as cleaner, more energy efficient technologies to achieve absolute reductions in greenhouse gas emissions. Ten key steps are aimed at three main groups: Plan Sponsors, for pension plans and endowments and their investment consultants; FundManagers for “buy side” investment managers and “sell side” brokers and securities analysts; and Corporations for boards of directors, CEOs and top executives.The Guide is available at [http://www.irrc.com/resources/Climate\_Guide.pdf](http://www.irrc.com/resources/Climate_Guide.pdf%22%20%5Ct%20%22_new)**1.13 Report on best practices and practical guidance for mutual fund directors**In July 2004, the Mutual Fund Directors Forum published a report titled “Best Practices and Practical Guidance for Mutual Fund Directors” which consists of 32 recommendations which are under 5 major headings. These headings are:         Recommendations to enhance the independence of fund independent directors         Recommendations for oversight of soft dollar, directed brokerage and revenue sharing arrangements         Recommendations with respect to valuation and pricing          Recommendations to enhance the effectiveness of fund independent directors with respect to conflicts of interest         Recommendations for review of management agreements and management fees.The full report is available at [http://66.216.74.187/PDFs/best\_pra.pdf](http://66.216.74.187/PDFs/best_pra.pdf%22%20%5Ct%20%22_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC proposes ongoing licensing relief for securitisation special purpose vehicles**On 17 August 2004 the Australian Securities and Investments Commission (ASIC) issued proposals to grant limited ongoing class order licensing relief for certain entities in the securitisation business. The proposed relief will exempt certain special purpose vehicle issuers (SPVs) of debentures or interests in a managed investment scheme from the requirement to obtain an Australian Financial Services (AFS) licence. The proposed relief would apply to those SPVs that carry on business only in relation to a particular securitisation transaction. ASIC is seeking comment on the proposals as they apply to issuers of securitisation products and managers of securitisation transactions.'The proposed relief acknowledges that an unreasonable burden may be imposed by requiring SPVs to hold an AFS licence where the SPV is created for the sole purpose of effecting a single securitisation transaction, and in circumstances where the securitisation process is largely a predetermined one', ASIC Director of Regulatory Policy, Mr Mark Adams, said.'The proposed conditions of relief are intended to ensure that relief will not affect services provided to retail clients, and that an AFS licensee accepts responsibility for financial services provided by the SPV', Mr Adams said.Securitisation is a process whereby a portfolio of relatively illiquid assets is packaged by a bankruptcy remote special purpose entity into marketable financial products. Currently in Australia, financial products backed by securitised assets are mainly sold to wholesale or professional investors. Securitisation asset classes include residential mortgages, credit card receivables, automobile loans and equipment leases.A securitisation will often involve the establishment of an SPV to purchase assets and issue debt securities or interests in a managed investment scheme (securitisation products) as well as entering into ancillary arrangements such as derivatives transactions to hedge any risk in the transaction. The SPV may be acting as trustee in issuing the financial products. The usual securitisation structure also includes a manager that is under a contractual arrangement with the SPV to manage the securitisation transaction. On 22 December 2003, ASIC issued Class Order [CO 03/1098] securitisation special purpose vehicles and securitisation managers to provide interim licensing relief until 30 September 2004 while undertaking final discussions with industry about the form and content of any permanent relief. ASIC has been consulting with the Australian Securitisation Forum and certain other parties in developing proposals for ongoing relief.The details of ASIC's proposed ongoing relief are outlined in a brief consultation paper issued at the same time as the information release. The consultation paper is presented in a different format to consultation on policy proposals. It reflects the discrete and technical nature of the policy proposals and recognises that the proposals are more definitive than usual because of the extensive industry consultation that has already taken place.ASIC invites comments on the consultation paper by Friday, 17 September 2004. Details of the proposed policy are contained in the consultation paper. To ensure that there is adequate time for compliance with the AFS licensing requirements or conditions of relief that may form part of ASIC's policy following the consultation process, ASIC has extended the interim relief under [CO 03/1098] from 30 September 2004 until 31 March 2005.ASIC aims to finalise its policy by late October or early November 2004. A copy of the consultation paper and [CO 03/1098] is available on [ASIC's website](http://www.asic.gov.au/%22%20%5Ct%20%22_new), or by calling ASIC's Infoline on 1300 300 630.**2.2 Removal of directors of public companies**On 17 August 2004 the Australian Securities and Investments Commission (ASIC) clarified the effect of agreements for the removal of directors of public companies.The [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) says that only the shareholders can remove a director of a public company and that attempts by directors to remove another director from office are void. This means that an agreement (or any other arrangement) that says that a director can be removed from office if the other directors decide is ineffective.Companies that have these arrangements in place and present them as if they are binding create a real risk that shareholders will believe that directors do have this power and will be misinformed. ASIC is concerned to ensure that shareholders are not misled in this way.ASIC recognises that companies and their boards want to be free to establish robust and effective measures for assessing the performance of individual directors, and of the board as a whole. Good governance often involves assessing the performance of individual directors and holding each director to account for their performance. Measures can include peer review mechanisms, where directors comment on and assess the contribution of other directors.But it must be the shareholders who ultimately decide whether a director is to remain in office.If a resolution to remove a director goes to a general meeting as a result of a performance review process, it is vital that shareholders be given all the details they need to make an informed decision. This includes giving the director who is the subject of the resolution a copy of the notice of meeting and the opportunity to put their case to shareholders.While this represents the law as it currently stands, ASIC encourages discussion about, and the development of, mechanisms for assessing the performance of directors. This is a valuable contribution to the necessary and ongoing review and improvement of corporate governance standards. ASIC urges companies to adopt the following two principles in designing such standards:          the arrangements, criteria and process should be transparent and fully disclosed; and          the arrangements should be clear and legally enforceable.According to ASIC, these two principles can be achieved by setting out the arrangements in the company's constitution. This has the added advantage of allowing shareholders a vote on the arrangements themselves.**2.3 Related party disclosure**The Australian Securities and Investments Commission (ASIC) announced on 10 August 2004 a campaign to crack down on related party disclosure documents, to ensure that shareholders receive sufficient information to make a decision about whether to grant related party benefits. Related party benefits are when a public company provides a financial benefit to a person or group that is not 'at arms length' from the company.'Our ongoing review of related party documents has shown that companies are not providing sufficient information to shareholders to enable them to make an informed decision on related party transactions', said Mr Malcolm Rodgers, ASIC's Executive Director, Policy and Markets Regulation.Mr Rodgers reminded directors that it is their responsibility to get the disclosure right.'ASIC has previously warned about the common defects found in related party documents (see below) but the documents lodged with ASIC continue to include these defects', Mr Rodgers said. 'As part of our new campaign, we will be issuing a comment letter to the company whenever our review of related party documents reveals one or more of the common defects that we have identified as key concerns', he said.The company is then required to circulate ASIC's comment letter to shareholders with the related party documents. The comment letter will also be available from ASIC's company database.However, as soon as ASIC detects one of the common defects, the company will be given the opportunity to withdraw the document. The company will then need to re-lodge amended documents if it wishes to hold the proposed shareholders' meeting.'ASIC will no longer allow companies to amend documents after we have identified defects. We are placing the responsibility on companies to ensure that all of the information relevant to the related party transaction is available to shareholders in the disclosure document from the start', Mr Rodgers said. **(a) Background**Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act), for shareholders to be able to vote on a related party transaction, the company must provide shareholders with a notice of meeting and explanatory statement that sets out certain information. At least 14 days before the public company intends to send the related party documents to shareholders, the documents must be signed by a director or company secretary and lodged with ASIC. ASIC then has 14 days in which to review the related party documents. If ASIC considers that the documents do not provide adequate disclosure to shareholders, it can issue a comment letter that the company is required to distribute to shareholders, along with the related party documents. **(b) Common defects**Valuations: The most commonly occurring defect is that the financial benefit is not valued adequately, including where the financial benefit is equity related, such as the issue of shares, options or convertible notes, or where it involves the sale or purchase of an asset, such as a mining tenement or an existing business. An adequate valuation requires the basis of the valuation and the principal assumptions behind the valuation to be disclosed, and in some circumstances it may be necessary to provide a valuation by an independent expert. It may be necessary where a company is purchasing an asset from a related party in exchange for shares to include both a valuation of the asset and a valuation of the shares. Where relevant, the valuation methodology should be consistent with that required to be adopted in the financial reports of the company.Directors' emoluments: The total remuneration package must be disclosed to shareholders where the proposed benefit is to be given by remuneration or an incentive. Shareholders must be able to assess the value of the overall remuneration package the director will receive when taking into account the financial benefit to be conferred.Identifying the related party: The related party to receive the financial benefit must be clearly identified. Financial benefit: Complete details of the financial benefit to be given to the related party must be provided to the shareholders, including not only details of what the benefit is (both type and amount), but also the reason for giving the benefit and the basis for giving the particular benefit. Related party's existing interest: It may be necessary to include details of the related party's existing interest in the company. For example, where shares or options in the company are to be granted to a related party, that party's existing interest will be relevant as it allows the shareholders to determine the likely extent of the related party's influence or control if the financial benefit were to be granted.Dilution effect of transaction on existing shareholders' interests: Where a company intends to provide equity related financial benefits to a related party, ASIC requires the company to state the possible dilution effects of that issue on the shares held by other shareholders, or provide sufficient information for shareholders to calculate the dilution effect themselves, provided that a statement to the effect that dilution will occur is also made. Trading history: For equity related financial benefits, details of the trading history of the relevant equity, for example the company's shares, should be included for the preceding 12 month period. This information should include the lowest and highest prices the equity traded at in the relevant 12 month period. It should also include the most recent closing price. Directors' recommendations and interests in outcome: The Act requires each director to make a recommendation as to the proposed resolution, or to state why they have not made a recommendation and to give details as to any interest the relevant director may have in the outcome of the proposed transaction. **2.4 ASIC consults on dollar disclosure****(a) Overview**The Australian Securities and Investments Commission (ASIC) has invited public comment on its policy proposal regarding new dollar disclosure obligations. The policy proposal paper, 'Dollar disclosure', was released by ASIC on 10 August 2004.ASIC's Executive Director of Policy and Markets Regulation, Mr Malcolm Rodgers said the law had been amended to require dollar disclosure from 1 January 2005. 'Unless ASIC makes a determination that, for example, dollar disclosure is not possible, fees and benefits must be disclosed as amounts in dollars. This is an important measure to help consumers make informed decisions about the financial services and products they use', Mr Rodgers said.'The dollar disclosure provisions set a high standard and require dollar disclosure other than in narrow circumstances. Even in those circumstances, the law requires clear disclosure using percentages or descriptions, and also requires worked dollar examples.' 'We have been guided by the high importance the law places on dollar disclosure, and accordingly will be using our determination powers sparingly', Mr Rodgers said.The policy proposal paper sets out how ASIC plans to approach the dollar disclosure provisions together with how it proposes to use its power to make dollar disclosure determinations. The paper discusses:          how it will administer the dollar disclosure provisions;          the situations ASIC might consider issuing dollar disclosure determinations on a class basis;          how applications for determinations will be assessed by ASIC; and          ASIC's approach to transition.Further detail on the policy proposal paper is set out below.ASIC expects licensees and product issuers to have plans for complying with the dollar disclosure obligations underway. The six month transition period exists for licensees and product issuers to make any necessary adjustments to their systems, processes and documents so that they can comply with the dollar disclosure obligations. Some licensees and product issuers have suggested they will experience difficulties in fully complying with the dollar disclosure obligations by 1 January 2005. ASIC's policy proposal asks for information about the types of difficulties industry participants are facing. ASIC will consider whether it is unreasonably burdensome for them to fully comply by 1 January 2005. If so, it may consider extending the compliance date for a short period provided industry participants demonstrate they are taking steps to ensure they can comply with the dollar disclosure obligations. ASIC will announce its decision on this transitional issue by the end of September.A copy of the policy proposal paper is available from [ASIC's website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630.**(b) The regulations**The dollar disclosure regulations ([Corporations Amendment Regulations 2004 (No 6)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78112" \t "default)) were made on 24 June. The regulations commenced on gazettal and provide for a six-month transition period.More detail on the new disclosure regime, including when each part applies, is set out in Information Release [IR 04-027: Next steps on dollar disclosure](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B04-27%2BNext%2Bsteps%2Bon%2Bdollar%2Bdisclosure?openDocument" \t "_new). ASIC notes that the Government announced a single figure fee measure package on 16 June 2004 (see the Parliamentary Secretary to the Treasurer's [Media Release Simple disclosure of superannuation fees and charges](http://parlsec.treasurer.gov.au/rac/content/pressreleases/2004/018.asp%22%20%5Ct%20%22_new)). ASIC will take into account any implications this new package of proposed regulations may have for the implementation of the dollar disclosure obligations when developing its policy on the dollar disclosure obligations. This will include considering the effect of the Government mandating the use of ASIC's revised fee disclosure template (issued on 16 June 2004; see ASIC [Media Release 04-192: ASIC releases revised fee disclosure model](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/04-192%2BASIC%2Breleases%2Brevised%2Bfee%2Bdisclosure%2Bmodel?openDocument" \t "_new)).Under the dollar disclosure provisions, providing entities and product issuers will be obliged to disclose various fees, benefits, costs and interests as amounts in dollars in the following documents:          Statements of Advice (SOAs);          Product Disclosure Statements (PDSs); and          periodic statements.In limited cases, ASIC can make a determination that a particular fee, cost, benefit or interest need not be disclosed as an amount in dollars. If a determination is made, the item needs to be disclosed by way of a percentage or description instead. ASIC can only make a determination where, for compelling reasons, disclosure in dollars is:          not possible;          unreasonably burdensome (including within a specified period); or          contrary to client interests.**(c) ASIC’s policy proposals** ASIC’s policy proposal paper summarises the dollar disclosure provisions. It considers in some detail ASIC’s approach to the key concepts of 'amount in dollars' and 'worked dollar examples'. For more information, see the section of the paper entitled 'What are the dollar disclosure provisions?' and Section A.ASIC’s proposed approach to dollar disclosure determinations in cases where dollar disclosure is 'not possible' is set out in Section B of the paper. It sets out two cases where ASIC proposes to issue class determinations, being:          where dollar disclosure is not possible because the amount depends on facts not known by and beyond the control of the providing entity or issuer; and         where dollar disclosure is not possible because the item is an intangible client benefit (e.g. product benefits whose value cannot be converted into dollars).The paper also explains how ASIC will approach applications for a dollar disclosure determination where the applicant believes disclosure in dollars is not possible.ASIC’s proposed approach to dollar disclosure determinations in cases where dollar disclosure is 'unreasonably burdensome' or 'contrary to client interests' is set out in Section C of the paper. ASIC does not propose any class determinations under these powers. This section of the paper set out the factors that ASIC proposes to take into account in assessing applications for a dollar disclosure determination where the applicant believes disclosure in dollars is unreasonably burdensome or contrary to client interests. Unreasonable burden and contrary to client interests are high standards and ASIC does not expect to make many determinations under these powers.The approach to transition that ASIC is considering and the use of ASIC’s power to make determinations where dollar disclosure is 'unreasonably burdensome within a specified period' are set out in the section of the paper entitled 'Transitional issues'. In this section, ASIC contemplates making a determination that would provide for a short, conditional extension of the transition period from the commencement of the dollar disclosure provisions until 28 February 2005. A condition of the possible determination might be to require providing entities and product issuers to self-certify (at a senior management level) that they have reasonable grounds to believe that:(a) it would be unreasonably burdensome for them to fully comply by 1 January 2005; and(b) they will be in a position to comply with the dollar disclosure provisions by 28 February 2005. ASIC will announce its decision about any determination it is considering on transition by the end of September.ASIC proposes to publish its final policy statement in October or November.**2.5** **Changes to remuneration disclosures by registered schemes**The Australian Securities and Investments Commission (ASIC) published on 9 August 2004 Class Order 04/0967, which provides short term relief from any requirement for financial reports of registered schemes that are disclosing entities to reveal remuneration paid directly or indirectly to directors and executives of their responsible entities.The Class Order covers financial years and half-years ending 30 June 2004 up to, but not including, 30 September 2004. The Order was made following a request by the Australian Accounting Standards Board (AASB) for relief from any relevant disclosure requirement of accounting standard AASB 1046 'Director and Executive Disclosures by Disclosing Entities' (AASB 1046).A media release issued by the AASB on 21 June 2004 stated that, in their view, AASB 1046 and s285(3)(b) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) together required disclosure of certain remuneration in registered scheme financial reports.In applying Chapter 2M of the Act, s285(3)(b) requires the directors and officers of the responsible entity be treated as the directors and officers of the scheme. The AASB is of the view that this means any remuneration paid indirectly to specified directors and specified executives of the responsible entity, through management fees, must be disclosed.Where a responsible entity has more than one managed investment scheme, the AASB said that the cost of remuneration of specified directors and specified executives must be allocated on an appropriate basis to each scheme. Where the responsible entity considers allocation on a meaningful basis impossible, the full remuneration of each person should be disclosed.In AASB Action Alert No 76 of July 2004, the AASB said 'The Board was sympathetic to the problems arising because IFSA ( 'Investment and Financial Services Association Limited') members had become aware of the applicability of AASB 1046 so close to the end of the financial year'.The relief is specific to the current circumstances and ASIC will not consider any extension of the relief. Further, ASIC does not set the accounting standards and the Class Order should not be considered a precedent for relief from the general application of other accounting standards, such as the new standards based on International Financial Reporting Standards.The Class Order does not provide relief to registered schemes that are not disclosing entities in relation to AASB 1017 'Related Party Disclosures'. Paragraphs 139 to 143 of ASIC Practice Note 68 'New Financial Reporting and Procedural Requirements' outline ASIC's view that AASB 1017 does not require similar disclosures by such schemes.Copies of the class order are available from the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new). **2.6 ASIC completes review of Australian managed fund practices: late trading and market timing**Mr Jeffrey Lucy, Chairman of the Australian Securities and Investments Commission (ASIC), confirmed on 6 August 2004 the findings of ASIC's review of certain investment practices in the Australian managed funds industry.The review was undertaken by ASIC after US regulators found, in September 2003, that some US mutual funds had entered into a set of trading arrangements that appeared to benefit certain large investors at the expense of the other mutual fund investors. 'During the review, ASIC found no evidence of systemic or large-scale use of improper investment practices in the Australian managed funds industry. While a small number of minor issues were identified, the fund managers concerned have taken steps to rectify them and to implement enhanced monitoring and compliance procedures', Mr Lucy said.ASIC's primary objective was to establish whether the practices described as 'late trading' and 'market timing' that were discovered in the United States existed in the managed investments industry in Australia. 'Late trading' occurs when a fund accepts instructions to purchase or sell interests after the official cut-off time. When those instructions are based on information that is not generally available, 'late trading' investors are able to trade advantageously in the fund to the detriment of the other fund investors. Where a fund manager permits late trading to occur, this is likely to be a breach of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).ASIC compared its findings with relevant international regulators including the US Securities and Exchange Commission, the UK Financial Services Authority and the Ontario Securities Commission in Canada, and will continue to monitor international developments in managed funds practice as well as international developments in the regulation of managed funds. 'Although recently there have been a number of reforms suggested for the US mutual funds industry, it is important to note that many of these measures, such as disclosure of fees and buy/sell spreads, are already current practice in Australia', Mr Lucy said.The potential for 'market timing' to occur exists when the net asset value of a fund is not, or cannot be, accurately calculated at the time that the price for purchasing or selling interests in the fund is set. For example, when a 'market timer' purchases interests in the fund that are undervalued, they effectively exploit market inefficiencies to the detriment of the other fund investors whose value of their underlying assets in the fund is diluted.In conducting its review, ASIC contacted the majority of fund managers operating in Australia, regarding both practices in Australia and the possible impact of certain conduct in the US on Australian operations. In addition to writing to over 70 fund managers, ASIC also conducted a number of site visits.All of the companies involved in the review cooperated with ASIC's requests for information. **2.7 ASIC provides relief for agency banking services**The Australian Securities and Investments Commission (ASIC) issued Class Order [CO 04/909] on 27 July 2004 to assist Australian authorised deposit-taking institutions (ADIs) that use agents to provide their banking services under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) in relation to basic deposit products.ADIs include most banks, credit unions and building societies. ASIC is aware that many ADIs provide basic deposit products through agents such as Australia Post, chemists, newsagencies and other outlets. These agents are contractually appointed by ADIs to provide a limited range of financial services outside of the traditional branch network. It is ASIC's view that when an agent helps to open a bank account, they may be 'arranging' to issue a financial product within the meaning of the Act.Class Order [CO 04/909] allows agents appointed by an ADI to arrange for the issue of a basic deposit product without the need to be licensed or to be formally appointed as an authorised representative under the Act. 'The measures ASIC has taken will not remove or reduce any of the consumer protection mechanisms expected of an Australian Financial Services (AFS) licensed provider under the Corporations Act', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said. 'This relief ensures that retail clients will continue to have wide access to basic deposit products, particularly in areas where there are few or no branches, whilst still receiving the same standard of protection that they would get at a branch of the AFS licensed ADI', Mr Johnston said. Under the Class Order, the ADI will be fully responsible and accountable to clients for the activities of their agents. This includes responsibility for ensuring their agents satisfy and continue to meet all relevant legislative and regulatory standards on conduct competency, as well as complying with the disclosure obligations imposed on providing entities under the Act. Under the ASIC relief, a customer using an ADI approved agent to open their bank account will:          receive financial product disclosure prepared by the ADI, such as a Product Disclosure Statement;          have access to and be informed of the ADIs internal and external dispute resolution systems;          be able to seek redress against the ADI (rather than the agent); and          deal with staff who are competently trained in opening a basic deposit account.A key feature of the relief is that any money deposited with an agent will have the same protections that would be available if the money was deposited directly with the ADI, and that clients will have equivalent legal rights against the ADI should that be necessary. In order to take advantage of the class order, the ADI needs to provide ASIC with notice in writing of its intention to rely on the relief.A copy of the class order is available from the ASIC website at [http://www.asic.gov.au/co](http://www.asic.gov.au/co%22%20%5Ct%20%22_new) or by calling ASIC's Infoline on 1300 300 630. |
| **3. Recent Takeovers Panel Developments** |
| **3.1 Australian Leisure and Hospitality Group Ltd: Conclusion of Panel proceedings without making a declaration** On 13 August 2004, the Panel announced that it has concluded the proceeding arising from the application from Australian Leisure & Hospitality Group Limited (ALH) dated 20 July 2004 alleging unacceptable circumstances in relation to the off-market takeover bid by Bruandwo Pty Ltd (Bruandwo) for all the ordinary shares in ALH. The Panel’s media release TP04/63 provides further details regarding the application. The application required the Panel to consider what disclosures a bidder should make regarding its intentions, especially in circumstances where there is a possibility that non-accepting shareholders will retain a minority interest in a target company controlled by the bidder.In its deliberations, the Panel considered the particular circumstances of Bruandwo’s bid for ALH. Bruandwo’s bid is subject to a 50.1% acceptance condition. Therefore the decision that each ALH shareholder needs to make in assessing Bruandwo’s offer is whether to accept the cash consideration being offered by Bruandwo, or retain their shares in ALH in circumstances where it is possible that Bruandwo may end up holding more than 50% but less than 90% of the ALH shares. Although Bruandwo disclosed an intention to develop a plan for the integration of ALH’s businesses with the businesses of Bruandwo, it did not provide a substantive explanation of the direction this planned integration would take or the impact it may have on ALH shareholders.Given the circumstances of Bruandwo’s bid, the Panel considered it appropriate that ALH shareholders be provided with more information than was provided in the Bruandwo bidder’s statement sent to shareholders. The Panel required that Bruandwo make further disclosure of:         the nature and objectives of the proposed integration;          information regarding the track record of the existing Bruandwo businesses to allow ALH shareholders to form a view on Bruandwo’s ability to manage ALH in the future;          the identity of Bruandwo’s proposed candidates for election to the ALH board, in the event that it receives sufficient acceptances to satisfy the 50.1% condition but less than 90% of the ALH shares; and          Bruandwo’s intentions regarding any change to ALH’s current dividend policy.In considering what additional information should be provided to assist ALH shareholders to assess the merits of the Bruandwo bid, the Panel recognised the limitations on the information that could be provided by Bruandwo. The Panel only required information that was sufficiently reliable that it could not be considered matters of opinion or speculation. The Panel accepted Bruandwo’s submission that it does not have and was not able to access the detailed information regarding ALH’s operations which would allow Bruandwo to state precisely how it will integrate ALH into its existing businesses. The Panel invited Bruandwo to provide further information relating to the above issues in the form of a supplementary bidder’s statement. The Panel also gave ALH an opportunity to make submissions regarding the supplementary bidder’s statement. The Panel decided that the supplementary bidder’s statement provided by Bruandwo did improve the ability of ALH shareholders to assess Bruandwo’s bid. The Panel accepted an undertaking from Bruandwo to issue a supplementary bidder’s statement in the form reviewed by the Panel, and to send copies of the amended parts of the bidder’s statement to ALH shareholders as soon as possible after its issue. Based on the undertaking provided by Bruandwo, the Panel concluded its proceedings on the basis that it was not necessary to make a declaration of unacceptable circumstances and that no order was required. In accepting Bruandwo’s undertaking, the Panel noted that Bruandwo had confirmed that it would extend its offer period by at least 5 business days.**3.2 Lake Technology Limited: Panel decides not to commence proceedings**On 4 August 2004 the Panel announced that it has considered the application by Mr Robert Catto dated 22 July 2004 alleging unacceptable circumstances in relation to the affairs of Lake Technology Limited (Lake). The Panel has decided not to conduct proceedings in relation to the application.**(a) Background****(i) The application**Mr Catto, a shareholder of Lake, alleged that unacceptable circumstances exist in relation to the takeover bid by Dolby Australia Pty Ltd (Dolby) for Lake. The application focussed on communications with Lake shareholders by the shareholder relations firm engaged by Dolby, Georgeson Shareholder Communications Australia Pty Ltd (Georgeson).Mr Catto submitted that, for the period from at least 8 July 2004 to 16 July 2004, Lake shareholders contacted by Georgeson representatives were misled, either directly or by omission, by representations made as to the price at which Dolby could compulsorily acquire their Lake shares and the rights of Lake shareholders to object to the acquisition under Part 6A.2 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).In support of the allegations made in the application, Mr Catto referred to statements allegedly made to him during a phone call instigated by a Georgeson representative. Dolby provided a complete transcript and audio recording of the conversation between Mr Catto and the Georgeson representative, the contents of which were not disputed by Mr Catto. **(ii) Information regarding compulsory acquisition**The Panel reviewed Mr Catto’s application in light of the existing information on the issues that was before Lake shareholders. It also considered the further information that has been given to Lake shareholders subsequently explaining the two relevant compulsory acquisition procedures that are at the heart of the application.Lake’s target’s statement dated 25 June 2004 was sent to shareholders at the same time as Dolby’s bidder’s statement. Clause 12.4 of the target’s statement describes in some detail the two separate methods (under Parts 6A.1 and 6A.2 of the Act) under which Dolby may become entitled to compulsorily acquire Lake shares. Dolby’s bidder’s statement mentions (at clause 5.2) that there are two compulsory acquisition methods that may apply, without providing any meaningful explanation of those distinct mechanisms.Dolby sent a letter to Lake shareholders dated 12 July 2004, advising them that Dolby held full beneficial interests in more than 90% of the shares in Lake and that Dolby intended to proceed to compulsorily acquire their Lake shares. The letter did not distinguish between the two different forms of compulsory acquisition in the same helpful way as the target’s statement. None of the target’s statement, the bidder’s statement or Dolby’s letter of 12 July 2004 stated that in order to be entitled to use the compulsory acquisition mechanism in Part 6A.1 of the Act, Dolby needed to receive enough acceptances to hold 96.1% of the Lake shares. This fact could be determined by a shareholder who applied the information set out in clause 12.4 of Lake’s target’s statement with the information concerning Dolby’s voting power in Lake set out in Dolby’s bidder’s statement. During the period in which Georgeson initiated the relevant communications with Lake shareholders, Dolby held a beneficial interest in less than 92% of the Lake shares, at least 4% short of the 96.1% threshold.Dolby lodged two supplementary bidder’s statements dated 16 July 2004 and 29 July 2004. The annexures to both of those supplementary bidder’s statements distinguished between the two forms of compulsory acquisition and set out the 96.1% threshold which applies (in relation to Dolby’s bid) to the compulsory acquisition mechanism under Part 6A.1 of the Act. Unlike the letter of 12 July 2004, Dolby did not send either of the supplementary bidder’s statement, or the ASX announcement annexed to the 16 July statement, directly to Lake shareholders. However, the 29 July supplementary bidder’s statement states that the letter annexed to it was distributed to all Lake shareholders.**(b) Panel’s consideration of the application**The Panel recognised that unacceptable circumstances would exist if Lake shareholders had been, or were likely to have been, misled by statements made to them by Georgeson representatives. The application alleged that some Lake shareholders were misled by representations made by Georgeson during the relevant period and accepted Dolby’s offer on the basis of those representations. The Panel reviewed the transcript of Georgeson’s call to Mr Catto and concluded that the material provided did not support the allegations in the application: i.e. the material did not support a conclusion that Georgeson had made misleading statements in the telephone conversation with Mr Catto. On that basis, the Panel considered that the onus lay with Mr Catto to establish a basis for the Panel to make further enquiries (taking into account the resources that are reasonable to expect from an individual shareholder). The Panel then gave Mr Catto an opportunity to provide supporting information from other Lake shareholders.Mr Catto said that although he had contacted a number of Lake shareholders, he was unable to specifically identify any former Lake shareholders who accepted Dolby’s offer on the basis of the canvassing telephone calls from Georgeson. Mr Catto provided the names of two Lake shareholders who had informed him that they considered telephone calls they received from Georgeson representatives misleading, although both had already accepted Dolby’s offer prior to receiving the call from Georgeson. Mr Catto did not (or was not able to) provide any specific details of the conversations involving those shareholders. The Panel notes that the actual call between Mr Catto and Georgeson was fairly short and may not have been representative of other calls to Lake shareholders. In addition, the shortness of the call may mean that more clarifying information may have been given in the ordinary course. However, in the absence of evidence concerning the content of any other conversations, the Panel made its determination on the basis of the transcript of the conversation with Mr Catto.In reaching its decision, the Panel drew some comfort from the clear disclosure made to Lake shareholders in the target’s statement regarding compulsory acquisition.The Panel did not review the script used by Georgeson representatives during calls to Lake shareholders in order to reach its decision.**(c) Communications with target shareholders**The Panel recognises that bidders are entitled to communicate with target shareholders during a takeover bid through oral communications. Indeed, such communications can assist shareholders by ensuring that they do not miss an opportunity to participate in the benefits of a bid through oversight or accident. However, the issues raised in the application highlight the difficulties shareholders can face in comprehending some of the complex legal issues that arise in relation to a takeover offer for their shares. In particular, the Panel notes that communicating clear, balanced and helpful information via telephone canvassing about complex legal issues can be especially difficult. Bidders need to exercise particular caution when communicating to shareholders in relation to complex issues such as compulsory acquisition, and make every effort to ensure that those communications are helpful and informative, in addition to not being misleading. The Panel considers that where target shareholders have already been provided with helpful and clear information in the offer documents in relation to particular issues, it is sensible for persons canvassing shareholders by telephone to direct them to the relevant parts of the offer documents.In relation to telephone canvassing, the immediate nature of the medium, while being very powerful in communicating with shareholders, also makes it susceptible to being misleading by omission or confusing shareholders. Persons canvassing shareholders need to ensure that the flow of these conversations (in response to enquiries of the shareholder during the conversation) do not lead to misapprehensions or confusion by shareholders being told only some of the essential facts on topics covered by canvassers.**(d) Decision**Accordingly, under Regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default), the sitting Panel decided not to conduct proceedings on the application.**3.3 Skywest Limited 03: Panel makes declaration of unacceptable circumstances and orders**On 30 July 2004 the Panel announced that it has made a declaration of unacceptable circumstances and final orders in relation to the Skywest Limited 03 proceeding with the effect of stopping the off-market takeover bid (the Bid) by CaptiveVision Capital Limited (CVC) for all of the issued shares in Skywest Limited (Skywest) and allowing Skywest security holders who sold their securities to CVC after 1 December 2003 to cancel those sales. The proceeding related to an application (the Application) made by Skywest dated 5 July 2004 in relation to the Bid. As CVC has a pending application to have the Panel’s decisions (both the declaration of unacceptable circumstances and the orders made) considered by a review Panel, the operation of some of the orders has been suspended until the review Panel can consider what interim orders it may wish to make to preserve matters during the consideration of that review.**(a) Background****(i) Parties**CVC is an unlisted public company incorporated in Singapore. CVC’s business is investing, financing and investment holding. The major shareholder of CVC is a Singaporean company, Advent Television Limited (Advent). The major and controlling shareholder of Advent is Mr Jeff Chatfield (Mr Chatfield). Mr Chatfield is also a director of CVC.Skywest is an unlisted Australian public company with approximately 240 shareholders. Skywest operates in the regional aviation industry in Western Australia. Mr Craig Lovelady was appointed the chief financial officer (Mr Lovelady) of Skywest on 18 June 2003 and this appointment was terminated on 30 June 2004. Mr Lovelady was a director of CVC but that ceased on or about 23 July 2003. **(ii) Alleged provision of information to CVC** On 17 June 2004, Mr Scott Henderson, managing director of Skywest (Mr Henderson), received the actual results for the operation of Skywest’s business for May 2004. After reviewing these results, including the impact of the results on Skywest’s forecast earnings for the year ending 30 June 2004, Mr Henderson circulated to all Skywest directors a copy of the actual results for May 2004 and the revised forecast. On 21 June 2004, Skywest issued an announcement disclosing a significant profit downgrade for the financial year ending 30 June 2004. Following receipt of this financial information, the Skywest board resolved that Mr Lovelady take a leave of absence pending an investigation into the reasons for the revised forecast, particularly having regard to feedback received from Skywest shareholders that they had been informed by CVC over a period of weeks by CVC’s advisers that Skywest would not meet its 2004 forecasts. The board of Skywest appointed Ernst & Young to provide an independent forensic IT analysis of the emails sent to and from employees of Skywest and CVC, its related companies and advisers which was recorded on Skywest’s database and Mr Lovelady’s laptop computer. The investigation discovered that Mr Lovelady had provided information concerning the affairs of Skywest (the Information) to CVC (principally, Mr Chatfield) and CVC’s financial advisers between 30 June 2003 until the time that Mr Lovelady’s employment with Skywest was terminated on 30 June 2004. The Information included:         management accounts for Skywest for August and September 2003;          details of the banking arrangements entered into by Skywest;          management profit forecasts for Skywest the financial year ending 30 June 2005 (the Forecast Information); and          the price at which it was proposed that Skywest offer shares under a foreshadowed prospectus (the IPO Information).An important aspect of the Information is not just its apparent content, but also its source – the chief financial officer of Skywest. In August 2003, Advent and/or CVC acquired a holding of 2,730,167 convertible notes and attached options by subscribing for them under a prospectus issued by Skywest. >From October2003, CVC began building its shareholding in Skywest by acquiring first options over Skywest shares (which it exercised shortly afterwards), then by acquiring Skywest shares directly and by acquiring convertible notes issued by Skywest and subsequently converting some of its convertible notes. As at 27 April 2004 (the date at which CVC lodged its initial bidder’s statement with ASIC and Skywest), CVC held approximately 19.57% of the total issued capital of Skywest. Following from the proceeding in Skywest Limited 01, CVC dispatched a replacement bidder’s statement (the Bidder’s Statement) to Skywest shareholders on 1 June 2004. Skywest dispatched its target’s statement (the Target’s Statement) on 24 June 2004 with the Skywest directors recommending that shareholders reject the Bid. Neither the Forecast Information nor the IPO Information had previously been provided to shareholders in Skywest and neither was included in the Bidder’s Statement or the Target’s Statement. **(b) Decisions**After consideration of the materials provided to the Panel by the parties, the Panel decided that circumstances relating to the affairs of Skywest were unacceptable and to make a declaration of unacceptable circumstances. The Panel considered that CVC was clearly and knowingly in possession of the Information at the time at which CVC acquired its pre-bid stake and at the time when it dispatched the Bidder’s Statement to shareholders. The Panel has not made any findings as to whether the information was subject to obligations of confidentiality owed by Mr Lovelady to Skywest, whether Mr Lovelady breached those obligations or whether CVC was, or should have been, aware of any such breach – those matters were not necessary for the Panel to decide, once CVC admitted that it possessed the Information and the Panel found that the Information had not been disclosed to Skywest shareholders in the Bidder’s Statement, Target’s Statement or previously.The Panel considered that:         some of the Information, while it may have been material to a decision by a shareholder in Skywest whether to accept an offer under the Bid when CVC first received it, had ceased to require disclosure because it had been incorporated in subsequent disclosures to Skywest shareholders;          the IPO Information and the Forecast Information was material to a decision by a shareholder in Skywest whether to accept an offer under the Bid, or was information which such a holder would reasonably require in order to make an informed assessment whether to accept an offer.The Panel considered that, contrary to submissions by CVC, the IPO Information and the Forecast Information was not speculative and “off the cuff” as there was evidence that CVC and Advent had not regarded it as such at the time it received the Information, including:         CVC and Advent had taken account of the IPO Information in formulating and implementing a strategy of acquiring a significant stake in Skywest through subscription of Skywest convertible notes; and         at about the same time as Mr Chatfield requested Mr Lovelady to send him, and Mr Lovelady supplied, the Forecast Information, Advent (three of whose directors are also directors of CVC) had prepared (with the assistance of Mr Lovelady) a draft information memorandum for a private offer of securities to be issued by Advent in which: (i) it disclosed a level of profit for 2004-05 consistent with the Forecast Information; and (ii) the directors were to state that they had a reasonable basis for disclosure of that information.The Panel was also extremely concerned that there had been no disclosure to Skywest or to Skywest shareholders in the Bidder’s Statement of the following:         the nature and extent of the relationship between Mr Lovelady and CVC;          the nature and extent of communication between Mr Lovelady and CVC (which included the sending of material concerning the Bid calculated to assist CVC in an encrypted and concealed form by use of specific software designed to make the material appear to be other than what it was); and          the monthly payments being made from CVC to Mr Lovelady between July 2003 and December 2003 (during which Mr Lovelady was CFO of Skywest).By not disclosing in the Bidder’s Statement:         CVC’s possession of the Information;          the IPO Information and the Forecast Information (in each case, the Panel considered that the disclosure would have had to have been made in a careful manner so that the disclosure was both accurate and complete with shareholders understanding both the content and the limits of the information concerned); and          the circumstances, particularly the relationship between CVC and Mr Lovelady, that allowed CVC to obtain the Information when its formal request for due diligence access to Skywest’s materials had been denied by Skywest,the Panel considered that:         CVC seriously contravened the policies of paragraph 602(a) that the acquisition of control over the voting shares in an unlisted company with more than 50 members takes place in an efficient, competitive and efficient market and paragraph 602(b) that shareholders are given enough information to assess the merits of a takeover proposal;          CVC failed to comply with the requirements in section 636 concerning the contents of the Bidder’s Statement; and          in light of its possession of the Information, statements made by CVC in the Bidder’s Statement were misleading.During the acquisition of its pre-bid stake and the bid period, CVC requested and was provided with non-public and material information by Mr Lovelady. The Ernst & Young forensic investigation found that the correspondence between Mr Lovelady (from his Skywest laptop computer) and CVC for the period since Mr Lovelady commenced his employment with Skywest in June 2003 amounted to over 450 emails. It also showed that Skywest was not presently able to retrieve many of those e-mails from its back-up systems.In addition, there was a large volume of telephone calls between Mr Lovelady and Mr Chatfield with telephone records indicating that Mr Lovelady made 59 calls and sent 23 SMS messages to Mr Chatfield between 14 May 2004 and 3 June 2004. Considering the nature, scope and continual flow of non-public information identified in the proceeding as having been communicated via email between Mr Lovelady from his Skywest email account and CVC and its advisers, the materials available to the Panel did not enable the Panel to form a view that the information identified during the proceeding as having been communicated via email by Mr Lovelady to CVC was the only information which had been communicated and omitted from the Bidder’s Statement. The Panel was also unable to consider information communicated via telephone and SMS messaging or via other email accounts or in hardcopy.The Panel was concerned that CVC:         declined an offer by Skywest to exchange documents retrieved from their respective computer systems on which they proposed to rely in the proceeding;          did not provide any further evidence of the correspondence between it and Mr Lovelady at any time during the Proceeding, even though it knew from Skywest’s evidence that there were many e-mails sent to it, its directors or advisers which may have contained relevant evidence; and          did not take advantage in its submissions of the opportunity that the Panel afforded for it to address this issue by means of signed statements by the directors of CVC and Mr Lovelady which would have addressed this issue. Those statements were to have stated that, having made full enquiries of each other and the other officers of CVC, there was no information known to them that was communicated (orally or in writing) by Mr Lovelady to the officers of CVC (apart from the information which had already been identified in the proceeding and any additional information provided with the statement) which should be included in the Bidder’s Statement to comply with section 636. The Panel first sought to formulate orders that might have allowed the Bid to proceed, as it was reluctant to deny Skywest shareholders an opportunity to consider the merits of the Bid for themselves. However, in the circumstances, the Panel could not be satisfied that it could make a complete assessment of at least the scope of all the information which Mr Lovelady provided to CVC throughout the period of his engagement by Skywest and which should have been disclosed to shareholders. Accordingly, the Panel could not be certain that the unacceptable circumstances identified by it in the Proceeding could be remedied by additional disclosure by CVC (even with corrective advertising) and therefore was unable to formulate orders of the kind that might allow the Bid to proceed. **(c) Declaration and orders**In general terms, the Panel has ordered that:1.      the Bid be effectively stopped from proceeding with all acceptances under the Bid to be cancelled, and CVC not to extend the Bid or declare the Bid free from any defeating conditions; 2.      certain Skywest security holders who sold their securities to CVC after 1 December 2003 may cancel those sales; 3.      CVC not to dispose of its Skywest securities until the earliest of 1 March 2005, the date that Skywest lodges its half year report and the date that Skywest next lodges a disclosure document in relation to an offer of its securities; 4.      unless agreed by Skywest, CVC (and its related entities or affiliates) is not permitted to make or publicly propose a takeover bid in relation to any class of securities issued by Skywest, during the period referred to in order 3; and 5.      CVC pay the reasonable costs and expenses of Skywest arising out of the proceeding (including the costs of engaging Ernst & Young).The Panel noted that Mr Michael Calneggia (a former director of Skywest who resigned in or about March 2003) (Mr Calneggia) and CVC entered into a call option agreement in October 2003 under which Mr Calneggia granted to CVC an option to acquire his interest in Skywest (totalling 5,033,000 shares). The option was exercised on 31 October 2003 and the respective share transfer forms were executed in December 2003. The Panel received a signed statement by Mr Calneggia indicating that although he was unaware of any profit forecast for the 2004-2005 financial year, he would have sold his shares to CVC in any event. Given Mr Calneggia’s signed statement, the option to cancel does not apply to his sale. **(d) Application for review** CVC has a pending application for a review of the Panel’s decision in this matter.**(e) Media canvassing and breach of panel confidentiality**During the proceeding, CVC alleged on a few occasions that Skywest had engaged in media canvassing in breach of the Panel’s interim orders and Rule 12 of the Takeovers Panel’s Rules for Proceedings. The most serious allegation was communicated to the Panel on 23 July 2004. CVC alleged that Skywest had provided a journalist with information concerning the Panel’s then current views on the proceeding, which party was most likely to benefit from the Panel’s decision and the likely timing of the Panel’s decision. The information had been contained in a letter from the Panel which was clearly stated to be confidential and not to be published, referred to or distributed by any party. Subsequently, Mr Henderson provided to the Panel a signed statement admitting to having engaged in discussions with the journalist and describing the circumstances and discussions he had had with the journalist. Mr Henderson not only provided information about what he believed the outcome of the proceeding would be, but also indicated the range of orders that may be made by the Panel. In his defence, Mr Henderson stated that he understood the discussions to be “off the record” and that the journalist was not intending to write any article based on the discussions. The Panel condemns Mr Henderson’s conduct and considers this type of conduct to be objectionable. The Panel believes that its ability to resolve disputes as quickly and efficiently as possible is likely to be adversely affected if parties seek to use publicity in any way and disapproves of any attempt by a party to use publicity to influence a decision of the Panel or detract from its authority. Further, the Panel considers that Mr Henderson’s conduct is in clear breach of the Panel’s requirement that Panel proceedings (and in particular Panel correspondence) remain confidential. The Panel considers Mr Henderson’s explanations for his conduct in the face of the express confidentiality requirements of the Panel to be both implausible and irrelevant. A copy of the declaration and orders will be available on the Panel’s website, attached to this media release.  |
| **4. Recent Corporate Law Decisions** |
| **4.1 Power of the court to grant relief from liability for anticipatory breach under section 1318**(By Lindsay Mackay, Freehills)Edwards v Attorney General [2004] NSWCA 272, New South Wales Court of Appeal, Spigelman CJ, Mason P, Young CJ in Eq, 6 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswca272.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswca272.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Related to the James Hardie Group inquiries, this case involved an application by directors for the court to grant relief from liability arising out of their payment of current asbestos related injury claims in full and thereby reducing the pool available to pay future claims. The directors were unable to obtain insurance. The court considered that its power under section 1318 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act) to grant this relief did not extend to prospective liabilities. However the court made an order granting relief in an interim period. Young CJ in Eq reasoned that continuing to pay the claims and not taking action to liquidate or wind up the company was the course of action that afforded the most benefit to future claimants. Spigelman CJ found that the likelihood of the directors being found liable for failing to appoint a liquidator was far fetched. The applicants, as well as being directors of the companies against which many asbestos related injury claims were brought, were also the directors of the holding company of those companies which was trustee of a fund with the purpose of paying such claims and contributing to medical research. However the court declined to give advice to the applicants under the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "default) (Trustee Act) as their liability as directors did not bear a sufficient nexus to their role as trustee. In the course of the judgment, the court considered the problems for ‘future claimants’ such as those with asbestos related injuries who could not be classified as creditors and therefore benefit from the provisions in the Corporations Act that deal with management of the solvency of companies.**(b) Facts**Amaca Pty Ltd (Amaca)and Amaba Pty Ltd (Amaba) were previously subsidiaries of James Hardie Industries Limited (JHIL) that were subject to numerous asbestos related injury claims. In 2001, by deed JHIL established a charitable private fund for the purposes of medical research and funding victims of asbestos related diseases. The trustee was the Medical Research and Compensation Foundation (MCRF), a company limited by guarantee. On the coming into operation of the deed, Amaca and Amaba became subsidiaries of MRCF. Through the fund, Amaca and Amaba pay their debts including the payment of asbestos related claims and providing funds for medical research.It was estimated that eventually the assets of these companies would be exhausted by the asbestos claims and the directors of Amaca and Amaba, also the directors of MRCF, were concerned that if they continued to pay all the asbestos injury claims in full, they may be liable themselves for future claims as they were unable to obtain insurance.If the directors continued to pay all claims in full, the pool of funds to meet future claims would be significantly reduced, however, if they did not pay the claims in full where there was a judgment debt, the companies could be forced into liquidation. Furthermore a Special Commission of Inquiry into the affairs of the James Hardie Group was being conducted including investigations as to the adequacy of current arrangements available to MRCF under the Corporations Act. The report of the Inquiry is not due until late September. The directors took the view that in the light of these circumstances, they should continue to pay all the claims in full until the report was published and that they should stay in office to administer the process. The directors sought relief under section 1318 of the Corporations Act which gives the court the power to grant relief from liability for negligence, default, breach of trust or breach of duty to directors, secretaries, officers and employees of a corporation in relation to anticipated proceedings. The court may grant relief where it appears that the applicant may be so liable but has acted honestly and that in the circumstances the applicant ought fairly to be excused for the negligence, default or breach. The directors also sought, in their capacity as trustees of the fund (as Directors of MRCF), judicial advice on this issue under section 63 of the Trustee Act.**(c) Decision****(i) Application for advice under the Trustee Act:**Young CJ in Eq considered that section 63 of the Trustee Act empowers a trustee to apply to the court for its opinion, advice or direction on any question relating to the management or administration of the trust property. His Honour noted that this was a very broad power, however the court retained a discretion as to whether or not to give the advice. In this case the court declined to give the advice. Young CJ in Eq considered that there was an insufficient nexus between the position of MRCF as trustee and the actions of the applicants as directors of Amaca and Amaba in paying the claims in full. He found that the court either had no jurisdiction in these circumstances or the court should not exercise its discretion. Spigelman CJ also declined to give advice, but for different reasons. His Honour considered that the applicants had only sought advice on whether they could refrain from appointing a provisional liquidator. It was his view that the likelihood of the applicants being held liable in tort for failing to appoint a provisional liquidator was far fetched. Considering that a purpose of the Corporations Act provisions is to encourage corporations to enter into voluntary administration and that in section 440 a court is not to appoint a provisional liquidator where a company is under an administration and the court is satisfied that the administration is in the best interests of creditors, it would be inconsistent to impose a duty on directors to appoint a provisional liquidator in relation to future creditors.**(ii) Application under section 1318**The court granted relief and made an order that the plaintiffs be relieved in whole from liability for any negligence, default, breach of trust or breach of duty in their capacity as directors arising out of the payment of the asbestos related liability claims. However the court considered that the power to grant relief under this provision did not extend to prospective relief and therefore the order was restricted to payments made from 24 June 2004 up to the date of the order.Young CJ in Eq considered case law interpreting the Corporations Act and predecessor legislation and found that the bulk of authorities suggested at the time of application for relief, the applicant must have a reason to apprehend that a claim might be made, ie for a past or continuing breach and that there could be no application for anticipatory breach. A difficulty arose in determining whether each new payment of claims was a new act that could be a new breach (and therefore a future breach outside the scope of the provision) or a continuing act that could be a continuing breach (and therefore within the scope of the provision). Here it was found that with each new payment to a claimant there was a new act that might be an act of default and therefore not a continuing breach, but a prospective breach. Spigelman CJ agreed with this analysis but noted that based on the order made in this application, the directors could proceed to pay claims on the basis that retrospective relief would be available in future from the court.Young CJ in Eq suggested that the problem in this case was that future claimants were unable to be assisted by the provisions of the Corporations Act. Future claimants as ‘future creditors’ of the companies were distinguished from contingent creditors (where an obligation already exists and liability will arise on the occurrence of an event which may or may not happen) and prospective creditors (where a debt is not immediately payable but will become payable). Asbestos injury claimants have no cause of action until damage has been suffered, which is usually on manifestation of disease symptoms. However, such claimants may not develop the disease or even come into contact with the asbestos fibres until many years into the future. The liquidation of the companies would therefore not assist the claimants as they would not have a right to the proceeds. Liquidation would also mean the loss of a potential benefit in the form of an injection of funds into the companies that could help fund future claims. Appointment of a receiver would also only afford a temporary solution. Future creditors could not participate in a scheme of arrangement because they have no actual or contingent debt. The power of the court to advise a liquidator would also not assist since this advice needs to be for the benefit of creditors as defined. The interests of future claimants is also unlikely to be a ground for an order for winding up on just and equitable grounds. While the interests of future claimants of life insurance has been held to be a ground for an order to wind up insurance companies, future claimants of life insurance are distinguished from asbestos injury claimants as they are known creditors at the time of winding up, their claims can be valued and they would benefit from the winding up itself.To maintain the status quo and continue paying claims in full would be the option of most benefit to future claimants since winding up would lead to a surplus of funds being used for medical research under the charitable purpose of the transaction deeds that would not aid future asbestos victims’ claims.In interpreting the Corporations Act, Young CJ in Eq suggested that it was important to look at the purpose of the Act as a whole, to provide limited liability to advance entrepreneurial endeavours and regulate the rights of shareholders etc. A narrow consideration of the purpose of a particular part of the Act, such as to afford a parri passu distribution of the proceeds of a winding up to creditors, was to be avoided.**4.2** **Schemes of arrangement – several issues considered**(By Nadia Kalic, Solicitor, Clayton Utz)MIA Group Ltd [2004] NSWSC 712, New South Wales Supreme Court, Barrett J, 3 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc712.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc712.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) The decision**The Supreme Court of New South Wales has provided some food for thought in relation to the following issues while ordering the convening of two meetings under section 411 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act"):         issue 1 - are optionholders creditors or "contingent members"?         issue 2 - what is the value of an optionholder's vote?         issue 3 - is a covenant by which a company promises to take certain action to reconstitute its own board of directors enforceable?**(b) The facts**MIA Group Ltd ("MIA") made two applications for orders convening meetings under section 411:         the first was an application for orders for the convening of a meeting of members of MIA to consider a proposed Part 5.1 scheme of arrangement between MIA and its members; and         the second was an application for orders for the convening of a meeting of the holders of options to subscribe for shares in MIA to consider a proposed Part 5.1 scheme of arrangement between MIA and its option holders.If implemented the schemes would cause all shares in MIA, and options to subscribe for shares in MIA, to become owned by the DCA Group Ltd ("DCA"). At the same time, a deed poll would be entered into by the external parties, DCA and its wholly owned subsidiary I-Med, in favour of the members and option holders of MIA. The deed poll contained a covenant by which DCA promised to take certain action to reconstitute its own board of directors. In particular, clause 4.6 of the deed poll provided DCA was to take all actions necessary to appoint three MIA nominees to the board of DCA, one of whom was specifically named.**(c) Supreme Court's findings**Barrett J approved MIA's applications and in doing so, made the following comments.**(i) Issue 1** Are option holders creditors or "contingent members"?MIA had proceeded on the basis that the option holders were creditors. Barrett J chose to comment on this point because of the decision Re Niagara Mining Ltd (2002) 47 ACSR 364 in which Lee J had expressed the opinion that option holders weren't "creditors" but rather were "contingent members" of a company. On the basis that the question regarding the correct characterisation of option holders has never been fully argued on a contested application, Barrett J followed the main stream of authority in Australia and agreed with MIA's approach that option holders were in fact creditors for the purposes of section 411 of the Act.**(ii) Issue 2** What is the value of an option holder's vote?The option holders of this particular scheme held options with varying exercise prices and expiry dates. Barrett J used and supported the Black-Scholes option pricing method to ascribe a "voting" value to these options so as to produce consistent relativities of value.**(iii) Issue 3** Is a covenant by which a company promises to take certain action to reconstitute its own board of directors enforceable?This arose in relation to the covenant by DCA to take all actions necessary to appoint three MIA nominees to the board of DCA, one of whom was specifically named.Barrett J cast doubts upon a company's power to make any effective covenant relating to the composition of its board of directors where the relevant power of appointment to fill casual vacancies resides with directors in any event. A decision by the directors on the question whether they should exercise their power to fill casual vacancies on the board can only be made by reference to particular persons eligible and available for appointment at the relevant time, after considering whether or not it is for the good of the company to make such appointment. Barrett J thought it would be difficult to see how directors could contract to appoint someone whom a third party (i.e. DCA) may, at some future time, propose.He also queried a company's capacity to make effective promises as to how its directors would exercise powers vested in them as directors (by the constitution) at some time in the future, as distinct from powers of the corporation exercisable through the instrumentality of the board of directors.Interestingly, Barrett J suggested that if and when the matter came back before the court for approval of the schemes it may be possible to produce evidence that the necessary resolutions of the directors of DCA had already been passed - providing the appointments of the three MIA directors would take effect automatically after the two schemes took effect.**(d) Conclusion*** This decision serves as a useful starting point when attempting to overcome some of the principal obstacles to a conventional scheme of arrangement in Australia such as the identification of the relevant class of claimants and the qualification of their claim for the purposes of ascertaining the statutory majority at a claimant's meeting. Barrett J has also suggested a practical solution for companies seeking to make promises to other parties in relation to the constitution of its board of directors.

**4.3 Misleading and deceptive conduct in offering security for a loan**(By Niti Gupta, Blake Dawson Waldron)Pico Holdings Inc v Voss [2004] VSC 263, Supreme Court of Victoria, Mandie J, 2 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/august/2004vsc263.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/august/2004vsc263.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case concerns claims made by Pico Holdings Inc. ("Pico"), a diversified holding and investment company incorporated in the USA, under the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) ("TPA") and [Fair Trading Act 1999 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "default) ("FTA"). Pico alleged that in September and December 2000, it made two loans to an Australian company, Dominion Capital Pty Ltd ("Dominion Capital") and that Dominion Capital defaulted in payment of those loans. The proceedings were brought against Peter David Voss ("Voss") - the holder of 99% of the shares in and the Managing Director of Dominion Capital. Pico claimed that Voss was either:         involved in misleading and deceptive conduct by Dominion Capital, under the TPA; or         liable as a principal for misleading and deceptive conduct under the FTA,where the misleading conduct was constituted by false representations that certain shares, offered to Pico as security for the two loans, were not encumbered.The court found that neither of Pico's claims could be made out. The TPA claims failed because:         there was no representation in respect of the first loan; and         whilst Dominion Capital was in contravention of the TPA in respect of the second loan, Voss was not "knowingly concerned, or party to" that contravention.The FTA claim against Voss as a principal also failed as the conduct of the company could not simply be attributed to Voss as alter ago of the company. **(b) Facts** **(i) September loan**Pico alleged that in late August 2000, Dominion Capital requested a loan of US$1 million, and that Dominion Capital verbally represented that shares it owned in Dominion Wines Ltd ("Dominion Wines") were unencumbered and could be offered as security to Pico for the loan. This was denied by Voss. Pico then claimed that it agreed to the loan and evidenced the agreement by means of a non-negotiable secured promissory note ("September Promissory Note") including an implied warranty as to the unencumbered nature of the shares forming security for the loan. It further stated that it lent the money to Dominion Capital in reliance on the verbal representation and warranty. Voss did not deny the issuance of the note but claimed that it had been agreed that it was never to be called upon and was only required to satisfy Pico's auditors.**(ii) December loan**Pico alleged that, in December, Dominion Capital requested a further loan of US$1.2 million, which was evidenced in a non-negotiable promissory note ("December Promissory Note"), which included a representation as to the unencumbered nature of the shares forming security for the loan. Voss admitted the loan agreement, but denied the existence of any warranty. Similarly to the September loan, Pico alleged that it lent the US$1.2 million in reliance on the representation made in August 2000 and the warranties in the two promissory notes.**(iii) NAB charge**Pico's claim for misleading and deceptive conduct was based on the existence of a fixed and floating charge granted to National Australia Bank Ltd ("NAB") over all of the assets of Dominion Capital ("NAB Charge"). It alleged that the charge subjected the Dominion Wine shares to a fixed charge and prohibited the creation of further encumbrances on the shares without NAB's approval. While Voss admitted the existence of the NAB Charge, he denied that the Dominion Wine shares were the subject of a fixed charge and further alleged that they were "marketable securities" acquired for disposal in the ordinary course of business, such that the NAB had no equitable or other interest as chargee in the shares. **(iv) The claim**Pico alleged that, as a result of the NAB Charge, the making by Dominion Capital of the representation in August and two warranties constituted "false and misleading conduct" under section 52 of the TPA. As Dominion Capital had neither provided security nor paid the two promissory notes, Pico had suffered loss and damage. It was alleged that Voss was directly or indirectly knowingly concerned in, or a party to, Dominion Capital's said contravention, as a result of:         being a director and majority shareholder of Dominion Capital;         making the representation as to encumbrances on behalf of Dominion Capital; and         signing the two promissory notes.If established, this would enable Pico to recover damage and loss from Voss. Pico also claimed, in the alternative, that Voss' conduct was misleading or deceptive in contravention of section 9 of the FTA and that Pico suffered loss and damage. In defence, Voss argued that he was not "involved in a contravention" and that he had not engaged in "trade or commerce" by signing the promissory notes. **(c) Decision****(i) September loan**The court held that Dominion Capital (or Voss) made no express representation to Pico, either in August 2000 or at all, that the shares in Dominion Wines were unencumbered. In addition, no warranty could be implied into the September Promissory Note that the Dominion Wine shares were unencumbered. The suggested representation and/or warranty was not obvious or necessary to give business efficacy to the note or the security supporting it. Lastly, even if a warranty was to be implied into the September Promissory Note, there was no evidence that Pico relied on it.**(ii) December loan**In the case of the December loan, the court held that there was an express representation by Dominion Capital that the Dominion Wine shares were unencumbered in the December Promissory Note. The court further held that the representation was false and the conduct of Dominion Capital misleading and deceptive. The Dominion Wine shares were at all relevant times subject to the fixed charge created by the NAB Charge, and did not fall within the "marketable securities" exception contained in that document. While it was part of Dominion Capital's ordinary business to buy and sell shares, the shares in Dominion Wines were not acquired for the purpose of disposal in the ordinary course of that part of Dominion Capital's business, but were rather acquired as a long-term investment. Thus, Dominion Capital contravened section 52(1) of the TPA. The court also concluded that Pico was materially induced to make the December loan, in part, by the representation that the shares were not encumbered and would not have made the loan if it had been aware of the NAB Charge. The essential question, however, was whether Voss was, within the meaning of section 75B(1)(c) of the TPA, "knowingly concerned in, or party to" the said contravention. In order for this to be established, the person must have knowledge of all the essential elements of the contravention. These elements were not identified by the statement of claim or pleadings. Voss himself gave evidence that he believed that the shares were not affected by the NAB Charge, as the shares were intended to be disposed of at the time of acquisition and the NAB had never restricted their dealings in the shares. The court held that, on balance, Pico could not establish that Voss had "actual knowledge" that the Dominion Wine shares were encumbered by the NAB Charge. Thus, Voss was not knowingly concerned in, or party to, the contravention by Dominion Capital.Pico's alternative claim was made pursuant to sections 9 and 159 of the FTA, against Voss as primary contravener. Pico contended that, by signing and despatching the December Promissory Note to Pico, Voss engaged (in trade and commerce) in conduct that was misleading or deceptive within the meaning of the FTA. Voss' principal defence was that the conduct was that of the company, Dominion Capital, and that he was not acting in a personal capacity. The court agreed and held that unlike Hamilton v Whitehead (1998) 166 CLR 121, the false and misleading representation made by Dominion Capital could not be attributed to Voss as alter ago of the company. For this reason, Pico's claim under the FTA also failed.**4.4 Precluded proceedings against a company being wound up**(By Rohan Bartlett, Phillips Fox)Melbourne University Student Union Inc. (In Liq.) v Sherriff [2004] VSC 266, Supreme Court of Victoria, Mandie J, 30 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/july/2004vsc266.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/july/2004vsc266.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Summary**The Court held that, under section 471B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), an application before the Australian Industrial Relations Commission is considered an action that cannot proceed against a company that is being wound up.**(b) Facts** The defendant (Sherriff) made an application to the Australian Industrial Relations Commission alleging unfair dismissal by the plaintiff (Melbourne University Student Union Inc.). Following this, the Court ordered that the plaintiff be wound up and appointed a liquidator. The plaintiff brought an application contending that the defendant cannot proceed with his application to the Commission because of section 471B of the Corporations Act.**(c) Decision** Under section 471B of the Corporations Act, a person cannot, except with the leave of the Court, begin or proceed with a proceeding in a court against a company being wound up in insolvency or by the Court.Under section 58AA(1) of the Corporations Act, lower case "c" court is defined as "any court". However, rather than precluding the extension of this definition to the Industrial Relations Commission, Mandie J made reference to a number of decisions that, for the purposes of section 471B and other similar sections, have held that such a proceeding is a "court" proceeding. His Honour made reference to previous decisions that had applied both a purposive and expansive interpretation to the word "court", giving it a wider meaning than that strictly referred to in section 58AA. These decisions had centred on the Industrial Relations Commission of New South Wales and Western Australia, as well as the Australian Industrial Relations Commission.His Honour noted a decision of the Full Bench of the Australian Industrial Relations Commission that had held section 471B to not apply to such proceedings. However, the Court noted that it was bound to follow decisions of intermediate appellate courts in the Corporations jurisdiction, unless they are plainly wrong. Mandie J was not persuaded to grant an injunction against the defendant. His Honour stated that this would put the defendant in a position whereby the Courts in the Corporations jurisdiction were saying one thing, and the Commission under the [Workplace Relations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6125" \t "default) was saying another. Under such circumstances, the Court did not require the plaintiff to give an undertaking. His Honour therefore precluded the defendant from proceeding with the action in the Australian Industrial Relations Commission without the leave of the Court, and ordered the defendant to pay the plaintiff's costs.**4.5 Directors of corporate trustees - Hanel revisited**(By Edward Kerr and Timothy Cleary, Mallesons Stephen Jaques)Intagro v ANZ Banking Group, [2004] NSWSC 618, Supreme Court of New South Wales, McDougall J, 29 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc618.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc618.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**In Hanel v O’Neill (2003) 48 ACSR 378 (“Hanel”), a majority of the Supreme Court of South Australia held that, when determining whether a corporate trustee is entitled to be indemnified out of the trust assets, it is necessary to consider both whether the trustee is legally entitled to an indemnity and whether or not the assets of the trust fund are sufficient to meet the liability. If the trust fund has insufficient assets, those persons who were directors at the time the liability was incurred are personally liable, even though the trust documents may provide a full indemnity and, at the time the liability was incurred, the trust assets may have been sufficient to meet the liability. Intagro has upheld that decision, but not without criticism. **(b) The personal liability of corporate trustees**Section 197(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) provides that:“A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:(a) has not, and cannot, discharge the liability or that part of it; and(b) is not entitled to be fully indemnified against the liability out of trust assets.This is so even if the trust does not have enough assets to indemnify the trustee. …”It is the last sentence just quoted (the “ambiguous sentence”) that has caused all the difficulty. The majority in Hanel held that a director is personally liable, not only if they are not entitled to be indemnified out of trust assets, but also if the trust assets are insufficient to meet that liability.The majority decision in Hanel has significant consequences, particularly for the directors of professional trustee companies who may find themselves liable for the liabilities of a trust despite having little or no real management responsibilities in respect of the trust.**(c) The issue in Intagro**Essentially, Intagro involved exactly the same question as was decided on in Hanel.**(d) Analysis****(i) The fundamental issue**McDougall J noted that section 197(1) replaced the former section 233 of the Corporations Act. His Honour also noted that section 233 had been interpreted as not being intended to make directors of a corporate trustee liable merely because the assets of the trust fund were insufficient to meet liabilities incurred as trustee. Unfortunately, the drafting of section 197(1), and in particular the ambiguous sentence, is ambiguous and grammatically poor, a point that McDougall J made a number of times. The fundamental issue therefore was “whether the legislature simply intended to re-enact, in ‘simple’ language, section 233; or whether it intended to make a substantial change”. The Explanatory Memorandum to the [Corporate Law Economic Reform Program Bill 1998](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10430" \t "default) (which included section 197(1)) does not refer to this amendment, or give any guidance as to the intention behind it. As McDougall J explained, if the decision in Hanel is correct, and the intention was to make a substantial change to the liability of directors of corporate trustees, then, given the far-reaching consequences of this change, it would be expected to have received greater publicity when it was enacted that it did.**(ii) Analysis of Hanel**McDougall J identified a number of difficulties with the majority decision in Hanel. First was the fact that the majority ascribed to parliament an intention to implement a very significant change in the law without any publicity of this fact. This was a particular concern given that the stated intention behind the amendments which included new section 197(1) was to restate parts of the law in “plain English”. This suggests that there would have been no intention to incorporate substantive amendments without an express explanation.Secondly, although McDougall J acknowledged that there may be policy reasons why the directors of corporate trustees should be liable in these circumstances, the majority’s approach could lead to some “extraordinary consequences”. In particular, a person is liable if they were are a director at the time the liability was incurred, even though at that time the trustee may have had the benefit of a full indemnity from the trust and the trust fund may have had sufficient assets to satisfy the liability. A person therefore may be liable even though they may have ceased to be a director and may have played no part in the depletion of the trust fund between when the liability was incurred and when it was required to be satisfied.McDougall J also took issue with the fact that the majority effectively interpreted “entitled” to refer not only to whether or not the trustee had a legal right or claim against the trust assets, but also the quantification or value of that right or claim. His Honour held that this is contrary to the dictionary meaning of “entitle”, as well the meaning given to that word in numerous decided cases in various areas of law.**(iii) Other interpretations of section 197(1)**McDougall J also referred to some alternative interpretations that may be given to section 197(1). In particular, His Honour referred to the comments of Austin J, speaking extracurially, that the ambiguous section should only “be taken to mean that the director’s liability (if it exists because the right to indemnity has been destroyed) is not diminished by reference to the fact that the trust has insufficient assets to indemnify the trustee” (Austin J, “Libby Slater Lecture” given to the Superannuation Lawyers’ Association of Australia in February 2004). McDougall J then offered his own interpretation of section 197(1), in which he suggested that the section should be construed as if the word “only” were inserted after the second reference to “liability” so that the person will be liable only if the corporation fails to meet the tests in section 197(1)(a) and (b). The ambiguous sentence can then be read as referring only to situations in which the director is liable, in particular because it is not entitled to be indemnified out of the trust. It would not apply where the trustee is entitled to be indemnified.**(iv) The decision**Despite expressing strong reservations about the decisions of both the majority and Debelle J in Hanel, and offering his own preferred interpretation of section 197(1), McDougall J ultimately held that section 197(1) is ambiguous and that therefore he was unable to find that the majority’s decision was “plainly wrong”. Therefore, His Honour felt himself compelled to follow the majority’s decision.**(d) Conclusion**In light of his strong criticisms of the decision in Hanel, McDougall J’s eventual decision to follow the majority in that case appears unsatisfactory. Clearly, the difficulties which His Honour identified with Hanel remain unaddressed. It would appear that McDougall J felt constrained, as a judge sitting at first instance, to follow the lead of a decision of the Full Court, despite his reservations with that decision.It is therefore appropriate to note that Spigelman CJ, in a recent decision of the New South Wales Court of Appeal in Edwards v Attorney General [2004] NSWCA 272, observed that, sitting as a Court of Appeal, he “may well have yielded to the temptation so valiantly resisted by McDougall J”. Although section 197(1) was not relevant to the determination of Edwards v Attorney General, Spigelman CJ clearly indicates that the decision of McDougall J should not be taken as suggesting that the interpretation of section 197(1), and the correctness of the decision in Hanel, are now settled law.**4.6 Limitations of Federal Court’s general powers under section 1324 of the Corporations Act**(By Michael Clifford, Corrs Chambers Westgarth)ASIC v Aboriginal Community Benefit Fund Pty Ltd [2004] FCA 963, Federal Court of Australia, Hely J, 26 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/july/2004fca963.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/july/2004fca963.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**The Federal Court does not have the power to make consequential orders pursuant to section 1324 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (which purports to give a Court broad powers to make orders in relation to any contravention of the Corporations Act) for the contravention of section 992A of the Corporations Act (prohibition on hawking of certain financial products).**(b) Facts**In the earlier matter of ASIC v Aboriginal Community Benefit Fund Pty Ltd [2004] FCA 178, the Federal Court held that the Aboriginal Community Benefit Fund Pty Ltd and the Aboriginal Community Benefit Fund No 2 Pty Ltd (Defendants) made unsolicited offers in relation to a financial product (named the Funeral Expenses Policy) from 11 March 2002 to 11 March 2003 in contravention of section 992A of the Corporations Act. In this matter of ASIC v Aboriginal Community Benefit Fund Pty Ltd [2004] FCA 963, ASIC sought further orders that:         notice of the contravention of section 992A of the Corporations Act be sent to all members who took out the Funeral Expenses Policy after 11 March 2002;         those notices provide that, if the member joined the Funeral Expenses Policy in circumstances involving a contravention of section 992A, he or she may seek a refund of the premiums paid; and         the Defendants appoint (at their own expense) an external claims reviewer to determine, in the case of a dispute, whether a member joined the policy in circumstances involving a contravention of section 992A and that decision be binding on the Defendants.ASIC sought these orders pursuant to section 1324 of the Corporations Act which purports to give a Court general powers to make orders in relation to (amongst other things) any contravention of the Corporations Act.**(c) Decision**The Federal Court considered the decision of Medibank Private Ltd v Cassidy (2002) 124 FCR 40, in which the Federal Court held that where a statute purports to give a Court general powers to make certain orders and the same statute gives a Court specific powers to make the same orders but subject to certain limitations, a Court cannot use its general powers to make orders that it could not make if it relied on those specific powers.The Federal Court noted that while section 1324 of the Corporations Act purports to give a Court general powers to make orders in relation to any contravention of the Corporations Act, section 1325 of the Corporations Act (which also gives a Court powers to make ancillary orders) provides that a Court cannot make ancillary orders:         in relation to a contravention of section 992A; and         if third parties cannot be identified in the application or if ASIC does not have the written consent of each person on whose behalf the application is made.Because of these section 1325 limitations, the Federal Court held that it does not have the power to make the consequential orders sought by ASIC in relation to the contravention of section 992A.The Federal Court also noted that there existed a real question as to whether it could invest judicial powers of the Commonwealth in a claims reviewer without any avenue of appeal for the Defendants.**4.7** **Relevant considerations when appointing a provisional liquidator**(By Kristy Parsons, Corrs Chambers Westgarth)Yellowrock Pty Ltd v Eastgate Properties Pty Ltd [2004] QSC 214, Supreme Court of Queensland, Muir J, 26 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/july/2004qsc214.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/july/2004qsc214.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case is an interesting example of a court exercising its discretion to appoint a provisional liquidator. Concerns as to the strained relationship of the three directors and allegations of questionable corporate dealings of the dominant two directors, prompted Muir J to appoint a provisional liquidator to Eastgate Properties Pty Ltd (Eastgate), despite the fact such orders are typically not made when a company is subject to a winding up application.**(b) Facts**In 2002 Eastgate acquired six parcels of land in Queensland with the goal of developing a strata title complex for ultimate sale. To finance this project, a loan of some $2,000,000 was arranged between Eastgate and Yellowrock Pty Ltd (Yellowrock), the latter of which was controlled by Mr Reichert, who along with Mr King and Mr George were the directors of Eastgate. Yellowrock was also the mortgagee of a mortgage in favour of Eastgate, as amended by a Deed of Priority and Deed of Compromise, both of which involved various third parties commercially related to the three directors.Despite these business ties, by 2004 the relationship of the three directors had soured such that Reichert was forced to make an application to the courts so as to gain access to Eastgate’s books and accounts. Upon doing so it became apparent that King and George, who managed the day-to-day affairs of Eastgate, had paid, purportedly by way of a dividend, sums of $360,000 to two companies which they respectively controlled, with a similar sum also having been paid to a third party. As well as questioning the “clandestine nature” of King and George’s decision to make such a payment, evidence was also raised which indicated that the dividend was not in fact paid out of the company’s profits. This dividend had been paid despite provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) which limit payment of a dividend to when the company has profits, as well as Eastgate’s constitution and the Deed of Compromise, the latter of which gave priority to Yellowrock if any profits were paid out. In addition to these matters, there was also evidence that Reichert had been “wrongly excluded from participation in the affairs of Eastgate,” as evidenced by the fact that when calling and holding meetings, King and George frequently made no attempt to ascertain Reichert’s availability and would hold such meetings regardless. This was said to have occurred despite the fact the matters resolved were often not of an urgent nature and Reichert protesting to them doing so.The financial status of Eastgate was also in question. It was alleged the funds that the majority directors sought to use to pay off the company’s tax liabilities were the same funds that Yellowrock sought to claim as a secured creditor.Yellowrock, the applicant and entity controlled by Reichert, sought the appointment of a provisional liquidator to Eastgate, as well as an order that Eastgate be wound up. **(c) Decision**After rejecting Eastgate’s arguments that the wording of the mortgage, Deed of Priority and Deed of Compromise prevented Yellowrock from bringing such actions, and considering the factual matters discussed in paragraph (b), Muir J reached the conclusion that “the majority could not be relied upon to protect the minority, or to generally act bona fide in the interests of Eastgate.” Accordingly Muir J granted Yellowrock’s application to have a provisional liquidator appointed, with their role being to ascertain whether Eastgate could pursue both its directors and the recipients of the purported dividend, as well as to determine in which order Eastgate’s competing creditors should be paid.In reaching this decision Muir J acknowledged that he was conscious of authorities such as Constantinidis v JGL Trading Pty Ltd (1995) 17 ACSR 625 and Zempilias v JN Taylor Holdings Ltd No 2 (1990) 55 SASR 103 which state that the appointment of a provisional liquidator, pending the determination of a winding up proceeding, is a “remedy of a wholly extraordinary nature” and “a drastic intrusion into the affairs of a company [that should] not be contemplated if other measures would be adequate to preserve the status quo.” So too did Muir J note that he was “conscious of the generally accepted principle that a provisional liquidator should only be appointed if the court is satisfied that there is a reasonable prospect that a winding up order will be made.” Nonetheless, given the factual circumstances discussed in paragraph (b), Muir J considered that such action was appropriate here, with Eastgate being “in need of a person independent of the board to examine its financial affairs.”Having thus granted the application to appoint a provisional liquidator, Muir J further considered that there was no need for “undue haste” regarding Yellowrock’s winding up application and accordingly adjourned its hearing to a later date.**4.8 Should the court entrust the winding up of an unregistered managed investment scheme to the contravening operator?**(By Martine Alpins, Blake Dawson Waldron)ASIC v Tasman Investment Management Ltd [2004] NSWSC 651, New South Wales Supreme Court, Barrett J, 23 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc651.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc651.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**The New South Wales Supreme Court has held that when an unregistered managed investment scheme, 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), is ordered to be wound up pursuant to section 601EE of the Act, it is in the public interest that an independent receiver is appointed to wind up the scheme. Justice Barrett stated that there must be exceptional circumstances for the court to entrust the operator of the scheme to conduct the liquidation.**(b) Facts**An unregistered managed investment scheme known as the Queen Victoria Project (QVP) was based upon developing a nursing home and retirement village complex on a property acquired in Wentworth Falls. The first defendant, Tasman Investment Management Ltd (TIML) was responsible for raising the initial capital of the scheme. The fifth defendant, Mr Warne was a financial adviser and at the time the sole director of TIML. Mr Warne introduced the majority of the investors into the scheme and raised $4,660,000. The property at Wentworth Falls, in the name of TIML, was acquired for $2,000,000 and was subject to a $680,000 mortgage to the National Australia Bank. The balance of the funds raised by TIML were expended leaving the value of the property, less the allowance for bank debt, as the only asset of the scheme and essentially $1,600,000 to return to investors.**(c) Issues for determination**The proceedings were brought by the Australian Securities and Investment Commission (ASIC) which sought:(i) a declaration from the court that TIML and Mr Warne had contravened section 601ED of the Act by operating the QVP as an unregistered managed investment scheme; (ii) an order that TIML, Mr Warne and the third defendant, QV Mortgage Pty Ltd be permanently restrained from operating an unregistered managed investment scheme in contravention of section 601ED(5) of the Act; and(iii) an order that an official receiver be appointed by the court to wind up the scheme.The making of orders (i) and (ii) were not opposed. There was no issue as to whether an order to wind up the scheme should be made under section 601EE of the Act. The main issue of the decision was whether the court should appoint an official independent receiver to sell the Wentworth Falls property as opposed to allowing TIML and Mr Warne to be responsible for the liquidation of the scheme.ASIC argued that an official receiver should be appointed on the basis that TIML and Mr Warne were inappropriate and unfit to play an active role in the winding up of the scheme. The minutes of several directors meetings revealed that some directors expressed concerns that certain matters relating to the raising of funds of the scheme should be bought to ASIC's attention and ASIC had no record of this occurring. In addition, when investigated by ASIC, it was apparent that Mr Warne knowingly breached the Corporations Act and had only a vague knowledge of the interests of each investor in the scheme.TIML, Mr Warne and QV Mortgage Pty Ltd argued that TIML should be allowed to sell the scheme property itself and bring the proceeds to court to be distributed. They submitted that appointment of an independent receiver would lead to a duplication of a large amount of work that had already been undertaken by the operator and therefore would be more costly. Also, the appointment of a receiver would produce the forced sale factor causing the property to sell for less than its market value. Finally, the operators argued that the investors in the scheme voted overwhelmingly to defer sale of the property without the appointment of a receiver.**(d) Case law**Justice Barrett noted that section 601EE(2) of the Act does not give guidance as to the way in which the court should order the winding up of a managed investment scheme and therefore it is in the court's discretion. In the course of the judgment Justice Barrett referred to several cases which discussed the issue.In ASIC v Atlantic 3 Financial (Aust) Pty Ltd (2003) 47 ACSR 52, Justice Mullins recognised that when deciding who should be responsible for the winding up of the scheme, there can be a tension between protecting investors as a whole (public interest) and protecting the interests of the individual investors (private interest). In order to resolve this tension between public and private interests it is necessary to balance all the factors relevant to the particular case.In the present case Justice Barrett agreed with the view expressed in ASIC v Takaran Pty Ltd (No 2) (2002) 43 ACSR 334 that protecting the public interest should be preferred and the court should only order that the winding up can be performed by a contravening operator in exceptional circumstances.**(e) Decision**TIML and Mr Warne were found to have contravened section 601ED of the Act by operating QVP as an unregistered managed investment scheme and the court ordered that they, along with QV Mortgage Pty Ltd, be permanently restrained from operating an unregistered managed investment scheme in contravention of section 601ED(5) of the Act.The court ordered that an independent receiver be appointed to manage the winding up of the scheme. Justice Barrett came to this conclusion on the basis that:         there would be a conflict of interest if Mr Warne were to be involved in the winding up of the scheme;         the operators of the scheme were aware of the scheme's non-compliance with the Act and failed to properly acknowledge it;         the preference of investors was of no real value to the court because the report provided to investors was biased towards the operator's view and did not properly inform investors of the merits of all options;         the proposal by the operator to conduct its own winding up of the scheme would entail supervision by a fee-charging professional and therefore the cost savings would not be significant; and          the Wentworth Falls property is subject to an expired mortgage and it is likely that a forced sale would not be avoided in any case.It was ordered that TIML, QV Mortgage Pty Limited and Mr Warne pay the plaintiff's costs.**4.9 Is a gaming machine licence property which can be subject to a charge?**(By Adam Schwab, Freehills)Perpetual Trustees Australia Ltd v Bank of Western Australia Ltd [2004] QSC 213, Supreme Court of Queensland, 22 July 2004The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/july/2004qsc213.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/july/2004qsc213.htm%22%20%5Co%20%22http%3A//cclsr.law.unimelb.edu.au/judgments/states/qld/2004/july/2004qsc213.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Summary**The Supreme Court of Queensland held that a gaming machine licence is property which can be validly surrendered by a receiver pursuant to a Deed of Charge. In doing so, the court rejected the notion that a gaming machine licence was treated at law as a right personal to the holder of the licence. The court also found that the powers of a receiver to dispose of property will not terminate upon the winding up of the company.**(b) Facts**The Applicant was the lessor of a premises in the Myer Centre in Brisbane. The premises were leased by Mainsable Pty Ltd (the fifth Respondent). Mainsable carried on a restaurant business under the name of “CBD Cellar Bar Dining” at the premises. Mainsable gave the Bank of Western Australia (the first Respondent) a fixed charge over particular assets and a floating charge over “all present and future rights, property and undertaking of [Mainsable] of whatever kind.”Subsequently, Mainsable has placed in receivership with the Receivers (the second and third Respondents) being appointed as manager of Mainsable on 25 June 2003 (pursuant to a Deed of Charge). Mainsable was subsequently placed in voluntary liquidation on 22 July 2003. The Receivers later caused Mainsable to surrender a gaming machine licence which it held in respect of its premises.The Applicant sought a declaration that the purported surrender of the gaming machine licence was of no effect as the licence is not treated by law as “property” but a right personal to the holder. The Applicant sought a declaration on the grounds that the receiver did not have the power to deal with the licence in the manner which it did under the Deed of Charge, and even if the Deed did grant such powers, these powers would cease upon the winding up of the company.**(c) Decision**Muir J rejected the Applicant’s claims, holding that a gaming machine licence was property which could be subject to the Deed of Charge and the surrender was valid, notwithstanding the voluntary winding up of the company. In delivering his judgement, Muir J considered several issues.**(i) Is the licence deemed to be “property” under the Deed of Charge?** Muir J stated that the “definition of Secured Property [from the Deed] “is that all property rights and interests, both present and future, of Mainsable be caught by the Deed of Charge and that the Bank and the Receivers be able to deal with all such rights and interests to maintain, enhance and realise the Bank’s security.”In considering the breadth of such a clause, his Honour noted the finding of Windeyer J in 888 Casino & Tavern Pty Ltd v Hurlfobe Pty Ltd (1997) 8 BPR 15,505, where he found that:“if the goodwill of a public house passes so also does the licence authorising the carrying on of the business and consequently if the mortgagee goes into possession he is entitled to call for a transfer of the licence.”As such, Muir J rejected the Applicant’s attempt to imply a prohibition on the surrender of gaming machine licences, despite the permissive wording of the Deed of Charge, concluding that “if the Legislature had intended to derogate from parties freedom to contract in this regard one would have expected it to have made intention in that respect reasonably clear.”**(ii) What powers are granted under the Deed of Charge?**His Honour considered the language of the Deed of Charge, noting that clause 13.1(c) provided that the receivers could exercise the “rights, powers and remedies” of Mainsable “in connection … with the Secured Property.” Muir J stated that “the licence is an adjunct to Mainsable’s business … and related directly to the goodwill of the business.” As such, dealings with the licence, such as the surrender of the licence constitute the exercise of a right “in connection with” the Secured Property.**(iii) Did the powers under the Deed of Charge cease upon the winding up of the Company?**The Applicant also argued that after the commencement of winding up of Mainsable, section 493(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act) provides that the Receiver must “cease to carry on its business except so far as it is in the opinion of the liquidator required for the beneficial disposal or winding up of the business.”Muir J considered numerous authorities, noting most recently the case of Grahame Webb Investments Pty Ltd v St George Partnership Banking Ltd (2001) 38 ACSR 281, where Fiztgerald JJA found that:“[A]fter compulsory winding-up, a receiver continues to have powers, including powers which can be exercised in the name of the corporation in receivership and liquidation. Although a receiver cannot incur liabilities which are enforceable against the company in liquidation or its assets, recent decisions in this country … establish that a receiver’s powers after compulsory liquidation include power to carry on the company’s business incidentally to the beneficial disposal of its assets.”As such, his Honour rejected the Applicant’s submission, holding that the rights of a receiver are “to be found in the instrument of charge, unless supplemented, diminished or qualified by statute. Those rights and obligations survive the winding-up except to the extent that the Corporations Act provides to the contrary.” Muir J stated that he saw no basis for concluding that on a winding up all such rights, which do not concern directly the disposition of the property charged, cease to have effect.As noted by the court, any other finding “would be inconsistent also with the authorities which acknowledge the ability of receivers, after winding-up, to exercise powers conferred on them by the instrument of charge including the power to carry on the company’s business and to conduct legal proceedings.”**4.10 Foreign state immunity and commercial transactions**(By Anna White, Mallesons Stephen Jaques)Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Limited [2004] VSC 262, Supreme Court of Victoria, Dodds-Streeton J, 19 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/july/2004vsc262.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/july/2004vsc262.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**               Foreign state immunity from jurisdiction under s9 of the [Foreign States](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7538" \t "default)[Immunities Act 1985 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7538" \t "default) (“Act”) is not lost pursuant to the “commercial transaction” exception in s11(1) of the Act if the transaction is predominantly of a political, diplomatic or governmental nature; and               Even if a transaction is characterised as a “commercial transaction” within the terms of s11(1), foreign state immunity can be restored, pursuant to s11(2)(a)(i) of the Act, if all parties to a transaction are foreign states.**(b) Facts**On 20 February 2004, the United States of America (“United States”) was served with a third party notice (“Notice”) dated 5 September 2003. In this application, the United States sought, inter alia, an order setting aside the Notice on the grounds that:(a) the United States, as a foreign state, was immune from jurisdiction in the proceeding pursuant to the Act; (“Statutory Ground”); and/or(b) the claims made against the United States in the Notice were not justiciable as they required the adjudication of “acts of state” and a “determination of matters bearing upon the validity of acts and transactions of foreign states” (“Non-Justiciability and Act of State Ground”).The determination of the application was a matter of urgency as the trial of the ‘recovery proceeding’ was to begin shortly. On 27 June 2003, Wells Fargo Bank Northwest National Association (“Wells Fargo”) commenced the recovery proceeding against the defendants in its capacity as security trustee for Export Import Bank of the United States (“Eximbank”). Eximbank is a corporation and an agency of the United States established pursuant to the Export Import Bank Act 1945. All issued capital of Eximbank is held by the United States through the office of the President. In the recovery proceeding, Wells Fargo sought to enforce securities and to exercise its mortgagee remedies in relation to an aircraft owned by Victoria Aircraft Leasing Limited (“VALL”). The aircraft had been purchased by VALL pursuant to funding arrangements provided by Eximbank. The aircraft was currently operated by Nauru Air Corporation (“NAC”) as part of its airline business, ‘Air Nauru’. Eximbank received a guarantee of all of VALL’s obligations under the financing arrangements from the Republic of Nauru (“Nauru”).Over the course of 2002 and 2003, VALL failed to make a number of payments due under the financing arrangements. These failures, according to the plaintiffs, constituted events of default, and pursuant to the financing arrangements, the entire amounts outstanding to Eximbank became due and payable. The defendants, VALL, NAC and Nauru, by defence and counterclaim did not deny these allegations, but claimed that the mortgage was unenforceable on the grounds of equitable estoppel and contract. They alleged that during meetings between representatives of Nauru and the United States in October 2002 and March 2003, the United States made a number of representations in exchange for Nauru’s cooperation with the ‘US agenda’. The US agenda addressed concerns the United States had in relation to Nauru’s banking sector, specifically that terrorist organisations were using Nauru banks to fund their activities. The defendants claimed that the United States reached agreement with Nauru and/or made representations to Nauru that they would:(a) ensure that Eximbank would give Nauru additional time to pay its debts to Eximbank, sufficient to ensure the operational viability of Air Nauru;(b) provide funds to Nauru sufficient to eliminate any problems Nauru might have in relation to repayment of the Eximbank financing; and(c) would not permit Eximbank to exercise any strict contractual rights which it might have to take possession of and sell the aircraft.The Notice served on the United States on 20 February 2004 made identical allegations to those in the defence and counterclaim. **(c) Decision****(i) Statutory Ground**The United States argued that as a foreign state, it was entitled to immunity under s9 of the Act, and that the case did not come within the ambit of any of the exceptions. The defendants argued that their claim against the United States came within the "commercial transaction" exception in s11 of the Act. It was noted by Dodds-Streeton J that the burden of establishing that a claim comes within a statutory exception rests upon the party contending that the exception applies. After considering the Australian Law Reform Commission Report on Foreign State Immunity No 24, the State Immunity Act 1978 (UK) and foreign case law (researches of counsel did not reveal any decided Australian case on s11 or the other relevant provisions of the Act), Dodds-Streeton J focused on the legislation itself. Her Honour noted that s11 first defines "commercial transaction" as a "commercial, trading, professional or industrial or like transaction into which the foreign state has entered or a like activity in which the state has engaged". It then, "without limiting the generality of the foregoing", gives three examples in s11(3)(a)-(c) of transactions which would be included. Dodds-Streeton J viewed the examples specified in s11(3)(a)-(c) as illustrative only. Her Honour stated that the specific transactions in s11(3)(a)-(c) would be commercial transactions only if they have the necessary quality of a "commercial, trading, business professional or industrial or like transaction" as per the s11 general definition. Dodds-Streeton J held that if a transaction was substantially, essentially or predominantly of a political, diplomatic or governmental nature, it was not a "commercial transaction" despite the fact that it incorporated some elements of the examples specified in s11(3)(a)-(c). The incorporation of only subsidiary or minor "commercial, trading, business, professional, industrial or like" elements in a transaction which is predominantly of a political, diplomatic or governmental nature, or an admixture of those elements, will not render it a "commercial transaction". Dodds-Streeton J viewed the alleged transaction between Nauru and the United States to be overwhelmingly non-commercial as it involved high level dealings about banking reform and terrorism. This was despite the United States’ obligations including the possible payment of funds, "a provision of finance" in terms of s11(3)(b). Her Honour stated that in characterising a transaction under s11 of the Act, a range of factors would be relevant, including the status and role of the participants and the nature of the subject-matter, dealings, acts and obligations. Her Honour noted that purpose, although not decisive, might be relevant in so far as it throws light on the nature of the transaction.An alternative argument raised by the United States was that if the dealings were found to constitute a commercial transaction, then s11(2)(a)(i) would operate to exclude the application of the s11 exception and restore immunity. The United States contended that "all the parties to the proceeding" in s11(2)(a)(i) should be read as "all the parties to the transaction" (being the transaction alleged in the Notice). Dodds-Streeton J accepted this interpretation of s11(2)(a)(i) on the basis that the literal meaning of s11(2)(a)(i) did not reflect the purpose behind the provision. **(ii) Non-Justiciability and Act of State Ground**As a subsidiary argument, the United States claimed that the doctrines of non-justiciability and act of state provided an alternate basis for immunity. Dodds-Streeton J found it unnecessary to determine these issues given that her Honour had found that the United States had immunity under the Act. **(iii) Relationship of this application to main proceedings**The defendants argued that a finding of immunity for the United States in this application would produce an odd result in the recovery proceeding. That is, if a similar application was made in the recovery proceeding, it would be contrary to public policy to deprive a defendant of its only defence, yet allow the plaintiffs (which include an agency of the United States) to proceed with the claim. Dodds-Streeton J stated that the present application by the United States could be determined independently of its potential implications (if any) for the recovery proceeding.**(iv) Conclusion**Dodds-Streeton J ruled that the alleged dealings in the Notice did not constitute a “commercial transaction” within s11 of the Act and that the immunity conferred by s9 applied to the United States. Alternatively, her Honour ruled that if immunity was lost under s11(1), it would be restored pursuant to s11(2)(a)(i) when, in accordance with intention, the literal meaning of that provision was modified to reflect its purpose. Dodds-Streeton J granted the United States’ application, setting aside the Notice on the basis of immunity from jurisdiction under the Foreign States Immunity Act 1986 (Cth).**4.11 Powers of the Companies Auditors and Liquidators Disciplinary Board in relation to auditors**(By Sarah d'Oliveyra, Phillips Fox)Goodman v Australian Securities and Investments Commission [2004] FCA 1000, Federal Court of Australia, Branson J, 7 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/august/2004fca1000.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/august/2004fca1000.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**In this case, Branson J of the Federal Court of Australia considered an application for an order of review, brought by Ralph David Goodman ('Goodman') under the [Administrative Decisions (Judicial Review) Act 1977 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "default) ('the ADJR Act'), in respect of a decision made by the Companies Auditors and Liquidators Disciplinary Board ('the Board') ('Goodman's application').In summary, Goodman's application was made in respect of a decision of the Board to hear an application by the Australian Securities and Investments Commission ('ASIC') to cancel Goodman's registration as an auditor pursuant to section 1292 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act') ('ASIC's application'). Goodman's application was dismissed and he was ordered to pay the costs of both ASIC and the Board. Upon the Board's subsequent hearing of ASIC's application, Goodman was suspended as an auditor for a period of twelve months.**(b) Facts** On or about 8 June 2004, ASIC made an application to the Board to cancel Goodman's registration as an auditor pursuant to section 1292(1)(d)(i) and (ii) of the Act, on the basis that he had failed to carry out or perform adequately the duties of an auditor in relation to the review of a financial report for a half-year (section 1292(1)(d)(i) of the Act) and further, or in the alternative, that he had failed to carry out or perform adequately and properly the duties or functions required by an Australian law to be carried out by an auditor (section 1292(1)(d)(ii) of the Act). ASIC's application was wholly based on an alleged failure by Goodman to comply with auditing standards prepared by the Auditing and Assurance Standards Board of the Australian Accounting Research Foundation (Australian Auditing Standards).On 25 June 2004, the Board made a preliminary ruling that ASIC's application came within the terms of section 1292(1)(d)(i) of the Act and that it therefore had jurisdiction to hear the application. ASIC's application was listed for hearing by the Board on 19 July 2004.Goodman subsequently applied to the Federal Court for orders of review of the following decisions of the Board:         That it had jurisdiction to hear and determine ASIC's application under section 1292(1)(d)(i) of the Act ('the First Ruling').         To conduct a hearing on 19 July 2004 ('the Second Ruling').Goodman also sought a declaration that ''the allegations against the Applicant [Goodman]…are incapable of amounting to a failure to carry out or perform adequately and properly a duty or function required by section 309(4) of the Act to be carried out or performed by a registered company auditor''.In respect of the First Ruling, Goodman claimed a lack of jurisdiction on the basis that in reviewing the relevant financial report, he was not carrying out or performing the duties of an auditor but rather, was carrying out or performing a duty or function required by an Australian law to be carried out or performed by a registered company auditor. In support of his application, Goodman also submitted that the Australian Auditing Standards are irrelevant to determining whether there has been any contravention of section 1292 of the Act. **(c) Decision** Branson J dismissed Goodman's application on the following grounds:         The Board is under a duty to receive and consider any application by ASIC for a person who is registered as an auditor to be dealt with under section 1292 of the Act.         The task of determining whether to conduct a hearing under section 1294 of the Act is within the jurisdiction of the Board.         The Second Ruling was not a reviewable decision under the ADJR Act because it did not, of itself, affect any of Goodman's substantive rights or interests.         The use of the words 'adequately' and 'properly' in section 1292(1)(d)(i) and (ii) of the Act incorporate notions of judgment which require consideration to be given to accepted professional standards such as the Australian Auditing Standards. Therefore, the Board is entitled to consider the Australian Auditing Standards (or such other accepted professional standards as determined by the Board at its discretion) in considering whether there has been a breach of section 1292 of the Act.**4.12 No relief for directors of corporate trustees who do not understand terms of the trust instruments**(By Carl Chessman, Corrs Chambers Westgarth)Arakella v Paton (No 2) [2004] NSWSC 605, New South Wales Supreme Court, Austin J, 7 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc605.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc605.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**A Court is unlikely to exercise its powers under section 85 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "default) (“Trustee Act”) to grant directors of a corporate trustee relief from any personal liability arising from a breach of the terms of the trust deed if those directors did not familiarise themselves with such terms.**(b) Facts** In March 1990, Arakella Pty Ltd (“Trustee”) was appointed trustee of the GNS Trading Trust (“Trust”). The directors of the Trustee relied on the Trustee’s accountant to advise them on all issues relating to the Trust and prior to August 2002, those directors did not seek any legal advice in relation to the terms of the Trust Deed.In August 2002, the directors of the Trustee were alerted to a number of potential breaches of the Trust Deed including the issue of units without unit holders’ approval and a failure to value and redeem units on the occurrence of a specific event. Subsequently, the directors sought legal advice on these issues. The directors of the Trustee also sought relief from any personal liability which may arise from these potential breaches pursuant to section 85 of the Trustee Act.**(c) Decision** The Supreme Court considered whether the directors of the Trustee ought to be relieved from any personal liability arising from these potential breaches of the Trust Deed by having regard to whether or not the directors’ behaviour was honest and reasonable in the circumstances. The Supreme Court found no evidence that suggested a failure by the directors to act honestly. However, the Supreme Court held that the directors did not act reasonably because of their failure to become acquainted with the terms of the Trust Deed and their reliance on an accountant to advise them in relation to the Trust generally.**(d) Practical implications**Directors of corporate trustees must familiarise themselves with the terms of the trust instruments to ensure that they do not breach those terms. If directors do not seek to familiarise themselves with such terms, they are unlikely to be granted relief by a Court from any personal liability arising from any breach of those terms.**4.13 Voidness for illegality and the effect in equity of liquidation on the "unclean hands" of a company** (By Ron Schaffer and Alastair Young, Clayton Utz)Karl Suleman Enterprizes Pty Limited (In Liquidation) v Babanour [2004] NSWCA 214, New South Wales Court of Appeal, Spigelman CJ, Beazley and Santow JJA, 28 June 2004The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswca214.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswca214.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **(a) Summary**In this latest decision of the Court involving the beleaguered Karl Suleman Enterprises Pty Limited (In Liquidation) (the "Company") the Court allowed the Company's appeal against a decision to strike out its statement of claim against an agent of the Company (the respondent to the appeal). The Company's agent was appointed to promote and introduce investors to a "fraudulent" managed investment scheme (the "Scheme"). At first instance the statement of claim was struck out by Windeyer J on the basis that any contract between the Company and its agent was void for illegality and/or because the Company could not enforce its equitable rights against its delinquent agent because the Company had not come to equity with "clean hands".The Court of Appeal overturned that decision. It found that any contract between the Company and its agent was not void for illegality. The finding was made on the basis that, although the Company had contravened the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the "Act"), the intention of the Act was merely to penalise persons who contravened it rather than to render acts done in contravention of the Act void.Further, the Court of Appeal found that, although the Company had contravened the Act, the statement of claim should not have been struck out for want of "clean hands". The Court of Appeal held that the effect of liquidation on the Company was to "wash" the hands of the Company. Herein lies what is essentially the most important aspect of this decision as it is an affirmation of the correctness of the approach taken in the New Zealand case of Marshall Futures Limited v Marshall [2002]1 NZLR 316 which held the appointment of liquidators to a company is sufficient to lift the "corporate veil" of a company such that it can be cleansed of prior inequitable conduct. This case, is therefore, an authoritative rejection, at least in New South Wales, of the strict approach that had been occasionally taken to the effect that the liquidation of a company cannot have a "cleansing" effect on the conduct of the company prior to liquidation.**(b) Facts**The Company set up the Scheme for investors to invest in a shopping trolley collection service business in consideration of the payment to the investors of significant periodic payments. Windeyer J described the Scheme as "an illegal and fraudulent operation". It was essentially a pyramid scheme whereby later investors' money would be used to make payments to prior investors.At all times the Scheme was unregistered, in contravention of sections 601EB and 601ED of the Act. Non-registration of a scheme is an offence that carries a maximum penalty of $22,000 or imprisonment for five years or both.In its statement of claim, the Company alleged that its agent breached his obligation to pay the Company monies that he had received from intending investors in the Scheme.The agent then brought proceedings to strike out the statement of claim for the reasons outlined above. Windeyer J found in favour of the agent. The Company appealed.**(c) Decision**Beazley JA (with whom Spigelman CJ and Santow JA agreed) allowed the Company's appeal.In respect of the question of voidness for illegality, her Honour held that Windeyer J had erred by finding that the Company's statement of claim was void. Windeyer J had concluded that, by virtue of the contravention of the Act and the general fraudulent nature of the Scheme the Company (albeit in liquidation) could not seek to enforce any legal (contractual) right that it may have had against its agent.The Court of Appeal held that courts should not refuse to enforce legal or equitable rights simply because they arose out of an unlawful purpose unless the statute itself discloses an intention that those rights should be unenforceable in all circumstances. To this extent the court applied the High Court's decision in Yango Pastoral Co Pty Limited v First Chicago Australia Ltd (1978) 139 CLR 410. That case stands for the proposition that a contract will not be void for illegality merely because a statute imposes a penalty for contravention of an express prohibition against certain conduct. According to Mason J, "the question is whether the statute intends merely to penalise the person who contravenes the prohibition or whether it intends to go further and prohibit contracts the making of which constitute the carrying [out of the conduct]"(at 426).In relation to the present case the Act provided that the Scheme would, unless duly registered, contravene the Act, and a penalty would apply. However, it is clear that the Act does not seek to invalidate action taken by the Scheme (the Act seeks to protect the members of an unregistered scheme by providing, pursuant to section 601EE, that the court may wind up a scheme that is being operated in contravention of it).Perhaps more controversially (although a decision that the Company's shareholders and creditors would argue must be right), is the decision of the Court of Appeal to favour the New Zealand decision of Marshall Futures. In that case it was held that the unclean hands of a company prior to liquidation can be "washed" when a liquidator takes control of the company. It was held in that case that "There cannot be any suggestion that the liquidator's hands are unclean..".Windeyer J had rejected the case of Marshall Futures and held that:"If the company guilty of fraud under one set of directors comes under the control of an honest set of directors that cannot make a claim which, if made by the company in the control of dishonest directors, would fail, into a claim that would succeed if brought when honest directors were in control."Windeyer J took a strict approach to the concept of the separate legal entity of a corporation in finding that the identity of directors (or the fact that liquidators had taken control of the Company) has no bearing on the conduct of the Company.In rejecting his Honour's approach, the Court of Appeal first noted that the equitable doctrine of "clean hands" is a defence rather than a doctrine that would found a strike out of a statement of claim. However, the Court of Appeal then applied the decision of Marshall Futures, and held that:"...his Honour is correct when he says that a change in directorship does not alter the legal identity of a company...the liquidators cannot make legal or non-fraudulent that which was illegal or fraudulent. However, they can take steps to reimburse the investors of sums of money of which they have been defrauded...it seems that that conduct is or is at least of a similar cleansing nature as has been held sufficient to defeat the defence of unclean hands." **(d) Conclusion**It appears that the critical feature of this decision, as far as equity is concerned, is that a company need not necessarily have performed an act (such as registering the Scheme) that would either wholly or partially wash its hands of inequitable conduct. Rather, this decision would indicate that a change in the directing mind of the company may found a cleansing of the prior acts of the company. On a practical level, and without such a finding, shareholders and creditors of a company in liquidation could be left out in the cold. As it is not the task of a liquidator to manage a company (and it may prove difficult for the liquidator to undo prior inequitable conduct), the liquidator may be left with no further avenues by which to pursue a company's equitable rights, tainted by the stigma of unclean hands, if the liquidator could not rely on the very fact of his appointment to wash the company's hands. |
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