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This milestone could not have been achieved without the support of those who contribute to the Bulletin – ASIC, ASX and the law firms named above.  This is also the final issue of the Bulletin for 2005. The next issue will be published in February 2006.  I wish all of our readers an enjoyable Christmas and a happy and prosperous New Year.  Professor Ian Ramsay Editor |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 New Centre for Corporate Law website launched**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has launched a new website. The website has a wealth of resources dealing with corporate law, corporate governance and securities regulation.  These resources include links to:   * Asian-Pacific corporate law and securities regulation sites (links are provided, on a country by country basis, to sites such as stock exchanges, securities commissions, corporate law legislation and corporate law judgments for each of these countries); * world securities commissions (links to approximately 60 securities commissions); * world stock exchanges (links to approximately 110 stock exchanges); * corporate governance (links to a range of organisations which are involved in corporate governance issues); * corporate social responsibility; * professional and interest bodies; and * financial news.   The Centre for Corporate Law website also provides free access to corporate law judgments of the High Court, Federal Court and the State Supreme Courts as well as decisions of the Takeovers Panel.  There are over 3,000 judgments on the website. An advanced search engine allows convenient searching for key words in all judgments. In addition, it is possible to search for judgments loaded onto the website within specified periods of time (eg in the last day, last week, last two weeks or last month).  The website also has issues 1 to 87 of the Corporate Law Bulletin.  Publications resulting from Australian Research Council (ARC) grants to members of the Centre for Corporate Law are on the website. This includes publications relating to the major ARC funded project "Corporate Governance and Workplace Partnerships".  Also on the website are research papers dealing with corporate law issues. Recent publications on this part of the Centre for Corporate Law website include:   * From the Picketline to the Boardroom: Union Shareholder Activism in Australia. * Shareholder Value and Employee Interests: Intersections of Corporate Governance, Corporate Law and Labour Law. * Employee Entitlements and Corporate Insolvency and Reconstruction * Australia Inside Out: The Corporate Governance System of the Australian Listed Market. * Employee Share Ownership Schemes in Australia: A Survey of Key Issues and Themes. * Shareholder Meetings: Key Issues and Developments. * The Impact of ACCC Enforcement Activity in Enforcement Cases. * The Role and Responsibilities of Directors on Board Sub-Committees * Insolvent Trading: An Empirical Study   You can subscribe on the website to receive news of Centre for Corporate Law events.  The address of the Centre for Corporate Law website is: [http://cclsr.law.unimelb.edu.au/](http://cclsr.law.unimelb.edu.au/" \t "_new)  **1.2 Review of the UK Combined Code**  On 15 December 2005, the UK Financial Reporting Council (FAC) announced that good progress has been made in implementing the revised Combined Code on Corporate Governance following its introduction in 2003. The Code has had a positive impact. There is no appetite for major change and only two suggested amendments carried strong support. These are the main findings of an implementation review carried out by the FRC between July and October this year.  The other main findings of the FRC's review are:   * It was the clear view of respondents to the review that there has been an improvement in the quality of corporate governance among listed companies since the introduction of the revised Combined Code, and more companies are choosing to follow the majority of provisions for which comparative data is available. * Both companies and investors report that the dialogue between boards and their main shareholders is more constructive than it had been several years ago, although there are concerns that the Combined Code continues to be viewed as a rigid set of rules in some quarters. * Investors consider that the overall quality of disclosure in annual reports has improved noticeably over the last couple of years, although they see scope for corporate governance statements to become more informative still. * In light of the progress that has been made since 2003, respondents to the review considered that significant changes to the Code were not necessary. As a consequence, the FRC will be recommending only two substantive amendments to the Code when it consults early in 2006.   The FRC will consult in January 2006 on possible amendments to the Combined Code. The main proposals will be to relax the existing provisions to allow the chairman to sit on the remuneration committee, and to add a new provision regarding companies including a ‘vote withheld’ box on AGM proxy voting forms, as recommended by the Shareholder Voting Working Group.  Further information is available on the [FRC website](http://www.frc.org.uk/" \t "_new).  **1.3 SEC votes to propose rule on foreign issuer deregistration**  On 14 December 2005, the United States Securities and Exchange Commission (SEC) voted to publish for comment proposals concerning the process whereby a foreign private issuer can terminate reporting requirements for classes of its securities registered under the Securities Exchange Act of 1934.  **(a) Introduction**  Under current rules, a foreign private issuer may exit the Exchange Act registration and reporting regime if the class of the issuer's securities has less than 300 record holders who are US residents. Under these rules, a foreign private issuer may find it difficult to terminate its Exchange Act registration and reporting obligations despite the fact that there is relatively little investor interest in the United States.  In light of the increased internationalization of the US securities markets that has occurred since the adoption of these rules, new Exchange Act Rule 12h-6 would allow a foreign private issuer to:   * terminate its registration of a class of equity securities under Exchange Act Section 12(g) and its resulting Section 13(a) reporting obligations or terminate, and not merely suspend, its Section 15(d) reporting obligations regarding a class of equity securities as long as the issuer meets specified criteria designed to measure US market interest for that class of securities; and * terminate, and not merely suspend, its Section 15(d) reporting obligations regarding a class of debt securities as long as it meets conditions similar to the current requirements for suspending its reporting obligations relating to that class of debt securities.   **(b) Equity securities**  A foreign private issuer would be eligible to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities under proposed Rule 12h-6 if it meets the following conditions:   * the issuer has been an Exchange Act reporting company for the past two years, has filed or furnished all reports required for this period, and has filed at least two annual reports under section 13(a) of the Exchange Act; * the issuer has not directly or indirectly sold its securities, with certain exceptions, in the United States in either a registered or unregistered offering under the Securities Act during the preceding 12 months; and * during the preceding two years, the issuer has maintained a listing of the securities on an exchange in its home country, as defined on Form 20-F, which constitutes the primary trading market for the securities.   An eligible foreign private issuer would then have to meet one of a set of alternative benchmarks, depending primarily on whether the issuer is a well-known seasoned issuer:  If the issuer is a well-known seasoned issuer, either:   * the US average daily trading volume of the subject class of securities has been no greater than 5 percent of the average daily trading volume of that class of securities in its primary trading market and US residents held no more than 10 percent of the issuer's worldwide public float; or * regardless of US trading volume, US residents held no more than 5 percent of the issuer's worldwide public float.   If the issuer is not a well-known seasoned issuer, regardless of US trading volume, US residents held no more than 5 percent of the issuer's worldwide public float.  Also, proposed Rule 12h-6 would provide that a foreign private issuer that is unable to meet one of the proposed new benchmarks, but does satisfy the rule's other conditions, could still terminate its Exchange Act registration and reporting obligations regarding a class of equity securities as long as that class of securities is held of record by less than 300 persons on a worldwide basis or less than 300 persons resident in the United States.  **(c) Debt securities**  A foreign private issuer would be eligible to terminate its Section 15(d) reporting obligations regarding a class of debt securities under proposed Rule 12h-6 if it meets the following conditions:   * the issuer has filed or furnished all required reports under Section 15(d), including at least one annual report pursuant to Section 13(a) of the Act; and * the class of debt securities is either held of record by less than 300 persons on a worldwide basis or less than 300 persons resident in the United States.   **(d) Counting method**  In order to facilitate a foreign private issuer's determination regarding whether US residents hold no more than the applicable threshold percentage of its worldwide public float or whether the number of its US resident equity or debt securities record holders meet the applicable threshold condition, proposed Rule 12h-6 would permit an issuer to:   * limit its inquiry regarding the amount of securities represented by accounts of customers resident in the United States to brokers, dealers, banks and other nominees located in the United States, the foreign private issuer's jurisdiction of incorporation, legal organization, or establishment and, if different, the jurisdiction of the foreign private issuer's primary trading market; and * rely in good faith on the assistance of an independent information services provider that in the regular course of business assists issuers in determining the number of, and collecting other information regarding, their shareholders.   **1.4 Global upturn in M&A fuelled by Asia**  The global merger and acquisition (M&A) market is currently outstripping last year's improved activity levels by 19 percent, the value and volume of completed activity rising in equal measure according to an analysis by KPMG's Corporate Finance practice, based on data supplied by Dealogic published on 12 December 2005.  As year-end approaches, 24,806 M&A deals with a combined value of US$2,059 billion have so far completed around the world this year. This builds on last year's positive figures by adding 19 percent to the 20,888 deals worth US$1,736 billion that closed over the same period last year (January-November 2004). The Asia Pacific region is experiencing the largest growth in M&A across the globe up 39 percent by value and 50 percent by volume on last year.  Calendar year 2005 is already a record year for the Asia Pacific region which has so far attracted 6,921 deals worth US$370 billion, the highest activity levels ever logged for Asia Pacific. The main driver behind this activity is the boom in Japan.  Of the 15 biggest deals in the Asia Pacific region, seven of them involved Japan. A noticeable feature of the Japanese activity is that a very large proportion of deals were Japanese companies buying other Japanese companies. The increase in Japanese deal volumes seems to be the result of a gradual erosion of cultural and other impediments to transactions as well as an indicator of the restored financial health of the Japanese banking system.  In 2005, Japan experienced an 87 percent increase in deal value and a 58 percent rise in deal numbers over the same 11 month period as last year. By deal value, this puts Japan as the number three targeted nation behind the US and UK and the second most active acquirer nation behind the US so far in 2005.  The top three sectors by value of activity this year are: telecoms, financial services and real estate. Of these, financial services saw a marked decline in activity compared to last year dropping 35 percent by value (four percent by volume) to US$220 billion from 1,667 deals so far this year. A further 444 insurance deals valued at US$30 billion have closed this year but this is also below last year’s activity levels - 53 percent by value and 13 percent by volume.  The value of private equity deals as a proportion of all deals worldwide has reached 13 percent so far this year and 7 percent by volume and is broadly on a par with last year's share of the market. The 1,600 private equity deals worth US$265 billion closed this year is a 19 percent increase in the value of private equity activity but a decline of three percent in the number of deals on the first 11 months of 2004 (all figures are US$).  Looking at the overhang for all deal activity as 2006 approaches, 3,015 deals with a combined value of US$987 billion announced globally in 2005 have yet to complete. This is a substantial increase in the value of the pipeline seen at this time last year, which stood at US$479 billion, and represents an extra 48 percent on the total value of deals closed in 2005 so far.  **1.5 Larger deals drive increased global IPO activity in 2005**  Global IPO activity saw sustained growth in 2005 according to figures released on 12 December 2005, by Ernst & Young and Thomson Financial. In the period from January through November 2005 $138.5 billion was raised in 1268 IPO's, already exceeding the $124 billion raised in the whole of 2004 (all figures are US$).  This increase in capital raised was led by larger deals in 2005 – there were 59 deals raising more than $500 million in January to November 2005, compared to 44 of a similar size in the same period in 2004. The three biggest deals of 2005 exceeded the previous year's largest, Belgacom ($4.4 billion raised), with the IPO for a Chinese State bank, China Construction Bank, raising $9.2 billion – the biggest IPO in five years, and the largest Chinese enterprise IPO ever. The next two largest deals in 2005 were for state-owned French enterprises: Electricite de France ($7.3 billion raised) and Gaz de France ($4.8 billion).  These deals helped France overtake the UK into third place in the top ten countries by total capital raised, behind the US and China, with 28 deals worth $14.8 billion. This led a European rebound – the region saw a 68% increase in capital raised in 2005 to $51.2 billion, in 290 deals. While none of the top three deals were US deals, the US accounted for the largest number of IPOs greater than $500 million, with 14 IPOs raising $10.2 billion. The US also retained first place in terms of both total capital raised and number of deals.  The strong European rebound was led by the two big French IPOs and the strength of the emerging Eastern European markets, particularly Russia and Poland. Another significant factor is the continuing popularity of the Alternative Investment Market (AIM) in the UK, which accounted for 82% percent of UK deals and 90 foreign transactions in 2005.  Highlights of the survey include:   * $138.5 billion raised in 1268 IPOs worldwide from January to November 2005, compared with $112.2 billion raised in 1352 deals in the same period last year. * Larger deals led the increases in capital raised in 2005 – there were 59 deals raising more than $500 million from January to November 2005, compared to 44 deals in the same period in 2004. * Europe rebounded strongly with $51.2 billion in capital raised – up 68% increase on 2004, although the total number of deals fell slightly. * Established European markets did well: France saw transactions up 17% and total capital raised up 163%; Germany a 360% increase in number of transactions and a 102% rise in capital raised; in the UK the number of deals dropped 40% but total capital raised was up 9%. * Emerging European markets also gave a strong showing, particularly Russia (deals up 33%, capital raised up 386%). * IPO activity in Asia dropped off slightly with the total number of deals down by 26% to 531 and the total capital raised down 4% to $38.0 billion. * China continues to lead in Asia with a 43% increase in the amount of capital raised, while Japan saw a drop in both the number of deals – down 22% and total capital raised (down 59%). * Although still top of the table, the US saw a fall both in the number of deals, down 5% to 175, and the total capital raised, down 21% to $27.9 billion.   Further information about the survey is available on the [EY website](http://www.ey.com/global/content.nsf/International/Home" \t "_new).  **1.6 Reform of shareholder meetings**  On 8 December 2005, the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce MP, announced that the Government will proceed with legislative reforms to rules for shareholder meetings. The announcement follows an extensive consultation process.  The Government intends to remove the '100 member rule', which requires companies to hold special general meetings at the request of only 100 shareholders.  "There is broad business support for this reform. It strikes an appropriate balance between facilitating shareholder participation and managing costs for companies" Mr Pearce said.  The Government will also proceed with reforms to require proxy holders to vote in accordance with shareholder instructions, and to facilitate electronic circulation of resolutions and members statements.  The Government will not proceed with proposals to reduce the threshold requirements for shareholders to propose members' resolutions and members' statements.  **1.7 IPOs – the Australian market in 2005**  A strong Australian IPO market continued to deliver solid returns for investors with premiums on both Small and Large Cap floats at a six year high of 17 and 24 per cent, respectively, according to an 11 month analysis by PricewaterhouseCoopers published on 6 December 2005.  The analysis, which charts IPO performance until 30 November 2005, shows that while Small Cap floats overall have been trading at a premium, 15 of the 39 listings are trading at a discount to their issue price, with eight of these trading at a discount of 15 per cent or more.  All but one of the 14 Large Cap floats listed is trading at a premium to their issue price. Historically, Large Cap floats have a more established history of earnings and gain greater after market support from investors than Small Cap floats.  The analysis takes into account 74 floats which have been completed in the 11 months to 30 November 2005, raising a total of $6.2 billion (excluding resources, compliance and backdoor listings). In addition, there are another 25 floats scheduled for completion in the lead up to Christmas. Collectively, these floats are seeking to raise over $7 billion, more than the entire amount raised in the first 11 months of the year.  Although the number of anticipated listings for the full year to 31 December 2005 (99), should be broadly in line with 2004 (97), the capital to be raised of more than $13 billion will be nearly double the $7.2 billion raised last year, and the highest by a significant margin since 1997 (the year of the Telstra IPO).  Of the 74 companies floated for the year to date, there has been a slight increase in the number of larger listings. Twenty eight had a market capitalisation of more than $100 million on listing. Consistent with prior years, the majority of IPOs for 2005 (46) remain smaller listings of less than $100 million market capitalisation on listing.  The sector with the strongest float activity to date has been Investment & Financial Services, which raised $3.3 billion from 14 floats. In this sector there were two major floats each raising $1 billion (on an instalment basis), being Babcock & Brown Capital and Macquarie Capital Alliance Management. Investment & Financial Services has consistently doubled the amount of capital raised year on year, over the past four years as new funds have come to market. This year, the sector was responsible for raising more than 50 per cent of the total capital raised to 30 November.  Other prominent sectors for float activity included Health & Biotechnology (13 floats raising around $122 million) and Property Trusts (seven floats raising $870 million). Activity in the retail sector softened with only three floats raising $89 million, significantly down on 2004 (nine floats raising $1.9 billion).  This analysis is part of the PricewaterhouseCoopers' Annual Survey of Sharemarket Floats. The 14th edition of the survey, for calendar year 2005 is due to be released early next year. The survey excludes resources listings because of differing operating and valuation fundamentals.  **1.8 Union shareholder activism: research report**  A research report published on 6 December 2005 by the University of Melbourne's Centre for Corporate Law and Securities Regulation and Centre for Employment Labour Relations Law highlights a growing trend of trade unions using their position as shareholders in companies to pursue industrial relations issues. The important question highlighted in the research report is whether, with the role of trade unions under labour law being reduced by the new WorkChoices legislation, unions will make even more use of their position as shareholders to pursue industrial relations issues.  **(a) How unions engage in shareholder activism**  Australian trade unions have used the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to pursue industrial relations issues in four key ways:   * Use of the "100 member rule" to put forward resolutions to be voted on at annual general meetings (AGMs). * Use of the "100 member rule" to call extraordinary general meetings (EGMs). * Lobbying for proxy votes through distribution of statements in support of union sponsored resolutions to be voted upon at shareholder meetings. * Posing questions to the board of directors at shareholder meetings in order to highlight employee interests.   **(b) Case studies**  The research report examines in detail the growing trend of union shareholder activism through a series of case studies. These case studies are:   * The Construction Forestry Mining and Energy Union (CFMEU) campaign at the Rio Tinto 2000 AGM. * The Transport Workers Union (TWU) campaign at the Boral 2003 AGM. * The Finance Sector Union (FSU) campaign to have a member appointed to the board of ANZ in 2003. * The Finance Sector Union (FSU) campaign at the Commonwealth Bank of Australia 2004 AGM. * The Australian Workers Union (AWU) campaign at the 2004 BlueScope Steel 2004 AGM. * The Australian Service Union (ASU) "vote no" campaign at the Quantas 2004 AGM. * The Australian Council of Trade Unions (ACTU) "vote no" campaign at the James Hardie 2004 AGM. * The Australian Manufacturing Workers Union (AMWU) campaign to call an extraordinary general meeting of NRMA members in 2004.   **(c) Key points**  The main findings of the research are:   * In all of the case studies examined in the research report, unions have engaged in shareholder activism against the backdrop of an industrial dispute with the company. * Until recently, Australian unions enjoyed a prominent role within the labour law regulatory framework and their ability to pursue industrial interests was significant. However, unions have experienced a decline in their power and influence starting with the [Workplace Relations Act 1996](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6125" \t "Default) and continuing through to the end of 2005 with the recent WorkChoices legislation. This reduced role of unions, caused by changes to labour law, can help to explain the recent use by unions of the Corporations Act to influence the conduct and management of companies. * The unions that have utilized shareholder activism are large and well resourced unions. * In order to obtain the support of other shareholders, unions have endeavoured to focus not only upon employee interests when they put forward resolutions to be voted upon at shareholder meetings, but they have also focused upon traditional corporate governance issues such as the independence of directors and perceived excessive executive remuneration. * Unions have used shareholder activism as a means of bringing pressure to bear on company boards of directors and also as a means of opening a direct dialogue with directors and senior management, typically in the context of failed or stalled enterprise bargaining negotiations between the company and the union. * In some cases, unions have been able to exert significant influence upon companies by using shareholder activism. When the Transport Workers Union requisitioned an extraordinary general meeting of NRMA in relation to industrial relations matters, NRMA estimated that it would cost $6 million to hold the meeting. The union was able to use the threat of the meeting to gain sufficient leverage in its negotiations with the company to have the dispute resolved in its favour. Sometimes unions are able to obtain significant votes in support of their resolutions indicating that they have been able to obtain the support of other shareholders. For example, at the Rio Tinto AGM in 2000, 20.3% of all shares voted were cast in support of a union sponsored resolution concerning the appointment of independent directors to the board of Rio Tinto. A second union sponsored resolution dealing with adherence by Rio Tinto to international labour standards received 17.3% of all shares voted. * An important question is whether unions will link with superannuation funds to bring even more resolutions to shareholder meetings, as has occurred in the US. In 2004, union sponsored pension funds in the US submitted 43% of all shareholder initiated resolutions dealing with corporate governance at meetings of US listed companies. * Will there be a backlash against union shareholder activism? Earlier this year, the Commonwealth Bank commenced legal action against the Finance Sector Union arguing that its union shareholder campaign constituted unlawful industrial action designed to coerce the Bank into making an enterprise agreement. The court has not yet handed down its decision.   The research report was written by Kirsten Anderson and Professor Ian Ramsay. It is available on the Centre for Corporate Law and Securities Regulation website at: [http://cclsr.law.unimelb.edu.au/go/news/index.cfm](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new)  **1.9 Survey - shareholders and other stakeholders**  Australians and shareholders believe that companies should consider the interests of all stakeholders but few companies do this well according to research released on 6 December 2005 by professional accounting body, CPA Australia.  CPA Australia's fourth annual Confidence in Corporate Reporting Survey revealed that nearly nine out of 10 Australians and investors believe the interests of shareholder and other stakeholders should be of equal importance to a company.  The survey also found that:   * nearly nine out of 10 Australians and shareholders believe better management of a company's social and environmental concerns benefits shareholders; and * only 38 per cent of Australians and 34 per cent of shareholders believe financial performance is more important than environmental and social concerns.   In practice, however, fewer Australians and shareholders believe company directors adequately balance the financial performance of their company with its social and environmental concerns, with the survey confirming that the majority of Australians and shareholders do not believe company directors adequately balance these interests.  A key consideration is determining who are company stakeholders. The CPA Australia survey asked respondents to nominate who they believed was a stakeholder from a list comprising shareholders, employees, local environment, creditors, customers, local community, future generations and the Australian public. In all cases more than half the public agreed that each was a stakeholder, with shareholders, employees and the local environment polling over 70 per cent.  CPA Australia's fourth annual Confidence in Corporate Reporting Survey surveyed 300 members of the public, including 166 shareholders, along with 150 analysts/advisers/brokers, 200 Directors/CEOs/CFOs and 50 Auditors on a wide range of corporate social responsibility and sustainability issues. Questions ranged from role and responsibilities of business, Governments, shareholders and regulators, to whether Australians seek information about the social and environmental practices of a company and whether this impacts on their investment, employment and purchasing decisions.  Copies of the CPA Australia's Confidence in Corporate Reporting Survey 2005 detailed findings and further media releases are available from the News and Advocacy section of the [CPA website](http://www.cpaaustralia.com.au/cps/rde/xchg" \t "_new).  **1.10 M&A – the Australian market in 2005**  The value of mergers and acquisitions (M&A) in Australia dropped by 19 percent in 2005 compared to the same period in 2004, according to research by KPMGs Corporate Finance practice published on 5 December 2005.  While the number of deals rose slightly from 612 in the first 11 months of 2004 to 651 in the first 11 months of 2005, the value of deals fell substantially from $61 billion to $49 billion over the same time frame.  According to KPMG, the slow down in M&A activity may be a result of three factors: the strong Australian dollar, an expensive local market and greater opportunities for organic growth in some sectors, particularly resources.  The value of Australian acquisitions of foreign-owned companies has almost doubled from US $12.9 billion for the full year 2004 to US $22.1 billion. Over the past year, many super fund vehicles, listed property trusts and Private Equity funds have bought into offshore ventures particularly in the infrastructure and real estate sectors. Inversely, the value of foreign investment in Australian companies has continued to decline decreasing by 75 percent over the past six years to US$7.2 billion for the 11 months to 30 November 2005.  **1.11 EU financial services policy for the next five years**  On 5 December 2005, the European Commission presented its new financial services strategy for the next five years. Although progress has been made through the successful completion of the Financial Services Action Plan (FSAP), the Commission concludes that the EU financial services industry (banking, insurance, securities, asset management) still has strong untapped economic and employment growth potential. The Commission's new strategy explores the best ways to effectively deliver further benefits of financial integration to industry and consumers alike. Priority No 1 is to consolidate progress and ensure sound implementation and enforcement of existing rules. No 2 is to drive through the better regulation principles into all policy making. No 3 is to enhance supervisory convergence. No 4 is to create more competition between service providers, especially those active in retail markets. No 5 is to expand EU's external influence in globalizing capital markets.  While the FSAP focused mainly on the wholesale market, retail integration will become more important over the next period. Barriers associated with the use of bank accounts will be examined, with a view to enabling consumers to shop around all over Europe for the best savings plans, mortgages, insurance and pensions, with clear information so that products can be compared.  A consultative Green Paper was published 3 May 2005. Responses have shown broad support for these priorities.  The full text of the Commission's new strategy is available on the [Europa website](http://europa.eu.int/" \t "_new).  **1.12 UK Financial Services Authority publishes better regulation plan**  On 2 December 2005, the Financial Services Authority (FSA) published plans for further moving the balance of financial services regulation towards high level principles rather than detailed rules and guidance.  In its Better Regulation Action Plan the regulator summaries more than 30 recent or proposed improvements to the way it regulates, including:   * introducing simpler, more up-to-date listing rules reduced in length by 40% with further simplification to be proposed in 2006; * encouraging industry, rather than regulatory, solutions for problems relating to soft commissions, bundled brokerage and contract certainty – regulation will be considered only if market failures remain uncorrected; * removing barriers restricting access to retail financial advice – allowing alternative business models to remove barriers that impede competition and innovation; * introducing more flexible rules for collective investment schemes – modernizing and simplifying the rule book has halved its length; * simpler conduct of business rules – consulting in 2006 on simplifying rules relating to dealing with retail customers, to include removing rules that are no longer effective or proportionate or which overlap and reviewing the balance between high-level and prescriptive rules; * lifting audit requirements for smaller regulated firms – saving around 9,000 firms from having to have annual accounts independently audited; * making application packs shorter – reducing the average time from application to authorisation by 25%; and * cutting bureaucracy for approved persons – reducing form-filling and reporting requirements placed on their employers.   The current approach to regulation is a hybrid of high level principles and detailed rules and guidance. However, the FSA believes that better outcomes will be produced by encouraging a focus on the best actions to take in a particular situation rather than simply following a mechanistic process. This will not, according to the FSA, result in any loss of predictability in the regulatory approach. The FSA will continue to provide guidance to firms, support industry solutions to problems that might otherwise be addressed through regulation, where these are appropriate, and take action against firms only when they are in clear breach of the principles.  The plan also sets out areas in which regulation may increase, particularly through the requirement to implement European Directives. Here, the FSA is committed to implementing directives in a sensible and proportionate way. It is obliged to implement the minimum requirements, even if these would fail a cost-benefit analysis from the UK's viewpoint, but it will not "gold-plate" EU requirements. It will add requirements only when they are justified in their own right. In addition, the FSA's scope is due to be widened by the Government to include Self-Invested Personal Pensions, Home Reversion Schemes and Islamic home finance products. HM Treasury is also reviewing how a number of other sectors are currently regulated.  In a parallel piece of work, the FSA and the Financial Services Practitioner Panel are conducting a project to establish more authoritatively the costs of regulation on a firm and to highlight areas where the costs may exceed the benefits. This was due to be completed early next year, but will now report during the second quarter of 2006 to allow time for further data collection.  The Better Regulation Action Plan is available on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  **1.13 James Hardie Industries approves final funding agreement for asbestos victims**  On 1 December 2005, James Hardie Industries NV (JHINV) announced that its Board had approved the Principal Deed (Final Funding Agreement) to provide long term funding for Australian asbestos-related personal injury claims that result from exposure to products made by former James Hardie Group subsidiaries.  The Final Funding Agreement was negotiated having regard to the terms of the Heads of Agreement signed on 21 December 2004 by the Australian Council of Trade Unions, NSW Government, Unions NSW, Asbestos support groups and James Hardie.  The Final Funding Agreement is a legally binding agreement and sets out the basis on which James Hardie will provide funding to the Special Purpose Fund (SPF). The arrangements include:   * the establishment of the SPF to compensate asbestos sufferers with claims against the former James Hardie Group subsidiaries, Amaca Pty Ltd, Amaba Pty Ltd or ABN 60 Pty Ltd; * initial funding of the SPF by James Hardie of approximately A$154 million; * a two year rolling cash 'buffer' in the SPF and an annual contribution in advance, based on actuarial assessments of expected claims for the following three years, revised annually; * a cap on the annual James Hardie payments to the SPF in all years, except the first year, initially set at 35% of annual net operating cash flow of the JHINV Group for the immediately preceding financial year, with provision for the percentage to decline over time, depending on James Hardie's financial performance and the claims outlook; * no cap on individual payments to proven claimants; and * special compensation arrangements for members of the Baryulgil community for asbestos-related claims arising from the activities of Marlew Mining Pty Ltd.   The Final Funding Agreement is subject to a number of conditions precedent, including James Hardie being satisfied with the tax treatment of the proposed funding arrangements and receiving the approval of its lenders and shareholders.  KPMG Actuaries has updated its actuarial report in relation to the expected liabilities of the SPF as at 30 June 2005. The KPMG Actuaries' central estimate of the net liabilities is A$1,568 million. This figure is discounted and net of insurance recoveries and NSW cost savings following recent legal reforms by the NSW Government. The undiscounted value of the central estimate (net of NSW cost savings) of the liabilities is A$3,131 million.  The arrangements are designed to provide funding for Australian proven personal injury claims over the 40+ year term of the SPF whilst preserving the financial health and growth prospects of James Hardie.  **1.14 European Commission and US SEC outline next steps in the financial reporting equivalence roadmap**  The European Federation of Accountants has facilitated progress on the roadmap for convergence between IFRS and US GAAP by organising a high level policy seminar bringing together the key stakeholders from both sides of the Atlantic.  Documents from the seminar, which took place in Brussels on 1 December 2005, including the speech of European Commissioner McCreevy, are available to download at: [http://www.fee.be/news/default.asp?library\_ref=2&content\_ref=535](http://www.fee.be/news/default.asp?library_ref=2&content_ref=535" \t "_new)  **1.15 US PCAOB issues report on initial implementation of Auditing Standard No 2**  On 30 November 2005, the US Public Company Accounting Oversight Board (PCAOB) published a report discussing issues identified in the course of the Board's monitoring of the implementation of Auditing Standard No 2, An Audit of Internal Control over Financial Reporting Performed in Conjunction with an Audit of Financial Statements. That standard implements sections 103 and 404 of the Sarbanes-Oxley Act of 2002 by establishing a process for auditing a public company's internal control over financial reporting in conjunction with an audit of financial statements.  The Board found that both firms and issuers faced enormous challenges in the first year of implementation, including strains on available resources; a shortage of staff with prior training and experience in designing, evaluating, and testing controls; and the limited timeframe that issuers and auditors had to implement section 404. These challenges were compounded in cases in which companies needed to make significant improvements in their internal control systems to make up for deferred maintenance of those systems.  The Board's monitoring revealed that some audits performed under these difficult circumstances were not as effective or efficient as Auditing Standard No. 2 intends and as the Board expects they can be in the future, given the benefits of experience, adequate time and resources.  The Board has identified, in its inspections and other monitoring, certain areas in which auditors should be able to make their audits more effective and efficient in the future, by obtaining sufficient evidence for an opinion in a manner that appropriately conserves time and other resources. These areas are described in the report.  The Board understands that, based on first-year experiences and on previous Board guidance, firms already have modified their audit methodologies and training materials in a number of these areas, to improve the effectiveness and efficiency of their internal control audits.  The Board previously provided guidance in its 16 May 2005 policy statement as well as in a series of staff questions and answers. The policy statement, in particular, focused on several of the auditing practices observed in the first year of implementation of section 404 that may have been ineffective or inefficient means of meeting the objectives of Auditing Standard No 2. It also described the PCAOB's intention to supervise implementation of the standard, from providing additional guidance to make audits of internal control more effective and cost-efficient to driving improvements in implementation through PCAOB inspections of registered public accounting firms.  The Board's observations in its report on initial implementation of Auditing Standard No 2 are based in significant part, but not exclusively, on information obtained by the Board in the Board's inspection process, which in the 2005 cycle included review of portions of a limited selection of audits of internal control over financial reporting.  The report is available on the [PCAOB website](http://www.pcaobus.org/" \t "_new).  **1.16 EU cross-border mergers directive adopted**  On 29 November 2005, the European Commission welcomed the recent adoption of the cross-border mergers Directive, which has now been published in the Official Journal. The Directive was adopted in a single reading by both the Council and the European Parliament. This key measure responds to strong demand from businesses and enables cross-border mergers of limited-liability companies in the European Union, which until now had been impossible or very difficult and expensive. It will be of particular interest to small and medium sized companies that want to operate in more than one Member State, but not throughout Europe, and are not able to seek incorporation under the European Company Statute. The Directive is expected to reduce costs, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit.  The Directive covers all limited-liability companies, with the exception of undertakings for collective investment in transferable securities (UCITS). Also, there are special provisions for cooperative societies. Given the diversity of cooperatives in the EU, Member States can, with the Commission's agreement, prevent a cooperative from taking part in cross-border mergers for a limited period of five years.  One of the main issues at stake during the adoption process was the provision on employee participation, given the widely diverging systems in force in Member States, and the related question of how to deal with cross-border mergers implying a loss or a reduction of employee participation. Under the adopted Directive, employee participation schemes should apply to cross-border mergers where at least one of the merging companies already operates under such a scheme. Employee participation in the newly created company will be subject to negotiations based on the model of the European Company Statute.  The Commission proposed the Directive in November 2003 (IP/03/1564). The Directive received the Council's political agreement in November 2004 (IP/04/1405) and was adopted by the European Parliament in May 2005 (IP/05/551). It was formally adopted by the Council in September 2005 and signed by the Council and Parliament on 26 October.  The full text of the Directive is now available in the Official Journal:  [http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2005:310:SOM:EN:HTML](http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2005:310:SOM:EN:HTML" \t "_new)  For more information on cross-border mergers in the EU, see:  [http://europa.eu.int/comm/internal\_market/company/mergers/index\_en.htm](http://europa.eu.int/comm/internal_market/company/mergers/index_en.htm" \t "_new)  **1.17 APRA releases proposed prudential framework for IFRS**  On 29 November 2005, the Australian Prudential Regulation Authority (APRA) issued the first of two consultation packages outlining its proposed prudential response to the adoption of International Financial Reporting Standards (IFRS) in Australia by authorised deposit-taking institutions (ADIs) and general insurers.  This consultation package follows industry consultation and outlines APRA's approach on a range of issues including fair value measurement, excess of market value over net assets (EMVONA) employer sponsored defined benefit superannuation fund surpluses and deficits as well as loan loss provisioning.  APRA's Chairman, Dr John Laker, said that APRA's approach seeks to align its prudential and reporting standards with IFRS-based financial reports to the extent practicable.  The consultation package includes draft ADI prudential standards, guidance notes and prudential reporting forms. Relevant changes for general insurers will be introduced following completion of consultation on APRA's general insurance Stage 2 reforms dealing with capital, assets in Australia and custodian arrangements.  Comments on the proposed ADI prudential standards, guidance notes and reporting forms are invited by 16 January 2006. The standards will come into force from 1 July 2006, with transition arrangements where appropriate.  APRA's consultation package is available on the [APRA website](http://www.apra.gov.au/" \t "_new).  **1.18 The UK Operating and Financial Review**  On 29 November 2005, the UK Financial Reporting Council (FRC) published a statement noting the announcement made by the Chancellor of the Exchequer in his speech to the CBI Annual Conference that the Government intends to remove the statutory requirement for quoted companies to publish an Operating and Financial Review (OFR) for financial years beginning on or after 1 April 2005.  The announcement has implications for a number of the FRC's operating bodies:   * The Accounting Standards Board (ASB), which has issued Reporting Standard 1 (RS1) 'The Operating and Financial Review' under its legal powers to make reporting standards for the statutory OFR; * The Auditing Practices Board (APB), which has developed draft standards and guidance in respect of the auditor's new statutory reporting responsibilities in relation to directors' reports and the OFR; and * The Financial Reporting Review Panel (FRRP), which has revised its Operating Procedures to take account of its anticipated new statutory powers to enforce compliance with the statutory requirements for the OFR with the law for financial years beginning on or after 1 April 2006.   As the Government's detailed plans for removing the statutory requirement for the OFR (while retaining the requirement for an enhanced business review in the director's report) become clearer, the FRC and its operating bodies will consider the implications, consult as appropriate and make further announcements.  The FRC states in its announcement that it has long believed that the publication of a narrative explanation of a company's development, performance, position and prospects should be encouraged as an important element of best practice in corporate reporting. The ASB first produced a statement of best practice in 1993 (updated in 2003). A significant number of FTSE 100 companies already publish an OFR. Regardless of whether or not an OFR is a statutory requirement, the FRC's view of best practice remains unchanged. RS1 is the most up-to-date and authoritative good source of best practice guidance for companies to follow.  Further information is available on the [FRC website](http://www.frc.org.uk/press/pub0974.html" \t "_new).  **1.19 SEC votes to propose rule to provide investors with internet availability of proxy materials**  On 29 November 2005, the Securities and Exchange Commission (SEC) voted to propose for public comment rules that would allow companies and other persons to use the Internet to satisfy proxy material delivery requirements.  **(a) Introduction**  When a person solicits a proxy from the shareholders of a company that is subject to the Commission's proxy rules, Rule 14a-3 currently requires that a proxy statement, which must include specified disclosure, be delivered with or prior to that solicitation. Further, when a company solicits proxies, it also must deliver an annual report to shareholders, which must include additional specified disclosure. Under current rules and Commission interpretations, the proxy statement and annual report must be delivered in paper form or, if the shareholder consents, they may be delivered electronically (for example, by e-mail). The electronic delivery option requires affirmative shareholder consent and currently is used only on a limited basis.  The proposed rules potentially would have two significant benefits: (1) they could result in a substantial decrease in the expense incurred by issuers to comply with the proxy rules; and (2) they would provide persons other than the company with a more cost-effective means to undertake their own proxy solicitations.  **(b) Companies' use of the proposed "Notice and Access" model to furnish proxy materials**  The company could satisfy its obligation to furnish proxy materials to shareholders through a "notice and access" model. The company would post its proxy materials on an Internet Web site (other than EDGAR) and would send a "Notice of Electronic Proxy Materials" (the Notice) at least 30 days before the date of meeting.  The Notice would have to contain the following information:   * a prominent legend in bold-face type that advises shareholders of: (1) the date, time, and location of the meeting; (2) the electronic availability of the proxy materials at a specified Web site address; and (3) a toll-free phone number and e-mail address that shareholders may use to request copies of the proxy materials; and * a clear and impartial description of the matters to be considered at the meeting along with the company’s recommendation regarding those matters.   The Notice would have to be written in plain English and could not include any additional information.  The following procedural requirements also would apply.   * The proxy card would have to be accompanied by, and delivered through the same medium (paper or electronic) as, either the Notice or the proxy statement. * If a shareholder requested a copy of the materials identified in the Notice, the company would be obligated to send the materials within two business days. * Additional soliciting materials that are distributed after the Notice is sent would have to be posted on the Web site specified in the notice. * For shareholders holding their shares through brokers, banks, or other intermediaries, the Notice and voting instruction form would be delivered through the intermediary. Those shareholders could request copies through either the company or the intermediary.   The proposed rules would have no impact on any state law obligation regarding soliciting proxies or holding annual meetings. Further, the proposed rules would not apply to business combination transactions.  **(c) Other soliciting persons' use of the proposed "Notice and Access" model to furnish proxy materials**  Persons other than the company that are soliciting proxies would be able to rely on the proposed "notice and access" model in substantially the same manner as the company, with appropriate changes in the information required in the Notice. Because a competing solicitation likely would begin only after the company began its solicitation, the Notice would have to be provided to shareholders by the later of 30 days before the meeting or 10 days after the company filed its proxy materials.  The proposed rules would continue to permit a soliciting person conducting a proxy solicitation to limit its solicitation to shareholders who are willing to access the soliciting person's proxy materials electronically. Under such a limited solicitation, the soliciting person would have no obligation to deliver paper or e-mail copies of the proxy materials to anyone. Unlike a company, a soliciting person also would not have to deliver a Notice to shareholders unless the soliciting person wanted to deliver the proxy card or request for voting instructions to shareholders instead of posting it on an internet website.  Comments on the proposed rules should be received by the Commission within 60 days of their publication in the Federal Register.  The full text of detailed releases concerning the rules is available on the [SEC website](http://www.sec.gov/" \t "_new).  **1.20 Basel Committee issues consultative document on sound credit risk assessment and valuation for loans**  On 28 November 2005, the Basel Committee on Banking Supervision issued for public comment guidance for banks and supervisors on sound credit risk assessment and valuation policies and practices for loans.  Sound Credit Risk Assessment and Valuation for Loans will replace the sound practices paper for loan accounting and disclosure published by the Committee in July 1999. The paper addresses how common data and processes may be used for credit risk assessment, accounting and capital adequacy purposes. It also highlights provisioning concepts that are intended to be consistent with prudential and accounting frameworks.  The practices address necessary processes for banks in sound credit risk assessment, valuation and control, and the responsibilities of the board of directors and senior management for maintaining adequate loan loss provisions.  The paper also provides guidelines on how supervisors should evaluate the effectiveness of a bank's credit risk policies and practices when assessing the adequacy of their credit risk assessment process and regulatory capital.  The consultative document is available on the [Basel Committee website](http://www.bis.org/" \t "_new).  **1.21 Forty-five percent of companies worldwide are victims of economic crime**  Rising economic crime poses a growing threat to companies, with nearly half of all organisations worldwide being victims of fraud in the past two years, according to PricewaterhouseCoopers' Global Economic Crime Survey 2005. The survey was published on 28 November 2005. The number of companies reporting fraud increased from 37 percent to 45 percent since 2003, a 22 percent increase. The cost to companies was an average US$1.7 million in losses from "tangible frauds," those which result in an immediate and direct financial loss. These include asset misappropriation, false pretences and counterfeiting.  The biennial survey involved 3,634 companies from 34 countries and was conducted in association with Germany's Martin-Luther University, Halle-Wittenberg. It revealed that the total losses at 1,227 of these companies that could quantify their losses exceeded US$2 billion over the last two years; the number of companies reporting financial losses increased by 50 percent since 2003.  Companies around the world, on average, reported suffering eight fraud incidents since 2003. The larger the company, the more likely it experienced and detected acts of fraud. Larger companies reported an average of 12 incidents. Regardless of size, no company or industry, regulated or unregulated, was immune from fraud. Depending on industry, from 38 percent to 60 percent of surveyed companies reported significant frauds.  According to the survey, the 22 percent increase in companies reporting fraud since 2003 may be attributed to:   * More incidents of fraud being committed. * Increased fraud reporting due to tighter regulations requiring increased transparency. * Introduction of risk management controls to detect fraud. * A "confess and remedy" environment among regulators that encourages fraud reporting.   Despite the growing number of companies reporting fraud, nearly 80 percent did not consider it likely that their company will suffer fraud over the next five years.  The survey also showed increases in the various types of fraud that can affect a company, from asset misappropriation to counterfeiting. In particular, there has been a 140 percent increase in the number reporting financial misrepresentation, a 133 percent increase in the number reporting money laundering, and a 71 percent increase in the number reporting corruption and bribery.  Nearly 90 percent of those responsible for fraud are male, between the ages of 31 and 40, with college educations or higher degrees. Half were employed by the defrauded company, almost one quarter of them in senior management. And of those who were caught, the most common means of detection was through accident or chance (34 percent).  In addition to the financial losses, 40 percent of companies reported suffering significant "collateral damage" to the day-to-day operations and success of their businesses. Of those, 43 percent suffered damage to their brand; 42 percent to their relations with other businesses (including suppliers and contractors); and 54 percent to staff morale.  A full copy of the report can be found at: [http://www.pwc.com/crimesurvey](http://www.pwc.com/crimesurvey" \t "_new)  **1.22 Australian sharemarket ownership**  While individual shareholders are increasingly involved in share market trading, their total direct ownership of shares in the S+P/ASX300 index on the Australian stock exchange remains low, according to research conducted for the Australasian Investor Relations Association (AIRA).  According to the research, institutions are, on average, owning a greater percentage of shares in Australia’s largest listed companies compared to individual shareholders. Conversely, the vast majority of shareholders own relatively small parcels of shares.  On average, shareholders that own less than 10,000 shares in the top 50 Australian listed companies own only 22.5 percent of all shares on issue, but comprise 95.3 percent of all investors on the share registers of these companies. (For all companies in the sample, shareholders with less than 10,000 shares comprise on average, 84.5 percent of all shareholders by number, but they own only 17.4 percent on average of shares outstanding.)  In comparison, shareholders that own more than 10,000 shares in the top 50 Australian listed companies own on average 77.5 percent of all shares on issue, but comprise only 4.7 percent of all shareholders in these companies. (For all companies in the sample, shareholders with more than 10,000 shares comprise, on average, 15.1 percent of all shareholders, but they own on average 82.3 percent of shares outstanding).  For the purposes of this research, individual shareholders are classified as owning less than 10,000 shares in a listed entity.  **1.23 The US 2005 proxy season: majority voting debate dominates the governance agenda**  US proxy adviser Georgeson Shareholder has published its review of the 2005 US proxy (annual general meeting) season. Following is an extract from the executive summary of the review. It contains a very useful outline of the recent debate concerning majority voting for directors.  While there was a modest decline in governance resolutions voted upon in 2005 (375, compared to 414 in 2004)1, activists have taken critical steps towards increasing their influence in the boardroom this year perhaps more than in any other year in recent memory.  Shareholders accomplished this feat by shifting some of the focus of their proposals away from micro-managing how boards of directors utilize poison pills and stock options, and instead concentrated their efforts on changing the way directors themselves are elected.  **(a) Majority voting resolutions**  Almost unnoticed in 2004 when it appeared in a scant 12 proxy statements, a resolution requesting that companies adopt an election standard (wherein only directors receiving a majority of votes cast win or maintain their board seats) averaged only 12% of votes cast in favour. The lack of support, however, did not deter its sponsors, who submitted the proposal to 79 companies in 2005. Of those, the "majority vote" proposal appeared on the proxy ballots of 55 companies.  Bucking the historical trend of relatively low support for new resolutions, the majority vote resolution has been a rousing success in 2005, scoring better than a majority of votes cast at 13 shareholder meetings and averaging a remarkable 43 percent of votes cast in favour of the proposal overall.  The success of the majority vote proposals has touched off a chain of events that may transform the balance of power between owners and managers for years to come.  The American Bar Association has formed a task force to evaluate whether the Model Business Corporation Act and/or state laws need to, or should be, changed to provide for majority voting. The proponents of the resolution, primarily union pension funds, joined with more than a dozen major corporations to create a task force to consider thorny issues related to the mechanics of majority voting, such as who chooses the replacement for defeated directors and what happens if an entire board fails to achieve the new election standard’s requisite majority.  To understand the significance of this proposal, one must understand how directors typically are elected in corporate America under the current system. Except in contested elections, shareholders can mark ballots "for" the election of nominees or they can check a box to "withhold" their votes.  There are no "against" votes. Under this plurality system, as long as there are at least some votes in favour of director nominees, a director will be elected, regardless of whether a large majority of shareholders withheld their support. Thus, in the current voting regime, large shareholder "withhold" votes send a potentially powerful message to boards, but generally do nothing more than that. Directors who suffer these ignominious votes of no confidence remain as members of the board.  Why did the majority vote resolution proliferate and do so well in 2005 after merger support in 2004? One potential reason for the surge in support stems from the disappointment of activists who pushed for the so-called "proxy access" rule. The rule (Securities and Exchange Commission proposed rule 14a-11) would have given shareholders the ability to nominate candidates (and have them listed) on the company’s proxy card rather than having to resort to expensive proxy contests in order to bring about change.  But a more basic reason for the majority vote movement, like the proxy access campaign that preceded it, is the continued frustration of shareholders who perceive that their successful shareholder resolutions are systematically ignored. From 2001 through 2005, shareholders submitted 419 resolutions to "destagger" boards or eliminate shareholder rights plans (or "poison pills") with a total of 314 (or 75%) of these proposals receiving a majority of votes cast. Proponents claim that because companies are not obligated to act on such resolutions, they have too often been ignored. As a result, institutional investors have responded by increasingly "withholding" votes from directors who fail to enact successful resolutions. But from the shareholder perspective, under the plurality system by which directors are currently elected and re-elected, a "withhold" is just one more vote cast to the wind. The majority vote system, according to many of its proponents, is a more effective way to hold directors responsible for their alleged unresponsiveness.  Companies, on the other hand, argue that voting directors off boards is too blunt a tool for the expression of shareholder dissatisfaction, and should only be used in the most extreme cases. Companies point to a number of changes as proof that current system is sufficiently effective.   * Over the past two years, 145 companies redeemed poison pills or took steps to eliminate staggered boards, often in response to the mere threat of a shareholder resolution appearing in their proxy statement. This includes 32 companies who presented proposals to repeal classified boards in 2005, 30 of which recommended shareholders support the resolution. * After years of successful majority votes on pill redemptions, pill renewal rates are down sharply from previous years. * Resolutions requesting greater use of performance based remuneration (36 proposals averaging 30% support) frequently resulted in negotiations between shareholders and companies on the appropriate levels of incentive-based pay, despite the fact that only a few of these proposals came close to a majority of votes cast. * Boards have become more independent. Shareholders over the years have frequently called for more independent boards through shareholder resolutions (30 proposals in 2005 sought greater numbers of independent, outside directors or sought a non-executive chairman). The effect of such advocacy is clear, with approximately 70% of directors in the S&P 1500 being independent as opposed to 64% five years ago.   Perhaps the greatest sign the proposal has gained traction is the growing number of companies (including Pfizer, Microsoft, Disney, and Aetna to name a few) that have voluntarily adopted election policies that require directors who fail to achieve a majority of votes cast to submit their resignation to the board. Is this a sign of full agreement or perhaps capitulation? Not quite. These companies each maintained their board's ability to decline acceptance of the tendered resignation. That falls short of what shareholder organizations like the Council of Institutional Investors (CII) really want. CII proposes that "holdover" directors remain only for a short transition period after their failure to obtain a majority. It is likely that resolving the director replacement issue will be of great significance in considering the majority vote debate over the course of the 2006 proxy season.  Looking ahead, some proponents are attempting to force the issue with "second generation" majority vote resolutions that take the form of proposed amendments to a company's bylaws.  **(b) Executive compensation**  While the majority vote debate was clearly the event of the year (and likely will be again in 2006), executive compensation issues persisted as a major governance concern and the most frequent subject of shareholder resolutions (35.5%). Much like the majority vote resolution, the success of proposals requesting companies to expense options was important in pushing a public policy debate towards regulatory reform. While fewer option expensing proposals were voted on this year (10), the resolutions averaged a 60% approval rate. Added to the 20 proposals that achieved majority approval rate in 2004, the support for these resolutions may have helped keep the Financial Accounting Standards Board and Congress on track to fully implement option expensing. Some companies began mandatory expensing in the third quarter of this year to be followed by the remaining companies beginning next year.  As mentioned above, pay-for-performance resolutions continued apace from previous years (47 proposals in various forms). Two of these proposals, one seeking the general use of performance-vesting stock and the other seeking performance-based stock options, garnered a respectable 34% of votes cast in favour. Both are likely to be submitted often in 2006. Shareholders were just as concerned with how payouts were made to departing executives. Shareholders supported resolutions to limit the size of new severance pay packages to reasonable limits unless approved by shareholders in advance. These "golden parachute" resolutions received the support of a majority of votes cast at 15 of the 20 companies. As was the case in 2004, a number of companies adopted compensation policies that would require a shareholder vote on packages of greater than 2-3 times annual salary and bonus pay.  **(c) Proxy contests and mergers and acquisitions**  The number of traditional proxy contests (defined by the distribution of opposing proxy statements) actually declined from 27 in 2004 to 24 in 2005. But as with the shareholder proposals discussed above, measuring trends through statistics alone is deceiving. This year marked the emergence of hedge funds as a force to be reckoned with in election contests and mergers. There were relatively few proxy fights that ended in an actual vote as management frequently decided to reach settlements with their dissident shareholders rather than risk a full-scale battle. With cash-rich hedge fund managers struggling to find ways to boost returns, even mergers with modest premiums were targets for proxy battles. In some cases, hedge funds pressed for a higher price (Providian Financial, MCI and ShopKo Stores), or if they were shareholders of the acquirer, acted to block the deal entirely.  The full report is available at: [http://www.georgesonshareholder.com/pdf/2005\_corpgov\_review.pdf](http://www.georgesonshareholder.com/pdf/2005_corpgov_review.pdf" \t "_new)  **1.24 Seminars, conferences and new research group**  The annual corporate law teacher's conference is being held at the University of Queensland on 5-7 February 2006. Details are at: [http://www.law.uq.edu.au/clta/](http://www.law.uq.edu.au/clta/" \t "_new)  The Corporate Law and Accountability Research Group (CLARG) was established in the Department of Business Law and Taxation (BLT), Faculty of Economics and Commerce, Monash University, in November 2005. The Research Group will provide a focus for collaborative research within BLT on corporate regulation and corporate accountability issues, and foster the development of research projects in these areas between BLT academics and external research partners.  For more information, visit CLARGs website at: [http://www.buseco.monash.edu.au/depts/blt/clarg/index.php](http://www.buseco.monash.edu.au/depts/blt/clarg/index.php" \t "_new) or contact the Research Group's Coordinator, Dr Anthony Forsyth, at: [Anthony.Forsyth@buseco.monash.edu.au](mailto:Anthony.Forsyth@buseco.monash.edu.au)  Monash University is holding two seminars in 2006 on insider trading regulation (10-11 February 2006) and financial services reform (14-15 July 2006). Details are at: [http://www.buseco.monash.edu.au/depts/blt/](http://www.buseco.monash.edu.au/depts/blt/" \t "_new)  **1.25 Australian Research Council Grant for research on employee share ownership plans**  The Minister for Education, Science and Training recently announced the successful recipients of Australian Research Council grants. One of these grants has been awarded to a team of researchers from the University of Melbourne (Professor Ian Ramsay, Professor Cameron Rider, Associate Professor Ann O'Connell and Professor Richard Mitchell) who were awarded $323,000 for a research project titled "Employee share ownership plans: current practice and regulatory reform".  Employee Share Ownership Plans (ESOPs) are important to the development of an economic culture of enterprise and innovation and the building of national wealth and savings in response to long-term demands of intergenerational equity. ESOPs require development through appropriate regulatory frameworks. The project will subject the existing regime of tax, corporate and labour law to technical and empirical scrutiny. It will produce the first comprehensive analysis of how current legal regulation structures and constrains the use of ESOPs in Australian enterprises. It will examine the current incidence and forms of ESOPs in Australia, the diversity of objectives that such schemes serve, the extent to which current corporate, tax and labour law inhibit ESOPs, and the case for reform of the regulatory framework. This will enhance the capacity of policy makers to evaluate and identify appropriate regulatory techniques to ensure the growth of efficiency of ESOPs at the national and enterprise level.  Key parts of the project are:  1. a detailed analysis of the current use of ESOPS (current data is patchy) by focusing on issues such as how use of ESOPS varies by industry, the different types of ESOPS, source of finance, etc); 2. how corporate law, taxation law and labour law impact upon the use of ESOPS; 3. identification of the established and emerging social, economic and policy objectives of ESOPS (with this being achieved largely by extensive interviews with key participants such as corporate management, unions, government, etc); 4. analysis of regulatory "fit"; ie, an examination of whether the regulation in this area (taxation, corporate law, labour law) provide a rational, coherent and sufficiently flexible legal framework with respect to the key social and economic objective for ESOPS identified by the  researchers; and 5. consideration of case for regulatory reform. |
| **2. Recent ASIC Developments** |
| **2.1 ASIC releases information on insolvency**  On 15 December 2005, the Australian Securities and Investment Commission (ASIC) released a series of information sheets to increase awareness of company insolvency procedures among directors, employees, creditors and shareholders.  ASIC's information sheets cover the following topics:   * Insolvency: a glossary of terms * Voluntary administration: a guide for creditors * Voluntary administration: a guide for employees * Liquidation: a guide for creditors * Liquidation: a guide for employees * Receivership: a guide for creditors * Receivership: a guide for employees * Insolvency: a guide for shareholders * Insolvency: a guide for directors   The information sheets are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.2 ASIC reports on Sydney futures exchange**  On 15 December 2005, the Australian Securities and Investment Commission (ASIC) ASIC released the findings of its third assessment of the Sydney Futures Exchange (SFE). Under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC is required to conduct an annual assessment of how well the SFE is complying with its obligations to supervise the market.  ASIC has concluded that the SFE has adequate arrangements for supervising the market, including arrangements for:   * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way; * monitoring the conduct of participants; and * enforcing compliance with its rules.   The report identifies some suggested improvements to SFE's supervision and compliance arrangements to ensure it can continue to comply with its obligations in the future, including:   * formalisation of agreements between SFE and its swap and bond dealers who provide settlement prices; * a review of record keeping practices in relation to disciplinary decisions made by the Business Conduct Committee and the Market Practices Committee; and * the continued monitoring resources available for SFE's supervisory functions.   The assessment report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.3 ASIC warns Telstra on disclosure procedures**  On 14 December 2005, the Australian Securities and Investments Commission (ASIC) announced that it has concluded its investigation of Telstra and does not propose to take any enforcement action.  The investigation of Telstra was in relation to suspected contraventions of the continuous disclosure provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by Telstra during the period 11 August to 6 September 2005.  While ASIC's investigation will not result in court action, ASIC is concerned that some of Telstra's disclosure procedures create potential risks to its ability to meet its continuous disclosure obligations in the future.  ASIC was concerned about three issues it uncovered during its investigation.  The first was a senior Telstra executive giving part of a confidential briefing paper to representatives of the media in the week commencing 15 August 2005. The briefing was intended only for certain members of Parliament and their staff. The selective release of that document to others created speculation about its contents until Telstra released the full document on 7 September 2005, following discussions with ASIC. A clarifying statement that some aspects of the document should not to be relied on by the market accompanied Telstra's release of the full document.  Also of concern was a briefing to analysts following the release of Telstra's annual results on 11 August 2005. It is clear that some information given during that briefing was not available in Telstra's ASX announcements, either before or after the briefing. While the briefing was web cast, that is not a substitute for the clear requirement in the ASX Listing Rules to provide any price-sensitive information to the ASX in the first instance.  The third issue was the earnings downgrade announcement on 5 September 2005 and the apparent linking of the $850 million estimate of costs of regulation to the downgrade. ASIC's investigation found that there was no such direct link and that the wording of the announcement had the potential to confuse ordinary readers.  **2.4 ASIC pension calculator**  The Australian Securities and Investments Commission (ASIC) has developed a new allocated pension calculator that compares various allocated pension products to see how different product fees may affect the regular income payments received during retirement.  An allocated pension product is something people can buy with the super they have built up while working. It can be a tax-effective way to receive regular income payments, with the right to take out lump sums, or even the whole amount, at any time.  The calculator is available on ASIC's consumer website [FIDO](http://www.fido.gov.au/calculators" \t "_new).  **2.5 ASIC announces simpler warnings for oral general advice**  On 30 November 2005, the Australian Securities and Investments Commission (ASIC) announced relief for providers of general financial product advice. The change will allow providers to give a shorter, simpler general advice warning when they provide oral general advice.  Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) a prescribed kind of general advice warning must be given when general advice is provided to a retail client. This relief will allow a shorter, simpler warning than the prescribed kind to be given.  The relief is provided under ASIC Class Order [CO 05/1195] Simplified warning for oral general advice.  In August 2005, ASIC released a consultation paper, inviting comments on proposed relief to reduce the repetition of the general advice warning while minimising consumer confusion about what kind of advice they are getting.  The consultation paper was the second step in ASIC's project implementing Refinement Proposal 5.1 of the Federal Government's proposals paper Refinements to Financial Services Regulation (2 May 2005): see IR 05-49 ASIC consults on proposal to reduce repetition of the general advice warning (31 August 2005). In finalising its relief for general advice providers, ASIC has taken into account submissions received in response to this consultation paper. The release of [CO 05/1195] completes ASIC's work on Refinement Proposal 5.1.  A copy of the class order is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 Rule changes**  Rule changes to give effect to non disclosure of broker IDs and the migration to an integrated trading platform, referred to as ITS, became effective on 28 November 2005. The amendments affect most pages of the Market Rules. However, a large majority of the amendments are consequential changes of defined terms or technical amendments that do not represent fundamental policy changes. The old, new and marked up versions of the rules are available on the [ASX website](http://www.asx.com.au/" \t "_new).  On 1 December ASX announced new implementation dates for ITS. Details are contained in Integrated Trading System Alert No 10.  ASTC has released an Exposure Draft in relation to proposed amendments to Section 13 of the Settlement Rules which relates to CHESS Depositary Interests ("CDIs") and Foreign Depositary Interests ("FDIs"). A copy of this document is available on the [ASX website](http://www.asx.com.au/" \t "_new). Submissions on this Exposure Draft are invited until 10 January 2006.  ASX has released an Exposure Draft in relation to proposed amendments to the Warrant Market (Section 10 of Market Rules) for issuer obligations and market making. The proposed Rules set out in this Exposure Draft take account of responses to a Consultation Document released to the market in May 2005 as well as the ASX's assessment of monitoring and enforcement requirements. A copy of this document is available on the [ASX website](http://www.asx.com.au/" \t "_new). Submissions on the Warrants Exposure Draft are invited until 18 January 2006.  **3.2 ASX market supervision**  On 16 December 2005, ASX announced the outcomes of its review of ASX's supervisory role, structure and processes.  The key outcomes of the review of supervision are:   * ASX will commit significant additional resources to further strengthen market integrity. ASX will dedicate more resources to detecting insider trading by establishing a specialist unit within its Surveillance team. Additional technological and training resources will be provided to further improve supervision of listed entities and market participants. Further additional resources are being directed at promoting corporate governance disclosure through the ASX Corporate Governance Council. * To reduce complexity and compliance costs, and remove areas of duplication, ASX will rewrite and simplify its Operating Rules (the Market Rules covering market participants and its Listing Rules covering listed entities) using modern principles-based drafting. * ASX has identified a number of ways of removing duplication and improving efficiency and productivity in its internal processes. These process reforms follow on from the internal reorganisation of its Market Supervision Division and the alignment of rewards and performance measures for all supervisory staff. * To minimise further the perception of conflict between ASX's regulatory and commercial functions, ASX will place its supervisory operational functions in a separate subsidiary company. The head of the supervisory functions, currently the Group Executive Market Supervision, will be known as the Chief Supervision Officer (CSO) and will continue to make all operational supervisory decisions. The CSO will not report to the CEO of ASX as at present but will report to the Board of the subsidiary company, which will include external directors. All existing internal and external controls to manage conflicts, including the roles of ASIC and ASX Supervisory Review, will continue. * In line with the approach taken by the Government for ASIC and APRA, ASX has separated regulatory policy decision making from supervision or enforcement decisions by establishing a Regulatory Policy Unit. The RPU will report to the CEO of ASX. * ASX will continue to fund and be responsible for the costs of market supervision. Funding will be provided through a transparent 3-year rolling budget, within disciplines around efficiency and productivity increases. Where additional investment is needed, and made, ASX will pass this on through increased annual listing fees.   A number of the improvements coming out of the Supervision Review have already been put in place or commenced. They are the new internal structure for Market Supervision, establishment of the new Regulatory Policy Unit, additional resources for corporate governance, rewrite and simplification of ASX's Operating Rules, new performance measures for all staff, and the continuous improvement initiatives to drive efficiency and remove duplication of internal. The specialist insider trading unit will be established from 1 March 2006 and the new supervision subsidiary will be fully operational from 1 July 2006. These improvements may be refined further with the benefit of consultation and input from ASIC, Treasury, Government and industry (where appropriate), and any further decisions will be made by the ASX Board in March 2006.  Further information is available on the [ASX website](http://www.asx.com.au/" \t "_new). |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Coopers Brewery Limited – Coopers 03 and 04 review application decisions**   On 12 December 2005, the Takeovers Panel advised that it had decided not to continue proceedings in relation to two review applications lodged with the Panel by Lion Nathan Limited and Lion Nathan Australia Pty Limited (together Lion Nathan) on 2 December 2005.  The applications related to issues of disclosure in the Second Supplementary and Corrective Target's Statement issued by Coopers Brewery Limited on 1 December 2005 at the request of the Coopers 03 Panel. The Panel in the review proceedings made an interim order on Monday 5 December 2005, postponing the holding of the Constitution EGM by Coopers until Wednesday 14 December 2005. The Panel required this extra time to allow Lion Nathan to send a document to Coopers shareholders, in response to the Second Supplementary and Corrective Target's Statement, giving them the benefit of Lion Nathan's views on:   * a number of issues relating to the value (or comparative pricing) of Coopers shares; and * the significance of the policy announced by the Coopers board in the Second Supplementary and Corrective Target's Statement that the Coopers board would consent to Coopers shareholders withdrawing transfer notices in the event that the Lion Nathan Bid lapsed, or the Coopers auditor found that "fair value" was less than the Lion Nathan Bid price.   Lion Nathan prepared the document, and the Panel approved it having considered comments provided by Coopers. Lion Nathan then sent that document to Coopers shareholders on Thursday 8 December 2005. On the basis that the Lion Nathan supplementary document remedied the Panel's concerns about proper disclosure to Coopers shareholders, the Panel has decided that it is no longer in the public interest to continue the proceedings.  Further information is available on the [Takeovers Panel website](http://www.takeovers.gov.au/" \t "_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 Review of decision by APRA to disqualify former insurance executive**  (By Charlotte Oppy, Phillips Fox)  Kamha v Australian Prudential Regulation Authority [2005] FCAFC 248, Federal Court of Australia, Full Court, Emmett, Allsop and Graham JJ, 30 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/november/2005fcafc248.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/november/2005fcafc248.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Dr Roberts was a delegate of the Australian Prudential Regulation Authority ('APRA') who disqualified Mr Kamha from being or acting in various capacities in the insurance industry under section 25A of the [Insurance Act 1973 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default). Mr Kamha brought proceedings in the Federal Court and sought review of this disqualification decision and various other findings of APRA.  A single judge of the Federal Court set aside the decision to disqualify Mr Kamha but declined to grant further relief.  Appeals were brought by Mr Kamha from the orders refusing further relief and by APRA and Dr Roberts, from the orders setting aside the decision to disqualify.  The Full Court of the Federal Court held that the orders of the primary judge should be set aside and the proceeding remitted to the primary judge for reconsideration. The Court further ordered Mr Kamha to pay the costs of the appeal by APRA and Dr Roberts and Mr Kamha's costs of appeal should be his costs in the proceeding.  **(b) Facts**  Mr Kamha had been a senior executive with FAI General Insurance Company Limited ('FAI') which became a subsidiary of HIH Insurance Limited ('HIH'). HIH collapsed in March 2001. As a result, there was a Royal Commission into the collapse, which considered (among other matters) Mr Kamha's conduct in relation to FAI.  Dr Roberts, a delegate of APRA, the body responsible for regulating bodies in the financial sector, formed the view that Mr Kamha was not a fit and proper person to be or to act as someone referred to in section 24(1) of the Act and disqualified him from acting as such. This decision was made pursuant to section 25A of the Insurance Act.  Mr Kamha subsequently sought review of these decisions in the Federal Court. The primary judge ordered that the decision of APRA under section 25A to disqualify Mr Kamha be set aside and be remitted to APRA for further consideration according to law. His Honour did not grant any relief in respect of the decision of APRA that Mr Kamha was not a fit and proper person to be or to act as a director or senior manager of a general insurer, a senior manager or agent in Australia of a foreign general insurer.  Mr Kamha appealed against the order made by the primary judge that the proceeding be dismissed without further relief and that APRA pay only half his costs. APRA appealed from the order setting aside the decision to disqualify Mr Kamha and remitting the matter for further consideration and the order for costs.  There were three substantive issues raised by the appeal.  **(i) Power to disqualify under section 25A**  The primary argument of Mr Kamha was that the power to disqualify under section 25A was only available in respect of someone who currently occupied a position referred to in section 24(1) of the Act. Since at the time of disqualification Mr Kamha was not in such a position, he argued there was no power to disqualify him.  In the alternative, he argued that even if section 25A was interpreted to enable APRA to disqualify any person, including a person who was once in a section 24(1) position but was no longer in that position and was not going to be in such a position in the future the provision would be invalid, as not being a law with respect to insurance. It would constitute an invalid exercise of legislative power under section 51(xiv) of the Constitution.  **(ii) Reasons for disqualification**  The primary judge found that Mr Roberts evidenced a purpose in coming to his decision, namely to make an example of Mr Kamha to others acting in section 24(1) positions. Assuming that this finding of fact was correct, the issue was whether a consideration of this kind constituted an irrelevant consideration.  On this issue, APRA argued that the primary judge's findings were incorrect in this respect.  Mr Kamha contended that as far as section 25A empowered APRA to disqualify Mr Kamha as a punishment or penalty for his past conduct, the provision was invalid as conferring judicial power on APRA.  **(iii) Discretion to refuse relief**  The final issue raised by the parties concerned the approach that the primary judge took to the claims made by Mr Kamha. Having concluded that one of the considerations taken into account by Dr Roberts in deciding to exercise the power to disqualify Mr Kamha was legally irrelevant, the primary judge set aside the decision to disqualify Mr Kamha. He did not however deal with the decision by APRA that Mr Kamha was not a fit and proper person to be or act as someone in a section 24(1) position.  The primary judge had purported to exercise a discretion under section 16 of the ADJR Act which permits the Federal Court in its discretion to make all or any of a number of orders specified in that section.  Mr Kamha argued that where section 10(2)(b)(ii) of the ADJR Act (which permits the Federal Court to refuse to grant an application in respect of a decision) does not apply there was no room for the exercise of any discretion (including the discretion under section 16) to later decline to deal with that decision once it was before a judge.  **(c) Decision**  **(i) Power to disqualify under section 25A**  The court held that there would be no statutory purpose in limiting the exercise of the power contained in section 25A to those who currently hold section 24(1) positions. This would lead to the result that a person fearing disqualification could simply resign from that position.  They further rejected Mr Kamha's contention that the relevant provisions of the Insurance Act were not laws with respect to insurance as contemplated by section 51(xiv) of the Constitution. The power to legislate with respect to insurance will support a law prohibiting a person who is not a fit and proper person from holding a senior management position with an insurer. It is sufficient to bring a law within the insurance power that the law prohibits a person from holding a senior management position with an insurer, irrespective of the characteristics of the person so prohibited. The validity of a provision such as section 25A does not depend upon whether the person disqualified has acted in a section 24(1) position in the past or whether they intend to act in such a position in the future.  **(ii) Reasons for disqualification**  While the court rejected certain aspects of APRA's argument, it found that Dr Roberts did not take into account a legally irrelevant consideration. The Insurance Act does not make legally irrelevant the consideration to disqualify an individual in order to make it clear to those in the profession the consequences of failure to meet standards of honesty and probity.  The court agreed that if section 25A authorised the exercise of judicial power by APRA this was beyond the power of the federal parliament and therefore invalid. However, the Court held that the power exercised or threatened to be exercised by Dr Roberts and APRA was not the exercise of judicial power. While the punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power. Further, the public must be able to maintain confidence in the senior management of general insurers and an element of deterrence is assurance to the public that lapses in conduct of senior management will not be taken lightly. APRA could validly take into account the deterrent effect of a disqualification under section 25A without rendering the power to disqualify the exercise of judicial power.  **(iii) Discretion to refuse relief**  The court held that grant of relief under the ADJR Act is discretionary and that section 16 undoubtedly reserves discretion to the Court as to whether to grant relief in a particular case. The exercise of this residual discretion is not affected by the fact that section 10(2)(b)(ii) of the ADJR Act does not apply in a particular case.  However, the court did find that the primary judge's exercise of the discretion required re-examination on the basis that the primary judge took into account the possibility that reconsideration of the disqualification decision by APRA might lead to a different result. Because the primary judge erred in concluding that Dr Roberts had taken into account an irrelevant consideration, there would be no reconsideration of the disqualification decision by APRA.  In these circumstances, their Honours held that the appropriate course was to remit the proceeding to the primary judge for the purpose of reconsidering the exercise of the residual discretion that arose under section 16 of the ADJR Act.  **5.2 Unsolicited off-market offers to buy shares at below market value and unconscionability**  (By Rowan McRae, Mallesons Stephen Jaques)  Australian Securities and Investments Commission v National Exchange Pty Ltd [2005] FCAFC 226, Federal Court of Australia, Full Court, Tamberlin, Finn and Conti JJ, 25 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/november/2005fcafc226.html](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/november/2005fcafc226.html" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/" \t "_new)  **(a) Summary**  This case concerned an unsolicited off-market offer by National Exchange Pty Ltd ("National Exchange") to buy shares in a public company, Aevum Ltd ("Aevum").  Aevum and ASIC brought claims against National Exchange, claiming that the offer did not comply with procedural requirements in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), was misleading or deceptive, and was unconscionable. At first instance, Emmett J found in favour of Aevum and ASIC, on the basis that the offer had not complied with Pt 7.9 Div 5A of the Corporations Act. ASIC appealed, claiming that the offer was misleading and fell within the scope of "unconscionable conduct" in the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default). National Exchange cross-appealed, claiming that it had complied with the procedure established under the Corporations Act.  The Full Court dismissed the appeal and cross-appeal. The Court upheld Emmett J's finding that the offer breached section 1019E of the Corporations Act in that the offer was not made as soon as practicable after the offer date. Similarly, Emmett J's finding that the offer was not misleading was upheld. The Court found that Emmett J had erred in finding that the offer was not unconscionable but nevertheless upheld the finding that it did not fall within the scope of unconscionable conduct as defined in the ASIC Act.  The decision indicates that while "unconscionability" will be broadly construed for the purposes of the ASIC Act, it is limited by the requirement that an unsolicited off-market offer will only be prohibited for unconscionability if it is accepted for the purpose of trade or commerce.  **(b) Facts**  Aevum was originally established as a friendly society. In 2002, it demutualised and became a public company limited by shares which were allocated to existing members. In late September 2004, Aevum published a prospectus offering new shares for subscription. The offer opened on 18 October 2004 and was to close on or around 12 November 2004.  National Exchange was an experienced share investor. Evidence admitted at trial indicated that National Exchange had directed a number of offers to members of demutualised companies because it was likely the members would accept an offer at less than market value.  In late October 2004, National Exchange sent unsolicited off-market offers to all members of Aevum to buy their shares at $0.35 per share. The offer document was dated 22 October 2004 but was not sent until 28 October 2004. The offer document stated that a fair estimate of the value of each share was in the range of $0.90 to $1.29. The offers sent to Aevum shareholders were to remain open until the earlier of two given times: 5pm on 10 November 2004 or the time when the total number of shares in respect of which National Exchange had received acceptances exceeded 3.35m.  National Exchange's offers to buy shares were accepted by 257 shareholders.  Aevum sought relief under the Corporations Act, claiming that the offers did not comply with the regime established under Div 5A of Pt 7.9 which applies to unsolicited offers to purchase financial products off-market. Aevum claimed contraventions of:   * section 1019E(2), on the basis that National Exchange's offer was not sent as soon as practicable after the offer date; * sections 1019G(2) and 1019G(3), on the basis that National Exchange's representations as to the date of withdrawal of the offer were ineffectual; and * section 1019I(4), on the basis that the offer was vaguely worded.   ASIC also brought proceedings against National Exchange, partly on the basis that Aevum might not have standing to bring its claim. In addition to Aevum's claims, the Commission claimed contravention of:   * section 1019K, on the basis that the offer documents constituted a misleading or deceptive statement; * section 1041E(1), on the basis that the statement was materially misleading; * sections 12CA, 12CB or 12CC of the ASIC Act, on the basis that the offer was unconscionable; and * section 12DF of the ASIC Act, on the basis that the offer was liable to mislead the public.   At first instance, Emmett J held that National Exchange had failed to comply with section 1019E of the Corporations Act, in that offer documents were not sent to offerees as soon as practicable after the date of the offers. Further, his Honour held that section 1019G(2) should be construed as requiring that an offer made under Div 5A should remain open for at least one month. National Exchange did not comply with this requirement. However, Emmett J rejected the claims that National Exchange had been misleading or deceptive. In addition, National Exchange's conduct was not unconscionable because there was no claim made in relation to a particular person; rather, the claim made was of unconscionable conduct "in the abstract". Section 12CC(1) did not apply because acceptance of the offer by Aevum shareholders was not made for "the purpose of trade or commerce".  ASIC appealed the decision on the basis that the primary judge had erred on three counts: the finding that the offers were not misleading; the finding that there was no unconscionable conduct; and the conclusion that acceptance of the offers was not for the purpose of trade or commerce.  National Exchange cross-appealed on two grounds: Emmett J's construction of section 1019G(2) as requiring an offer to be open for at least one month; and his Honour’s interpretation of "withdrawal" in that context.  **(c) Decision**  **(i) Did the offer comply with section 1019G of the Corporations Act?**  Section 1019G(2) provides that an unsolicited offer to purchase a financial product off-market may be withdrawn at any time but not within one month after the date of the offer. A purported withdrawal contrary to this provision is ineffectual. The key issue here was whether this provision requires that an offer must remain open for at least one month. The Full Court (Tamberlain, Finn and Conti JJ) upheld Emmett J's purposive approach to the construction of section 1019G. Extrinsic material (including the Explanatory Memorandum and the Second Reading Speech) supported a broad interpretation of the section, lending support to the conclusion that an offer should remain open for at least one month. As such, no error was shown and the ground of cross-appeal was not made out.  **(ii) Was the conduct misleading?**  The Full Court noted that as a matter of commercial logic, it was difficult to see why a substantial number of Aevum shareholders had agreed to sell their shares for a price well below market value. However, the Court was not prepared to speculate as to why members had accepted the offers. On its face, the offer material did not contain any misleading or deceptive representations and did not evidence misleading or deceptive conduct. As such, Emmett J's decision was upheld.  **(iii) Was the conduct unconscionable?**  The Full Court held that Emmett J had erred in approaching the question of unconscionable conduct on the basis of limitations imposed by the general law on that concept. The Court held that limitations in the unwritten law, such as the need to identify a specific or particular person, could not be implied into section 12CC of the ASIC Act. Instead, a broad concept of "unconscionable conduct" is to be preferred.  In determining whether National Exchange's conduct was unconscionable, the Court had regard to the list of factors contained in section 12CC(2), including whether recipients were able to understand the offer document, the circumstances under which recipients could have acquired an equivalent offer and whether National Exchange had acted in good faith.  The court found that National Exchange had "set out to systematically implement a strategy to take advantage" of Aevum shareholders who were perceived as "vulnerable targets and ripe for exploitation". National Exchange's conduct was "predatory and against good conscience … [and] designed to take advantage of inexperienced offerees". Consequently, the Full Court held that Emmett J had erred in finding that National Exchange did not engage in unconscionable conduct for the purposes of section 12CC of the ASIC Act. This conclusion led to the question of whether acceptance by members was "for the purpose of trade or commerce".  **(iv) Were offers accepted "for the purpose of trade or commerce"?**  The Full Court upheld Emmett J's conclusion that the acceptance of an unsolicited offer to buy shares could not be characterised as acceptance "for the purpose of trade or commerce". The Court concluded that the acquisition of the financial service (that is, the acceptance of the offer) could not be for the purpose of trade or commerce; nor could the transaction be considered to relate to the supply of services ordinarily acquired for personal, domestic or household use. As such, even though the conduct was considered unconscionable, it did not fall within the scope of sections 12CC or 12CB of the ASIC Act.  This part of the decision places a clear constraint on the application of sections 12CC and 12CB of the ASIC Act. In essence, even if an unsolicited offer is clearly unconscionable, it will not be prohibited unless it is accepted "for the purpose of trade or commerce".  **(v) Did the appeal lack utility?**  Finally, the Court considered National Exchange’s claim that the appeal by ASIC lacked utility, on the basis that substantive relief had already been granted. National Exchange claimed the appeal was an attempt by ASIC to obtain an advisory opinion on the law by means of a claim for declaratory relief.  The Court rejected this contention, stating that there was a live issue as to the meaning and effect of the relevant statutory provisions.  **5.3 Shareholders cannot rank with unsecured creditors**  (By David Cowling and Stephen Magee, Clayton Utz, Sydney)  Johnston v McGrath [2005] NSWSC 1183, Supreme Court of New South Wales, Gzell J, 23 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1183.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1183.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  A shareholder bought shares in a company on market. The company subsequently went into liquidation. The shareholder lodged a proof of debt with the liquidator, claiming that he had been induced into buying the shares by misleading and deceptive conduct by the company. His claim was based on section 82 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).  It was held that the liquidator was entitled to reject the proof of debt, because the shareholder had not proved that his loss had been caused by the misleading and deceptive conduct.  **(b) Facts**  Mr Johnston bought shares in HIH in January 2001, just two months before it went into provisional liquidation. He claimed that he had been misled into making his investment by a September 2000 HIH media release and HIH's 2000 annual financial report (published in October 2000). Based on this claim, he lodged a proof of debt with HIH's liquidators.  The liquidators admitted that the media release and annual report contained misleading and deceptive statements. Nevertheless, they rejected Mr Johnston's proof of debt.  Mr Johnston appealed to the NSW Supreme Court.  **(c) Decision**  **(i) The misleading and deceptive issue**  Gzell J rejected Mr Johnson's claim. Although there was no dispute about the company's misleading statements, the judge didn't confine himself to that evidence. He also looked at the spate of media stories about HIH in the months leading up to Mr Johnston's investment (which Mr Johnston claimed to have read in full).  Gzell J found that, no matter what HIH had said in September and October, the newspaper stories had consistently painted a "dismal picture" of HIH's prospects (and the sharemarket had followed suit). Overall, said the judge, the media reports "counteracted the misleading and deceptive statements" put out by HIH. In the light of that, he did not believe that HIH's media release and annual report had played a part in Mr Johnston's purchase of HIH shares.  Even if Mr Johnston had originally relied on HIH's statements, his "conduct in ignoring the repeated warnings in the printed media that he assiduously read was so dominant as to cut the causal chain to the misrepresentations".  **(ii) The Sons of Gwalia issue**  Because he found that Mr Johnston had not actually been misled by HIH, Gzell J did not have to consider the Sons of Gwalia issue (Sons of Gwalia Ltd v Margaretic [2005] FCA 1305).  In brief, that issue is whether a claim by a shareholder who bought his shares on the basis of misleading statements by the company is postponed to the claims of other unsecured creditors in the company's liquidation (because of section 563A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)).  Justice Gzell believed that a shareholder who has been misled into buying shares should rank equally with other unsecured creditors in a winding up:  "Untutored by precedent, I would have thought that damages payable by a company to a shareholder under the Trade Practices Act 1974 (Cth), s 82 were not owed by the company to the shareholder in the capacity of a member of the company. The damages are payable because of the company’s misleading and deceptive conduct. They have nothing to do with the congeries of rights the member of the company has under the shareholding."  He also indicated that, if it had not been for the High Court decision in Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15, he would have held that there should be no difference in this regard between shareholders who subscribe for shares and those who buy their shares on market:  "The issue that next arises is whether s 563A of the Corporations Act 2001 (Cth) applies only to subscribers for shares and does not apply to transferees of shares. Again, untutored by precedent, I would have thought that it makes no difference to the operation of s 563A whether the member acquired his shares directly from the company or acquired them from another member. There is nothing on the face of s 563A that suggests such a distinction. The provision is in general terms, applicable to amounts owed by a company to a member in that capacity regardless of how the member acquired the shares."  However, he felt that he was bound to reach the opposite conclusion by Webb Distributors. From this standpoint, he was unable to agree with the Sons of Gwalia/Concept Sports position that Webb does not apply to shareholders who buy their shares on market (Cadence Asset Management Pty Ltd v Concept Sports Ltd [2005] FCA 1280).  **(d) Comment**  This case is important for two reasons.  **(i) Weight of non-High Court opinion**  This is the fourth recent case to consider the rights of shareholders to claim damages from their company (the fourth being Crosbie v Naidoo (2005) 216 ALR 105).  In all four cases, there has been judicial support for the position of the shareholder. Although Mr Johnston lost this case on the facts and would have lost it if Gzell J had been required to rule on the question of the shareholder's ranking, Gzell J made it clear that he favoured an interpretation of s 563A that differed from the High Court's decision in Webb.  If, as appears likely, one or all of Concept Sports, Sons of Gwalia or Johnston v McGrath goes to the High Court, the High Court will have the opportunity to re-examine this issue. Should the High Court decline to overturn Webb, it will be interesting to see if there are then calls for legislative reform to introduce a provision similar to section 111A of the Companies Act 1985 (Eng):  "111A. Right to damages not affected  A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares."  **(ii) No easy road for shareholders**  This case also illustrates the evidentiary and causation problems that shareholders will face even if they are given equal standing with other unsecured creditors. They will not be able to establish a right to compensation from their company simply by claiming to have been misled or even by pointing to clearly misleading statements by the company. A court may take a broad view of the range of information available to the shareholder. In this respect, there may be another difference between shareholders who subscribe to shares on the basis of a prospectus and those who buy on market:   * a shareholder who buys on market may be expected to have read more than just company press releases, and so may be expected to have at least seen any media material that could counter-balance misleading statements by the company; and * on the other hand, a shareholder who buys off a prospectus may not be a follower of the financial press and so might not necessarily be expected to have seen negative reports about the company.   **5.4 Application for creditors' scheme of arrangement**  (By Benjamin Dendle, Freehills)  HIH Casualty and General Insurance Limited [2005] NSWSC 1180, Supreme Court of New South Wales, Barrett J, 18 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1180.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1180.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/" \t "_new)  **(a) Summary**  The liquidators of eight wholly-owned subsidiaries of HIH Insurance Ltd applied to the Supreme Court of New South Wales for an order convening a meeting of the companies' creditors to approve a creditors' scheme of arrangement pursuant to section 411 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Corporations Act').  In convening the meeting, the court decided that it was immaterial that creditors for whom HIH Insurance Ltd carried reinsurance were not afforded an 'enhanced position' under the scheme of administration that they were not afforded under section 562A of the Corporations Act.  A "scheme administrator" falls within the definition of "officer" in section 9 of the Corporations Act. Therefore, the provisions of the Corporations Act binding on officers, including directors' and officers' duties, as well as provisions of the scheme itself, apply to the scheme administrators.  Existing liquidators were permitted to act as the initial administrators of the scheme pursuant to section 411(7) of the Corporations Act.  **(b) Facts**  On 29 March 2005, Justice Barrett rejected an application by the liquidators of HIH Insurance Ltd to make orders for the convening of meetings of creditors under section 411(1) of the Corporations Act. On 17 November 2005, the liquidators applied to have their amended scheme approved.  Hazelwood Power and La Trobe Power were creditors in respect of whose risks the HIH companies carried reinsurance. They proposed amendments to the provisions of the scheme relating to reinsurance, specifically in respect of notice periods and the provision of insurance contracts.  The scheme provided for two of the existing liquidators of the companies to be the initial administrators of the scheme. However, pursuant to section 411(7)(f) of the Corporations Act, any person that had been a liquidator of the companies within the previous 12 months was prima facie precluded from being the initial administrators of the scheme.  **(c) Decision**  **(i) The role of the court in section 411 applications**  In defining the function of the court under section 411 applications, Justice Barrett quoted his judgment in Re Westfield Holdings Ltd (2004) 49 ACSR 734, which refers to Justice Santow’s judgment in Re NRMA Insurance Ltd (2000) 33 ACSR 595, as follows:  "The court must see, on the material placed before it;  1. that the proposal fits within the statutory concept of arrangement or compromise; 2. that there will be available to members all the main facts relevant to the exercise of their judgment; 3. that ASIC has had reasonable opportunity to examine the proposal and the scheme; and 4. that the scheme is so conceived and presented as to that structure, purpose and effect that there is no apparent reason, so far as can be foreseen, why it should not, in due course, receive the court’s approval if the necessary majority of members' votes is achieved."  **(ii) Insured's interests and section 562A of the Corporations Act**  Hazelwood Power and La Trobe Power, as creditors in respect of risks for which the HIH companies carried reinsurance, proposed that the scheme be amended to accord with section 562A of the Corporations Act. Section 562A gives priority to such creditors as far as the proceeds of the reinsurance is concerned, where an amount is received by the company or the liquidator under the contract of reinsurance. Pursuant to section 562A(4), a company insured under a reinsurance contract may apply to the court for an order varying this rule and allowing other creditors to participate in the reinsurance proceeds.  The scheme contained a clause requiring the scheme administrators, before making any payment out of the proceeds from reinsurance received by them, to give any insured creditor interested in those proceeds 60 days’ notice. The intention was to ensure that relevant creditors have time to decide whether to make a section 562A(4) application. Hazelwood and La Trobe argued this provision should be altered in two ways:  1. notice should be given within 28 days after receipt of the amount; and 2. the insured should be given a copy of the relevant contract of reinsurance if requested.  The first modification was requested as a matter of convenience. The second modification was based on the fact that any application under section 562A(4) could depend on the terms of the reinsurance. Justice Barrett rejected these arguments, stating that the proposed scheme placed creditors within the position that they occupy under the Corporations Act. It was immaterial that the insureds were not afforded some 'enhanced position'. The question for the court was, if the proposed scheme was passed at a meeting of creditors, was it likely to be approved by the court upon an uncontested hearing for approval.  Justice Barrett was satisfied that the new scheme preserved the rights of such insureds to whom section 562A(4) applied and, therefore, did not require amendment. The new scheme also accommodated the liquidators satisfying any subsequent orders of the court.  **(iii) Duties imposed on scheme administrators**  Justice Barrett observed that scheme administrators, to whom liquidators entrust all assets, operate under a regime sufficiently akin to that of liquidators, so as to engender confidence that appropriate safeguards exist. His Honour was satisfied that a "scheme administrator" falls within the definition of "officer" in section 9 of the Corporations Act. Each of the key sections imposing statutory duties of care and diligence, good faith and avoidance of conflict (sections 180 to 184) refer expressly to a "director or other officer of a corporation." In addition, a number of provisions of the Corporations Act dealing with receivers are, by section 411(9)(a), made applicable to a person administering a compromise or arrangement. This meant that both statutory provisions as well as provisions of the scheme were binding on scheme administrators, thereby providing sufficient safeguards.  **(iv) Administrators of the scheme and section 411(7) of the Corporations Act**  Justice Barrett also considered whether the existing liquidators were precluded from being the initial administrators of the scheme. Pursuant to section 411(7)(f), a person must not be appointed to administer the scheme if they have at any time within the last 12 months been an officer or promoter of the body or related body corporate. Under subparagraph (f) of the definition of "officer" in section 9 of the Corporations Act, a liquidator of a corporation is an officer of the corporation. The two liquidators were, therefore, precluded, unless they fell into one of the two following exceptions under section 411(7):  1. where, under section 411(7)(f), ASIC directs that the provision does not apply to a particular person; or 2. where the court grants leave for a person otherwise excluded to act.  ASIC itself had not made any direction under section 411(7)(f). However, ASIC did appear as amicus curiae and held no objection to the court granting leave. Justice Barrett saw the purpose of section 411(7) as the same as that underlying section 436B(2), which states that a liquidator may not appoint himself as a Part 5.3 administrator without the leave of the court. His Honour held that the aim of this section was to bring to the surface any situations of conflict of interest. As neither ASIC nor any creditors suggested any such problem here, Justice Barrett granted the necessary leave to allow the liquidators to act as scheme administrators.  **5.5 'For the time being in force': applicability of rules in incorporated associations**  (By Matthew Coghlan, Phillips Fox)  Healy v The Real Estate Institute of Western Australia Incorporated [2005] WASCA 219, Supreme Court of Western Australia, Court of Appeal, Murray AJA, Wheeler and Pullin JJA, 17 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasca219.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasca219.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/index.cfm](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/index.cfm" \t "_new)  **(a) Summary**  This case concerned a situation where an incorporated association changed its rules relating to appeals against decisions of the association. The appellants were aggrieved by a decision made while the old rules of the association were still in force, however the appellants did not appeal that decision until after the new rules had come into effect. The appellants sought a declaration allowing them to appeal against the association's decision under the old rules in force at the time of the decision. However, the Court rejected this claim, instead holding that the rules to be applied were the rules in force at the time the appellants lodged their appeal. Under these new rules, the time period specified for lodging an appeal had expired, and therefore the appellants were unable to appeal the association's decision.  **(b) Facts**  This case concerned an application by the three appellants to become members of the Real Estate Institute of Western Australia ('REIWA'). The three appellants were respectively Mr Healy, Mrs Stageman and Country and Metro Real Estate Pty Ltd ('Metro'). Mr Healy had applied for associate membership of REIWA as an employee and director of Metro, Mrs Stageman had applied for individual membership of REIWA as a licensed agent and director of Metro, and Metro had applied for corporate membership of REIWA.  The dispute arose after REIWA rejected the three appellants' applications on the grounds that Mr Healy had been convicted of a criminal offence (attempting to pervert the course of justice) which rendered him ineligible for membership according to the Rules of REIWA. Further, because Mr Healy was a director of Metro, and Mr Healy was ineligible for membership, this also rendered Metro ineligible, which in turn rendered Mrs Stageman ineligible.  The court noted that this rejection was an incorrect application of REIWA's Rules, however the subject of this case was not that misapplication, but rather the appellants' rights to appeal this rejection under REIWA's Rules.  By way of background, in December 1998 REIWA had purported to change its Rules such that appeals against membership decisions were required to be lodged by the appellant within 14 days of the date of the decision (the 'new appeal rule'). Under this new appeal rule, the appeal would be heard by an Appeals Board appointed by the REIWA Committee which had no power to extend the 14 day lodgement period. Previously (under the 'old appeal rule') the lodgement period was 14 days from the date the appellant received notification of the decision (rather than 14 days from the date of that decision itself). Further, under the old appeal rule, the appellant could appeal to an independent arbitrator.  REIWA adopted this change to the Rules on 3 December 1998, however it failed to register this change with the Commissioner of Consumer Affairs within one month, as is required by the [Associations Incorporation Act 1987 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "Default). REIWA subsequently re-adopted this change on 15 September 1999 and correctly registered the change with the Commissioner such that the new appeal rule came into effect on 27 October 1999.  The appellants' original applications for membership had been rejected in May 1999, at which time they were notified of their appeal rights under the new appeal rule which had not been validly registered with the Commissioner at that time. However the appellants did not appeal this rejection until May 2001. Accordingly, the appellants argued that the old appeal rule should apply as the rejection had occurred in May 1999 when technically the old appeal rule was still in force. Therefore, given that the appellants had been notified of their appeal rights pursuant to the new appeal rule, they had not received proper notification of their appeal rights under the old appeal rule, which was the valid and effective rule at that time (ie. May 1999). Therefore, it was argued, the 14 day appeal lodgement period prescribed in the old appeal rule (which commenced upon notification of the decision to the appellant) had never actually commenced. Consequently, it was still open to the appellants to appeal the rejection to an independent arbitrator pursuant to the old appeal rule.  **(c) Decision**  In the judgment of Murray AJA, with which Wheeler and Pullin JJA concurred, the Court (upholding the decision of Commissioner Odes QC in the WASC) rejected the appellants' argument. Rather, the Court held that the applicable rules in a dispute of this nature were the rules 'for the time being in force'. Consequently, the relevant rule which would govern the appeal process was the rule in place at the time the appellants lodged their appeal in May 2001, ie. the new appeal rule.  The appellants also submitted that REIWA had deprived the appellants of their capacity to utilise the old appeal rule by communicating to the appellants in May 1999 that it would be futile to appeal the rejection. The Court rejected this argument, finding that REIWA had done nothing to prevent the appellants from assessing their correct appeal rights and from exercising those rights in a timely manner.  Finally, the appellants submitted that REIWA should be stopped from denying the applicability of the old appeal rule due to REIWA's allegedly unconscionable conduct, first in misapplying the membership eligibility rules, and second, in failing to advise the appellants of their true appeal rights so that the appellants could exercise those rights in a timely manner. The court rejected this submission on the basis that REIWA's misapplication of the membership eligibility rules was a genuine mistake. Further, the Court held that REIWA was under no obligation, contractual or otherwise, requiring it to advise the appellants of their appeal rights, and that nothing in REIWA's conduct could be described as unconscionable.  For these reasons the appeal was dismissed.  **5.6 Negligence claim against an accountant and auditor: issues of causation**  (By Juliana Eversden, Senior Associate, Mallesons Stephen Jaques (Perth)  Ruth Cooper, Solicitor, Mallesons Stephen Jaques (Perth)  Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates [2005] HCA 69, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 16 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/november/2005hca69.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/november/2005hca69.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case involved a seemingly simple issue of causation which, when examined more closely, turned out to be more complicated than at first glance. This case only serves to highlight the issue of causation as a complex and often difficult area of the law.  This case involved a claim by the NSW Travel Compensation Fund against an accountant who prepared financial statements and an auditor who audited those statements and who knew that those financial statements were to be relied upon by the Fund to determine whether or not Ms Fry could continue as a licensed travel agent. The accountant and auditor were found to have been negligent in their preparation of the financial statements and consequently engaged in misleading conduct in contravention of the [NSW Fair Trading Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default). The accountant and the auditor had failed to disclose substantial liabilities in preparing the financial statements.  The accountant and the auditor argued that most of the loss arose after Ms Fry was terminated from the Fund and yet continued to carry on her business as a travel agent. They argued that they should not be held responsible for losses occurring after Ms Fry was terminated from the Fund as she was at that stage carrying on the business of a travel agent illegally.  In a unanimous decision of the High Court of Australia, the accountant and the auditor were found to be liable for the loss occasioned to the Fund through Ms Fry carrying on her travel agent business illegally. Their Honours reasoned that the Fund would have terminated Ms Fry earlier had the financial statements been accurate and the discretion to pay money from the Fund specifically envisaged that it would take time to close a business down following its termination from the Fund. There was no suggestion of delay on the Fund's part in taking steps to shut down Ms Fry's business once they became aware of her acting illegally. Central to their Honours reasoning was the fact that the accountant and the auditor knew that the Fund would rely on the accuracy of the financial statements and the financial statements were intended to protect the Fund against the very risk which eventuated.  **(b) Facts**  This was an appeal from the NSW Court of Appeal concerning issues of causation that arose in assessing damages against an accountant and an auditor who were held to have been negligent and to have engaged in misleading and deceptive conduct.  Under legislation in NSW all travel agents are required to be licensed and a condition of the license is that the licensee will participate in a statutory compensation scheme to provide compensation to those who suffer loss by the acts or omissions of travels agents (the scheme).  The principal of a NSW travel agency was a participant in the scheme and held a license. In order to remain a participant in the scheme, financial statements had to be submitted to the scheme. Such statements were prepared for the June 1997 and June 1998 financial years by the first respondent, an accountant, and were audited by the second respondent, an auditor. In the original proceedings, it was found that these financial statements were false and misleading and the accountant and auditor were found liable for engaging in misleading and deceptive conduct pursuant to section 42 of the Fair Trading Act 1987 (NSW). If prepared and audited properly, the statements would have revealed that the travel agency had substantial trading losses and was in fact in significant financial difficulties.  In early 1999, the scheme eventually got wind of the agency's financial difficulties and at the threat of the scheme doing its own audit on the travel agency, the agency decided to withdraw from the scheme and therefore had its licence cancelled on 23 February 1999. Despite this, it continued to trade without a licence. In April 1999 the travel agency collapsed. The scheme then received a large number of claims from customers, some of whom had dealt with the agency before its licence had been cancelled but the majority had dealt with it after cancellation. The claims resulted in losses to the scheme.  **(c) Decision**  Put simply, the issue in this case was whether the negligent conduct of the accountant and the auditor was the cause of those losses which occurred after the cancellation of the licence, or was the illegality of carrying on the business without a licence an ‘intervening factor’ and therefore the true cause of those losses.  Chief Justice Gleeson provided the main judgment with which the remainder of the High Court Justices essentially concurred. His Honour confirmed that the "but for" test in itself is an inadequate test when determining issues of causation and that often "normative considerations" are required. Such normative considerations are sometimes referred to as "values" or "policy" considerations. However, this does not mean that there should be a value judgment in relation to Ms Fry's illegal conduct. What is required in cases such as these is 'an accurate identification of the risk against which protection was sought by the plaintiff and of the loss that was suffered, considered in light of the kind of wrongful conduct by the defendant'.  His Honour commenced his enquiry by examining the compensation scheme itself and found that the scheme was clearly not limited to providing compensation in relation to unlicensed travel agents. His Honour held that the risk of an unlicensed travel agent continuing a business was a risk which the Fund specifically sought to protect itself from by obtaining financial statements. Ms Fry's illegality did not take the risk outside the scope of risk against which the Fund sought protection. The Fund was therefore entitled to rely on the accuracy of the financial statements. His Honour allowed the appeal and the accountant and the auditor were held liable for all the Fund’s losses, including those losses which occurred after Ms Fry continued to conduct her business whilst unlicensed.  **5.7 Minority shareholder's exclusion from management may be oppression**  (By Jonathan Stewart, Blake Dawson Waldron)  Remrose Pty Ltd v Allsilver Holdings Pty Ltd [2005] WASC 251, Supreme Court of Western Australia, Hasluck J, 16 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasc251.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasc251.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/" \t "_new)  **(a) Facts**  Scott Park is the sole director of Remrose Pty Ltd (Remrose). Paul Silvestro controls Allsilver Holdings Pty Ltd (Allsilver), although it is unclear from Hasluck J's decision whether he owns all the shares in Allsilver.  Allsilver and Remrose carry on a home building business in Western Australia through six companies: Scott Park Homes Pty Ltd (and its wholly owned subsidiary Blueprint Homes (WA) Pty Ltd), Scott Park Homes Great Southern Pty Ltd, Scott Park Homes South West Pty Ltd, S P Administration Services Pty Ltd and Scott Park Developments Pty Ltd (collectively the Group Companies). Allsilver is the majority shareholder in the Group Companies holding over 50 percent of the issued share capital in all of these companies (except Blueprint Homes (WA) Pty Ltd). Remrose holds, in most of the companies, the remaining shares in the companies (except Blueprint Homes (WA) Pty Ltd). Some of the Group Companies have other shareholders with small shareholdings, but these shareholders are not relevant for present purposes.  Mr Park has been the managing director of the Group Companies since the formation of the business in 1997 (though Mr Silvestro disputed that he was merely a silent partner in the Group Companies' operations). It is Mr Park's registration as a builder under which the companies operate and it is under his name ("Scott Park Homes") that the companies are branded. The Group Companies had a pre-tax profit for the financial year ending 30 June 2005 of approximately $4 million.  The current proceedings arise from an apparent breakdown in the relationship between Mr Silvestro and Mr Park. On 7 October 2005, without prior warning, Mr Silvestro handed Mr Park draft notices of resignation in relation to his position as director of each of the Group Companies. Mr Silvestro also gave Mr Park notices of general meetings of shareholders of each of the Group Companies which had as their sole business the removal of Mr Park as director of each of the Group Companies. The details that led to this move by Mr Silvestro are not revealed in detail in the judgment, though the breakdown in relationship seems to have occurred suddenly. Mr Park refused to sign the resignations.  Remrose applied for an interlocutory injunction to refrain Allsilver from exercising its rights as majority shareholder to remove Mr Park as director on the basis this would be unfairly prejudicial to Remrose as minority shareholder.  **(b) Removal from management**  Hasluck J discussed the basis of the protection of minority rights. He noted that the majority of cases involving minority rights arise from small unlisted companies where minority shareholders cannot easily sell their shares. However, he considered that not all conduct of a majority shareholder could necessarily be conduct that was improper with respect to minority shareholders and, in many cases, majority shareholders could be acting in the best interests of all members. Hasluck J stated that whether conduct is fair depends on the circumstances of the conduct and the identity of the individuals concerned.  Hasluck J held that if a minority shareholder has a legitimate expectation to participate in the management of a company then to deny that expectation may be conduct that unfairly prejudices (or unfairly discriminates against) the rights of that minority shareholder.  **(c) Injunction granted**  Hasluck J found that Remrose had a legitimate expectation that Mr Park participate in the management of the Group Companies. He noted that the lack of a written shareholders agreement did not preclude this finding. He held that Allsilver's attempt to remove Mr Park as a director of the Group Companies may be "unfair" to Remrose as the minority shareholder.  Further, Hasluck J considered that the removal of Mr Park as director of the Group Companies may result in adverse consequences for the Group Companies. This was because of the "undisputed fact" that Mr Park's name has been linked to the business of the Group Companies and the "clear and objective evidence" that the Group Companies have been increasingly profitable under Mr Park's management. Hasluck J held that the conduct of Allsilver may have an adverse effect on the Group Companies.  Hasluck J considered that the "irreparable damage" caused by severing Mr Park's close personal association with the company may have "irreversible consequences" through the departure of the man characterized as the company's founder (even if the financial impact may be small). This damage was not able to be undone, in his view, by reinstatement at some later date or by damages or an account of profits. He held that the balance of convenience favoured the granting of the injunction.  Accordingly, Hasluck J held that there was a serious issue to be tried. He granted the injunction to maintain the status quo and precluded Allsilver from holding the proposed general meetings of the Group Companies to remove Mr Park as director of the Group Companies.  **5.8 Enforceability of guarantee where creditor fails to maintain security**  (By Nadia Hall, Blake Dawson Waldron)  GE Finance Australasia Pty Ltd v Tony B Holdings Pty Ltd [2005] WASC 247, Supreme Court of Western Australia, Master Newnes, 15 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasc247.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/november/2005wasc247.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/" \t "_new)  **(a) Summary**  GE Finance Australasia Pty Ltd's (Plaintiff) claim arose out of guarantees entered into by Tony B Holdings Pty Ltd and Tony Barlow (the Defendants) in respect of a lease and two hire purchase agreements between the Plaintiff and Tony Barlow Australia Ltd (TBAL).  The Defendants argued that the guarantees were unenforceable as the Plaintiff had breached its implied duty to maintain security of the agreements (and the goods which were the subject of the agreements), by failing to perfect an assignment of each agreement. The Defendants also argued that by failing to affect the assignment of the agreements the Plaintiff had acted unconscionably.  Master Newnes held that the guarantees were enforceable as the provisions of the guarantees clearly excluded any implied terms and there was no evidence to suggest that the Plaintiff had acted unconscionably.  **(b) Facts**  This case involved an application for summary judgment.  The Plaintiff and TBAL entered into a lease agreement by which the Plaintiff agreed to acquire and lease to TBAL certain shop fittings and fixtures for a period of 60 months (Lease). TBAL agreed to pay monthly rental and stamp duty.  On 27 June 2000 and 17 October 2000 respectively, TBAL entered into hire purchase agreements with the Plaintiff in respect of shop fittings and fixtures.  The Defendants entered into a written guarantee by which they guaranteed the performance by TBAL of its obligations under the Lease and each hire purchase agreement.  On 5 July 2002, part of TBAL's business was sold to Flashline Pty Ltd (Flashline) and in February 2003 part of TBAL's business was sold to Allendale Pty Ltd (Allendale). The respective contracts of sale provided that Flashline would take an assignment of TBAL's interest in the Lease and the hire purchase agreement of 17 October 2001 and Allendale would take an assignment of TBAL's interest in the hire purchase agreement of 27 June 2000.  On 6 March 2003, an administrator was appointed to TBAL in accordance with the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and as at 15 August 2003 there were still amounts owing in respect of the Lease and the two hire purchase agreements. In April 2004 the Plaintiff made demand for payment of those amounts by the Defendants under the respective guarantees. The Defendant's denied liability under the guarantees on the ground that an effective assignment of the Lease and each hire purchase agreement had not occurred.  **(c) Decision**  The Defendant's argued that it was an implied term of the guarantee that the goods subject to the Lease and hire purchase agreements would not be abandoned by the Plaintiff. Alternatively, the Defendants submitted that in equity, the Plaintiff had an obligation to maintain its security in the agreements and the goods which were subject of the agreements. The Defendants argued that by failing to perfect the assignment, the Plaintiff allowed the goods to be dissipated and had consequently impaired or lost its security.  The Plaintiff submitted that the alleged implied terms were inconsistent with the terms of the guarantees as the terms of the guarantees preserved the guarantors’ liability even where any security had been "impaired or lost by the Plaintiff".  Master Newnes relied on Williams v Frayne (1937) 58 CLR 710 and stated at paragraph 34 that:  "unless it is a condition…of the guarantee that the creditor will obtain or maintain a security, a breach of the creditor's duty will…discharge the guarantor's debt to the extent of the loss of the security."  Master Newnes also held that where a guarantor has agreed that his or her liability will not be affected by anything that would otherwise have affected or discharged it that will normally be effective to preserve the guarantor's liability notwithstanding acts or omissions of the creditor.  The clear terms of the guarantees in this case were held to preserve the Defendants' liability as guarantors.  Master Newnes went on to consider whether the failure by the Plaintiff to perfect the security or not informing the Defendants of its failure to do so, constituted unconscionable conduct within the meaning of section 12CC of the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default).  Master Newnes cited with approval the meaning given to "unconscionable" by Dowsett J in Hurley v McDonald's Australia Ltd (2000) ATPR 41-741, namely "actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable…"  Master Newnes held there was no evidence in this case that the Plaintiff had acted unconscionably in connection with the assignment of the Lease and the hire purchase agreements. TBAL simply gave up possession of the goods when the sales of the businesses were completed. There was no evidence that the Plaintiff knew that TBAL was giving up possession of the goods or that it represented that a valid assignment had been effected.  **(d) Conclusion**  Master Newnes held that nothing had been put before him that was capable of discharging the Defendants' liability as guarantor.  **5.9 Unliquidated damages for misleading and deceptive conduct inducing entry into contracts with third parties – are these debts provable in bankruptcy?**  (By Magdalena Paszkiewicz, Freehills)  Coventry v Charter Pacific Corporation Limited, [2005] HCA 67, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/november/2005hca67.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/november/2005hca67.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The High Court considered the issue of whether a claim for unliquidated damages for the contravention of a statutory prohibition is a debt provable in the bankruptcy of the person who contravened the prohibition and, by that conduct, induced the claimant to make a contract with a third party. In this instance, the appellants acted in breach of section 995(2) of the former Corporations Law (Qld) by engaging in misleading and deceptive conduct in securities dealings, which induced the respondent to enter into contractual relations with a third party.  The High Court (Chief Justice Gleeson and Justices Gummow, Hayne, Callinan and Kirby), held that a statutory claim for unliquidated damages for misleading or deceptive conduct, which induced the claimant to make a contract with a third party but not with the bankrupt, is not a debt provable in bankruptcy. The court held that it is instead a demand in the nature of unliquidated damages arising otherwise than by reason of a contract or promise. As a result the bankrupt is not discharged from liability and the claim may be pursued by the claimant during and after discharge from the bankruptcy. In reaching its decision, the court considered whether the respondent’s claim for unliquidated damages arose otherwise than by reason of contract, promise or breach of trust, and whether the claim constituted a debt provable in the bankruptcy of the appellants.  Justice Kirby delivered a separate judgement, concurring with the orders granted.  **(b) Facts**  In 1992 and 1993, Andrew and Michael Coventry made representations to Charter Pacific Corporation Limited (“the respondent”) which had the effect of inducing the respondent to enter into a deed with Michael and Lynette Coventry as trustees of the Mike and Lyn Coventry Family Trust, and others. By the deed, the respondent agreed to lend money to Evtech Pty Ltd, one of the deed parties, and additionally to purchase shares from Evtech Pty Ltd and other parties to the deed. The loaned monies were not repaid and the acquired shares ultimately proved to be worthless.  Andrew and Michael Coventry were made bankrupt in 1994 and were subsequently discharged from bankruptcy in 1997.  In 1994, the respondent commenced an action in the Supreme Court of Queensland against, among others, Andrew Coventry ("the first appellant") and Michael and Lynette Coventry as trustees of the Mike and Lyn Coventry Family Trust ("the second appellant"). The respondent claimed damages for 'misrepresentations, misleading and deceptive conduct and/or breaches of contract'. Justice Fryberg of the Supreme Court of Queensland held that the allegations of misleading and deceptive conduct were contrary to section 995(2) of the former Corporations Law (Qld), however damages for that contravention were not claims for a debt provable in bankruptcy.  The appellants unsuccessfully appealed to the Court of Appeal of the Supreme Court of Queensland. The Court of Appeal, following the Victorian Court of Appeal decision of Aliferis v Kyriacou (2000) 1 VR 447 ("Aliferis"), held that a claim arises by reason of a contract or promise only if a contract or promise is an essential element of the cause of action. In this instance, the Court held that a contract or promise was not an essential element of the respondent's claim. Instead, the claim for damages for misleading or deceptive conduct was founded upon conduct anterior to and separate from the making of the deed or subsequent agreement.  The appellants appealed to the High Court. The appeal by the second appellant was dismissed for want of prosecution. Only the claim by the first appellant was considered by the Court.  **(c) Decision**  **(i) Joint decision of Gleeson CJ, Gummow, Hayne and Callinan JJ**  The central issue for determination, as identified by the majority of the High Court, hinged on the interpretation of section 82 of the [Bankruptcy Act 1996 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) ("the Act") in determining the definition of a debt provable in bankruptcy. More specifically, the interpretation of sub-section 82(2) and the meaning of the expression 'demands in the nature of unliquidated damages arising otherwise than by reason of a contract [or] promise', which identifies exceptions to the definition of debts provable in bankruptcy.  In making their decision, their Honours considered the development of bankruptcy legislation by tracing it back through early State and colonial legislation, to its origins in eighteenth century English legislation. Set-off provisions in bankruptcy legislation were similarly examined; as they were considered to cast light upon which debts are provable in bankruptcy. Their Honours additionally examined the nineteenth century English and subsequent Australian cases which have explored these provisions.  The majority considered the fraudulent misrepresentation cases of Jack v Kipping (1882) 9 QBD 113 and Re Giles; Ex parte Stone (1889) 61 LT (NS) 82, to show claims for unliquidated damages for misleading or deceptive conduct which induced the party misled to make a contract with a party other than the bankrupt are claims arising otherwise than by reason of contract.  The majority held that the Court of Appeal of Queensland wrongly applied the essential element test to sub-section 82(2) of the Act. The majority held that the Aliferis test, used to determine whether a demand arises by reason of a contract or promise, centres on the way in which a particular claim is made, and whether the claimant must plead the existence of a contract. It does not satisfactorily reflect the meaning given to section 82(2) by failing to consider whether the bankrupt was in fact a party to the contract. Furthermore, the majority overruled the Aliferis decision to the extent that claims for unliquidated damages for misleading or deceptive conduct inducing the making of a contract with the bankrupt are claims arising by reason of a contract.  Section 82 of the Act was construed, in light of its legislative ancestors, to show that not all claims are provable in bankruptcy. It follows that the exceptions to the definitions of debt provable in bankruptcy in sub-section 82(2) do not include claims for unliquidated damages for fraudulent misrepresentation where the representations induced the claimant to make a contract with a third party. As the bankrupt has no contract with the party claiming damages from it, these claims are a demand arising otherwise than by reason of a contract or a promise, and thus are not provable in bankruptcy.  The majority noted, in contrast, that a claim for unliquidated damages for misleading or deceptive conduct by the bankrupt, which induced the claimant to make a contract with the bankrupt, would be a debt provable in bankruptcy.  The appeal by the second appellant was dismissed for want of prosecution. The appeal by the first appellant was dismissed with costs.  **(ii) Justice Kirby's decision**  Justice Kirby was critical of the majority's view that the set-off provision of the Act and the purpose of the earlier Australian federal and English statutes provide insights into the ambit of debts and liabilities provable in bankruptcy generally.  Justice Kirby preferred to look to the equivalent provisions of the Act in the jurisdictions of Canada and New Zealand, where similar bankruptcy legislation was also inherited from the United Kingdom statutes and subsequently reformed. Both of the applicable Canadian and New Zealand laws provide that all demands in the nature of unliquidated damages are provable debts. Prior to their reform, questions of whether demands in the nature of unliquidated damages are provable in bankruptcy depended on the cause of action relied upon in the demand, and the underlying facts and circumstances of the case were not taken into account in determining whether the demand was provable.  The test to be applied, as identified by Justice Kirby, is to consider the cause of action relied upon by the plaintiff. His Honour noted that this approach has a disadvantage, by affording a plaintiff the privilege to elect, by way of pleading, whether it must prove in any later bankruptcy or whether it may sue upon an action outside that system. However, he reasoned that this approach is of greater certainty and is supported by precedent. Additionally, it would remain for the court to characterize the demand, by looking to the nature of the demand in deciding its character.  Justice Kirby held that the first appellant failed to invoke the background facts and circumstances test, and agreed with the orders proposed in the majority judgment.  In his judgment, Justice Kirby highlighted strongly the need for parliamentary reform in relation to this aspect of bankruptcy law.  **5.10 Successful application to set aside a statutory demand**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Condor Asset Management Ltd v Excelsior Eastern Ltd [2005] NSWSC 1139, Supreme Court of New South Wales, Barrett J, 10 November 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1139.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/november/2005nswsc1139.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/" \t "_new)  **(a) Summary**  A statutory demand was issued by Excelsior Eastern Ltd (Excelsior) on Condor Asset Management Ltd (Condor). Condor commenced proceedings under section 459G of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to have the demand set aside on four separate grounds:   * the demand was not properly served; * there was a defect in the demand which would cause substantial injustice to Condor (section 459J(1)(a)); * the accompanying affidavit by an employee for the solicitor of Excelsior, was defective such as to warrant setting it aside for "some other reason" (section 459J(1)(b)); and * there was a genuine dispute as to the existence of debts.   Barrett J found that Excelsior's failure to identify separate descriptions and separate amounts in respect of each of the assigned debts meant that the demand was defective and capable of causing substantial injustice to Condor. He found that a genuine dispute did exist in relation to the debts claimed, and accordingly set aside the statutory demand.  **(b) Facts**  The statutory demand dated 5 August 2005 stated that Condor, "as responsible entity of the Peridon Village Trust", owed Excelsior "as assignee of the GDK Financial Solutions Trust" the "amount of $15,768.50 being the amount of the debt described in the schedule". The schedule to the demand described the amount owed as "short term loans advanced by the trustee of the GDK Financial Solutions Trust who assigned the debts" to Excelsior. The demand did not provide Condor with a means of validating this assertion.  The demand was served at an address that was not the registered office of Condor. Nevertheless, the documents came into Condor's possession and attention by virtue of a director of Condor having visited and retrieving the demand from the premises to which it had been posted.  The Plaintiff challenged the demand on the four grounds set out above.  **(c) Decision**  **(i) Service**  It was common ground that it was not "served" on the Plaintiff in the manner contemplated by section 109X of the Act. However, following a line of authority on informal service of statutory demands, Barrett J concluded that section 109X should not be construed so as to exclude any means of service which is proved to have brought a document to the actual attention of a company.  **(ii) Defect causing substantial injustice**  Barrett J agreed with Lindgren J's comment in Chippendale Printing Co Pty Ltd v Deputy Commissioner of Taxation (1995) 55 FCR 562 that "a statutory demand relating to two or more debts must give a 'description' of the individual debts and state their amounts as well as state the total of those amounts". As the schedule of the demand provided only a general description of the debts and the total amount of $15,768.50, his Honour found that the demand was defective.  Barrett J then turned to the issue of whether this defect caused substantial injustice to Condor and stated:  "Fundamental, in these circumstances, is the proposition that the company on which the demand is served must be able to identify with precision the debt – or each and every one of the several debts – upon which a statutory demand is based. Failure to provide the means of such identification means that the company is denied the ability even to begin to consider whether s.459H(1)(a) provides a ground for challenge. A company in that position suffers severe prejudice; and that prejudice must, of its nature, mean that there will be, in terms of s.459J(1)(a), "substantial injustice" unless the demand is set aside."  Barrett J also found that the failure in the description of the debt to outline material from which Condor could determine if an assignment of the debt to Excelsior had been properly made was another defect that could cause substantial injustice.  **(iii) Adequacy of the supporting affidavit**  Barrett J rejected Condor's argument that the deficiencies in the affidavit in support of the demand provided "some other reason" under section 459J(1)(b) as to why the demand should be set aside on the grounds that Excelsior's solicitor was an appropriate deponent and that he acknowledged the source of his knowledge in relation to the information provided in the affidavit.  **(iv) Genuine dispute**  Barrett J affirmed that a company will fail in challenging a statutory demand on the "genuine dispute" ground only if its challenge is so devoid of substance that no further investigation is warranted and that "once a company shows that even one issue has sufficient degree of cogency to be arguable, a finding of genuine dispute must follow".  Barrett J rejected Excelsior's argument that Condor had merely made an assertion of a genuine dispute. His Honour held that the evidence by a director of Condor that certain transactions did not occur were more than a mere assertion and should be accepted as indicating a genuine dispute as to the nature of the demand.  **5.11 Extending time for a winding-up application: The meaning of 'special circumstances'**  (By Justin Fox and Ben Langford, Corrs Chambers Westgarth)  Perpetual Nominees Ltd v DY2 Pty Ltd [2005] NSWSC 1072, Supreme Court of New South Wales, 19 October 2005 per Hamilton J  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc107.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswsc107.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/index.cfm](http://cclsr.law.unimelb.edu.au/go/corporate-law-judgments/index.cfm" \t "_new)  **(a) Summary**  This case considered the meaning of "special circumstances" in the context of section 459R(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). That section entitles a court to extend the 6 month period within which a winding up application must be determined, if "special circumstances justify the extension". The court granted the requested extension on the basis that the applicant had demonstrated circumstances which were "out of the ordinary".  **(b) Facts**  The defendant owed the plaintiff more than $5 million. The plaintiff was in possession of a property in Dee Why under a mortgage which secured the debt.  Building work was taking place on the property, but the works were incomplete.  The plaintiff was unable to sell the land in this state due to uncertainty over the certification of the unfinished building works. The defendant applied to the plaintiff for finance to complete the works. That application was still being processed at the hearing date. The court accepted evidence that completing the building works would realise an improved price for the property and could lead to full satisfaction of the defendant’s debt.  **(c) Decision**  Section 459R(1) of the Corporations Act imposes a six month time limit for determination of an application for a company to be wound up in insolvency. Under section 459R(2), that period can be extended only if:  "(a) the Court is satisfying that special circumstances justify the extension; and (b) the order is made within the period as prescribed by subsection (1), or as last extended".  Hamilton J found that special circumstances existed. Hamilton J repeated his observation in Expile Pty Ltd v Jabb's Excavations Pty Ltd (2002) 194 ALR 138, that 'special circumstances' has its ordinary meaning in that it connotes the opposite of 'ordinary' or 'common.'  The special circumstances in this case were largely that it was in the creditor's interest to delay determination of the application so that, on completion of the building works, they would realise the full value of the property. Hamilton J considered those facts to be out of the ordinary, and exercised the Court's discretion to extend the time.  **5.12 The right of a bank under security documents to appropriate assets of directors and shareholders to reduce the indebtedness of a company**  (By Kelly Brown, Mallesons Stephen Jaques)  Australia and New Zealand Banking Group Limited v Karam [2005] NSWCA 344, New South Wales Supreme Court, Court of Appeal, Beazley JA, Ipp JA and Basten JA, 10 October 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswca344.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/october/2005nswca344.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The New South Wales Court of Appeal, in making this decision, considered the right of the Bank under the applicable security documentation to appropriate the assets of the directors and shareholders of the Company to reduce the indebtedness of the Company.  The Court determined that a claim for relief on the basis of "illegitimate pressure" for conduct which was not unlawful, should be determined under the equitable doctrines of undue influence, unconscionability, the relevant statutory remedies and not under economic duress.  The Court held that on the facts the Bank did not act unconscionably or exert illegitimate pressure by requiring the Karam Family to execute documents to secure (and clarify its earlier security) the finance provided by the Bank to the Company. In making this determination the Court considered among other factors, that the Company was family owned and therefore the Karam Family had the same knowledge of the financial circumstances of the Company as the Bank. As a result, the Karam Family were not in a position of special disadvantage and the Bank was found not to have acted unconscionably. The Court generally noted that the fact that a party is in financial difficulty is relevant but not sufficient to establish unconscionable conduct on the part of the stronger party.  As a result, the Bank could rely on the security documentation to apply the proceeds from the sale of personal assets of the Karam Family towards the indebtedness of the Company.  The Court reversed the decision of Santow J in the Equity Division and upheld the appeal by the Bank and dismissed the cross-appeal by the Karam Family.  **(b) Facts**  Over 14 years Karam Bros Footwear Pty (Ltd) ("Company") borrowed money from the Australia and New Zealand Banking Group Limited ("Bank"). The Bank obtained security, including a guarantee from the directors and shareholders of the Company (the "Karam Family"), over the assets of the Company and the personal assets of the directors of the Company. The directors of the Company were initially unaware that they were personally liable for the Company's debts.  In 1993, when the Company got into financial difficulty, the Bank provided further finance to the Company. As the Bank was unsure about the enforceability of the earlier security documentation and to clarify its security position, it required the directors of the Company to execute a deed of covenant and an acknowledgement that the directors were personally liable for the Company's debts. In addition, the directors, at the request of the Bank, sold various properties to reduce the Company's indebtedness.  When the Company failed, the assets of the Company were insufficient to repay the Bank. The Bank sought to recover the outstanding amounts from the personal assets of the Karam Family.  The Karam Family sought:   * relief from the security documents on the basis that they were unjust for the purposes of the [Contracts Review Act 1980](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default) and unconscionable under the general law; * an order that the security documents be varied or set aside; * damages against the Bank in negligence and pursuant to section 82 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default); and * an order for equitable compensation.   Santow J in the Equity Division of the Supreme Court of New South Wales held that:   * the earlier security transactions were unconscionable and that subsequent transactions should be set aside on grounds including, economic duress and unconscionability; * the Company, and not the Karam Family, is liable to the Bank for the remaining debt; * proceeds from the sale of the properties by the directors of the Company could be applied by the Bank in reduction of specific parts of the Company’s trading debt; and * the personal homes of the Karam Family did not secure any part of the business debt of the Company.   The Bank appealed and the Karam Family cross-appealed against Santow J's decision.  **(c) Decision**  The Court reversed Santow J's judgment and upheld the appeal and dismissed the cross-appeal.  In reaching this decision, the Court considered the following:   * whether the acknowledgment and deed of covenant entered into by the Karam Family and the Bank in 1993 ("1993 Documents") had the effect of rendering the personal homes of the Karam Family as security for the on-going indebtedness of the Company; * whether the Bank acted unconscionably or exerted illegitimate pressure on the Karam Family to enter into the 1993 Documents; * whether the earlier documentation securing the assets of the Company gave rise to a continuing effect of unconscionable conduct; and * the basis of the cross-appeal.   **(i) Legal principles**  The Court determined that a claim for relief on the basis of "illegitimate pressure" with respect to conduct which is not unlawful, should be determined under the equitable doctrines of undue influence, unconscionability, relevant statutory remedies and not under economic duress. For the Court to set aside the security documentation, the Karam Family would need to satisfy the Court that the Bank exerted undue influence (actual or presumptive) or acted unconscionably by taking advantage of the Karam Family's special disability or special disadvantage (In Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447), when entering into the security documents.  **(ii) 1993 documents**  The Court determined that the Bank did not exert illegitimate pressure and did not act unconscionably in entering into the 1993 Documents with the Karam Family. In making this finding, the Court considered the bargaining positions of the parties, their relationship and the terms of the transaction. The Court specifically considered the following:   * the fact that a party is in financial difficulty is relevant but not sufficient to establish unconscionable conduct on the part of the stronger party; * the greater the financial risk, the greater the justification for increased security; * the Karam Family understood the nature and effect of the action they were taking; * because the company was family owned, the Karam Family had the same knowledge of the financial circumstances of the Company as the Bank and therefore the Karam Family were not in a position of special disadvantage (distinguished from the facts in In Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447); and * the directors of the Company received financial and legal advice.   On this basis, the Court found that the 1993 Documents were enforceable according to their terms.  **(iii) Earlier documentation**  The Court determined that the Bank did not act unconscionably in entering into the earlier documentation with the Karam Family. The Court also noted the following when considering the earlier documentation:   * the 1993 Documentation clarified wrongly held beliefs that the personal assets of the Karam Family were not available to meet the indebtedness of the Company; and * the Bank was entitled to resolve any confusion surrounding the scope of the earlier documentation by requiring the Karam Family to enter into the 1993 Documentation before providing further financial assistance.   **(iv) Cross-appeals**  The Karam Family cross appealed against Santow J's decision that the proceeds from the sale of certain properties by the directors of the Company could be applied by the Bank in reduction of only specific parts of the Company's trading debt and not the indebtedness of the Company as a whole.  The Court determined that the purpose of the earlier security documentation was to secure the indebtedness of the Company to the Bank and that the proceeds should not be confined to specific parts of the Company’s trading debt. On this basis, the Court dismissed the cross-appeal by the Karam Family. |
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