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| **Brief Contents** |
| |  |  |  | | --- | --- | --- | | [**1. Recent Corporate Law and Corporate Governance Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#h1)  [**2. Recent ASIC Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#h2)  [**3. Recent Takeovers Panel Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#h3)  [**4. Recent Corporate Law Decisions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#h4)  [**5. Contributions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#5) |  | [**6. Subscription**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#6)  [**7. Change of Email Address**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#7)  [**8. Website Version**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#8)  [**9. Copyright**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#9)  [**10. Disclaimer**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#10) | |
| **Detailed Contents** |
| **[1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm" \l "1)**  [1.1 Establishment of the Audit Quality Review Board](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#011) [1.2 The impact of superannuation choice](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#012) [1.3 Does increased disclosure of executive remuneration make a difference?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#013) [1.4 Basel Committee issues guidance on corporate governance for banking organisations](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#014) [1.5 APRA implements stage 2 general insurance reforms](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#015) [1.6 US Federal financial regulatory agencies issue interagency advisory on external auditor limitation of liability provisions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#016) [1.7 Ethical ranking of companies](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#017) [1.8 UK ASB issues reporting statement on the Operating and Financial Review](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#018) [1.9 Survey reveals computer-based risks, foreign trade and corporate governance as the top corporate risk concerns](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#019) [1.10 Guidelines on supervisory co-operation for cross-border banking and investment firm groups](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0110) [1.11 UK FSA publishes financial risk outlook](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0111) [1.12 IFAC issues new guidance on developing codes of conduct](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0112) [1.13 Venture capital data](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0113) [1.14 Interactive map of corporate governance](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0114)  [1.15 Study examines the corporate governance views of both companies and investors](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0115) [1.16 Overview of US fund governance practices 1994 - 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0116) [1.17 Information quality and governance](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0117) [1.18 Mapping the global capital market](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0118) [1.19 Report on the auditing profession](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0119) [1.20 New Centre for Corporate Law Research Report - An Empirical Study of the Statutory Derivative Action](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0120) [1.21 Seminar on the AWB inquiry](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0121)  **[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm" \l "2)**  [2.1 ASIC relief on measuring remuneration](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#021) [2.2 ASIC provides financial reporting relief to foreign licensees](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#022) [2.3 ASIC releases draft guidance on shorter, better prospectuses](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#023) [2.4 Trans-Tasman regulatory alignment moves a step closer](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#024) [2.5 ASIC relief on reporting remuneration disclosures](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#025)  **[3. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm" \l "3)**  [3.1 Citect Corporation Limited - decision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#031) [3.2 Dromana Estate Limited - decision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#032) [3.3 Bridgewater Lake Estate Ltd - decision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#033)  **[4. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm" \l "4)**  [4.1 Defaulting participant under a Joint Venture Agreement](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#041) [4.2 When an assisting creditor will be entitled to priority over other creditors - Corporations Act section 564](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#042) [4.3 Effective service of statutory demands](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#043) [4.4 Removal of a liquidator facing conflict of interest issues](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#044) [4.5 Restitution of moneys paid under a void business sale contract](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#045) [4.6 Exoneration provisions for corporate officers and the dynamics of discretion](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#046) [4.7 The circumstances in which the just and equitable ground for winding up a company will apply](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#047)  [4.8 Improper use of position by company director](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#048) [4.9 Is rescission necessary before a subscribing shareholder can recover from an issuer under section 729(1) of the Corporations Act?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#049) [4.10 Articles of Association governing transfer of shares and principles of construction](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0410) [4.11 Implying terms into a constitution and other attempted penalty shots](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0411) [4.12 Unquantifiable price and no apparent authority in contract for services](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20102%20February%202006.htm#0412) |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Establishment of the Audit Quality Review Board**  On 17 February 2006, the Honourable Chris Pearce MP, Parliamentary Secretary to the Australian Treasurer, launched the Audit Quality Review Board (AQRB).  Mr Pearce said that the AQRB work will complement other existing review processes undertaken by the professional bodies - the Institute of Chartered Accountants in Australia, the National Institute of Accountants and CPA Australia and the surveillance activities of the Australian Securities and Investments Commission (ASIC). The Government welcomed and supported this initiative.  ASIC has also welcomed the establishment of the AQRB. ASIC Chairman Mr Jeffrey Lucy said a high quality and independent audit process is crucial to the operation of a fair and efficient market. 'The presence of robust and reliable financial reporting is crucial if we are to have confident and informed investors,' Mr Lucy said.  The Board has a remit to review those systems, established by the major audit firms that are intended to ensure that they meet independence and quality standards in relation to their audits of listed companies. The Honourable Andrew Rogers QC is the inaugural independent Chairman. Mr Rogers said: "The Board has the potential to play a vital role in the re-establishment of trust in Australian financial reporting, following several high profile failures in recent years, complementing the expanded role of ASIC under CLERP 9 and contributing to the continual improvement of the audit profession for the benefit of the Australian public".  The Board will consist of a number of eminent individuals with a wealth of knowledge and experience in legal, regulatory, business and auditing affairs. A number of members will be from the profession and will provide the experience and professional expertise necessary to carry out reviews. However, they will not be permitted to carry out reviews of the firms in which they practiced. The other Board members comprise Mr Alan Cameron AM, Mr William Coad AM, Ms Brigid Curran, Mr Ian Gilmour (who is also Company Secretary), Professor the Honourable Michael Lavarch, Mr Robert Lynn, Professor Ian Ramsay and Mr John Richardson. Mr Nick Hullah is Technical Adviser to the Board.  The four major Australian auditing firms have voluntarily agreed to provide the Board with access to their quality systems, highlighting their continued commitment to the integrity of the auditing process. All firms conducting audits of publicly listed companies in Australia are eligible to sign up with the AQRB.  St James Ethics Centre is the foundation member of AQRB, a public company limited by guarantee. St James will also be available to address ethical issues in AQRB and be involved in dispute resolution, if necessary.  **1.2 The impact of superannuation choice**  A new analysis of the impact of choice of super fund in Australia has found that, contrary to some predictions, neither industry nor retail super funds have suffered significant outflows following the introduction of choice of fund.  The Introduction of Choice of Superannuation Fund Results to Date, published on 14 February 2006 by the Association of Superannuation Funds of Australia (ASFA) Research Centre, is the first comprehensive assessment of the impact of choice of fund since its introduction in July last year.  It compares some of the documented predictions for choice of fund with what has actually happened to date. The study used data and feedback from member surveys, super funds, and clearing houses for super contributions made by employers to determine actual movements related to choice of fund.  Data from published and unpublished ANOP Research findings from late 2005 on attitudes to super and choice suggest that there is only a modest level of interest in changing funds, which often is only triggered by key events such as changing jobs or wanting to consolidate numerous small accounts.  Clearing house and super fund feedback suggests that the great bulk of employers have not had any employees exercising choice.  The ASFA study suggests that the rate of changing funds will continue at 11% or 12% of employees a year, with around half of that due to active choice by employees and the rest due to job change or fund closure.  The study found that a mass exodus to self managed superannuation funds (SMSFs) has not occurred and is not expected. Of those who have exercised choice, only 3% requested their contributions be paid into an SMSF. However, most of the SMSFs nominated appeared to be already established, rather than new entities formed to receive the contributions.  Possible reasons for the movement to SMSFs being lower than was predicted by some commentators include: strong investment returns; regulatory restrictions on the selling of SMSF options; and greater public awareness of the responsibilities involved in running an SMSF.  There is evidence that industry funds have fared better than some commentators expected from choice of fund, and have continued to close the gap of market share between them and retail funds. Industry funds are now able to attract and retain members without needing to rely on provisions in industrial awards. As well, the account balances of those in industry (and other super funds) continue to grow.  The ASFA paper predicts that both retail and industry funds are set to jointly dominate the market for superannuation in the future, with neither likely to significantly gain an upper hand. This reflects market developments, such as the closure of many corporate super funds.  The ASFA paper also looks at the likely impact of choice of fund being extended to employees covered by State Awards, and the impact of new industrial relations legislation on State and Commonwealth agreements. These changes could see an additional million employees having access to choice of fund from 1 July 2008.  The study is available on the [ASFA website](http://www.asfa.asn.au/policy/rpm.cfm?page=reports" \t "_new).  **1.3 Does increased disclosure of executive remuneration make a difference?**  In the January 2006 issue of the Corporate Law Bulletin reference was made to the recent proposal by the US Securities and Exchange Commission to publish proposed rules that would enhance disclosure requirements for executive and director remuneration. Will this enhanced disclosure lead to reduced remuneration? The Wharton Business School has published on its website the views of several of its professors in relation to the possible effects of the new disclosure proposals. The general view is that the proposals are unlikely to reduce executive remuneration but they agree that more complete and clearer disclosure will improve the current system.  The article is available on the [Wharton School website](http://knowledge.wharton.upenn.edu/article/1374.cfm" \t "_new).  **1.4 Basel Committee issues guidance on corporate governance for banking organisations**  On 13 February 2006, the Basel Committee on Banking Supervision issued guidance to help promote the adoption of sound corporate governance practices by banking organisations. This guidance results from a consultative document published in November 2005, which elicited comments from banks, industry associations, supervisory authorities and other organisations.  The guidance, entitled Enhancing Corporate Governance for Banking Organisations, builds on a paper originally published by the Committee in 1999, as well as the Principles for Corporate Governance issued by the Organisation for Economic Co-operation and Development in 2004. This guidance is intended to help ensure the adoption and implementation of sound corporate governance practices by banking organisations worldwide, but is not intended to establish a new regulatory framework layered atop existing national legislation, regulations or codes.  The paper highlights the importance of:   * the roles of boards of directors (with a focus on the role of independent directors) and senior management; * effective management of conflicts of interest; * the roles of internal and external auditors, as well as internal control functions; * governing in a transparent manner, especially where a bank operates in jurisdictions, or through structures, that may impede transparency; and * the role of supervisors in promoting and assessing sound corporate governance practices.   The guidance is available on the [BIS website](http://www.bis.org/publ/bcbs122.htm" \t "_new).  **1.5 APRA implements stage 2 general insurance reforms**  On 9 February 2006, the Australian Prudential Regulation Authority (APRA) released new prudential standards as part of its general insurance stage 2 reforms, following extensive development and consultation.  The three standards address key recommendations of the HIH Royal Commission and form an important element of APRA's supervision of risk and financial management by general insurance companies.  APRA's general insurance stage 2 reforms commenced with the release of its discussion paper, Prudential Supervision of General Insurance Stage 2 Reforms in November 2003. A follow-up discussion paper, Risk and Financial Management, and draft standards were released in May 2005.  The package introduces a new approach to prudential guidance which will reduce the compliance burden on APRA-regulated general insurance companies while providing APRA with a strong and flexible prudential framework. The framework consists of principles-based prudential standards and separate prudential practice guides, which provide non-binding guidance on meeting these new standards and on prudent practices in these particular areas.  The standards clarify and strengthen APRA's previous requirements in risk and reinsurance management and emphasise the importance of documenting reinsurance contracts for more certainty. They also cover audit and actuarial reporting and valuation. The three standards are GPS 220 Risk Management, GPS 230 Reinsurance Management, and GPS 310 Audit and Actuarial Reporting and Valuation.  These standards include a requirement for:   * provision of a rigorous business plan including the insurer's ability to meet future capital requirements; * senior management to provide a financial information declaration annually; * documentation of reinsurance arrangements including a reinsurance arrangements statement; * prior approval of limited risk transfer arrangements; and * approved actuaries to prepare a financial condition report annually.   The prudential standards and PPGs are available on [APRA's website](http://www.apra.gov.au/General/general-Insurance-PPGS.cfm" \t "_new).  **1.6 US Federal financial regulatory agencies issue interagency advisory on external auditor limitation of liability provisions**  On 3 February 2006, US Federal financial regulatory agencies announced the issuance of a final advisory that addresses safety and soundness concerns that may arise when financial institutions agree to limit their external auditors' liability. The agencies' primary concern is that limiting the liability of external auditors in engagement letters may reduce the reliability of audits.  The "Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters" informs financial institutions that they should not enter into external audit engagement letters that incorporate unsafe and unsound limitation of liability provisions with respect to audits of financial statements and internal control over financial reporting. Generally, this includes provisions that: (1) indemnify the external auditor against claims made by third parties (including punitive damages); (2) hold harmless or release the external auditor from liability for claims or potential claims that might be asserted by the client financial institution; or (3) limit the remedies available to the client financial institution. The advisory does not treat provisions that waive the right of financial institutions to seek punitive damages against their external auditors as unsafe and unsound.  The advisory is effective for audit engagement letters executed on or after the date it is published in the Federal Register. The advisory does not apply to previously executed engagement letters. Nevertheless, the agencies encourage any financial institution subject to a multi-year audit engagement letter containing unsafe and unsound limitation of liability provisions to seek to amend its engagement letter to be consistent with the advisory for periods ending in 2007 or later.  The agencies may take appropriate supervisory action if unsafe and unsound limitations of liability provisions are included in external audit engagement letters executed on or after the date the advisory is published in the Federal Register.  The advisory is available on the [Federal Reserve Board website](http://www.federalreserve.gov/boarddocs/press/bcreg/2006/20060203/default.htm" \t "_new).  **1.7 Ethical ranking of companies**  On 1 February 2006, Geneva-based Covalence published its annual ethical ranking, giving the best ranked companies as well as those companies which have made the most progress in 2005.  Twenty multinational companies are analyzed in ten major sectors (automobiles, banks, chemicals, entertainment and leisure, food and beverage, mining, oil and gas, pharmaceutical, retailers and technology hardware).  Covalence's ethical quotation system is a reputation index based on quantifying qualitative data, which are classified according to 45 criteria of business contribution to human development such as labour standards, waste management, product social utility or human rights policy. It is a barometer of how multinationals are perceived in the ethical field.  Leaders across all sectors:   |  |  | | --- | --- | | **Rank** | **Best Ethical Score** | | 1 | GlaxoSmithkline | | 2 | Merck | | 3 | Bristol Myers Squibb | | 4 | Unilever | | 5 | Starbucks | | 6 | Toyota | | 7 | Hewlett-Packard | | 8 | Alcoa | | 9 | Boehringer Ingelheim | | 10 | HSBC |   The full list is available on the [Covalence website](http://www.covalence.ch/index_uk.php" \t "_new).  **1.8 UK ASB issues reporting statement on the Operating and Financial Review (OFR)**  On 26 January 2006, the UK Accounting Standards Board (ASB) issued a Reporting Statement 'The Operating and Financial Review'.  The Reporting Statement has been issued in the light of the UK Government's decision to remove the statutory requirement on quoted companies to publish OFRs. Following the repeal of the legislation, the ASB has withdrawn Reporting Standard (RS) 1 'The Operating and Financial Review' and has converted RS 1 into a statement of best practice on the OFR, which is set out in the document issued.  Legislation remains in place requiring companies to prepare an enhanced review of their business (the Business Review) in the directors' report, in line with the provisions of the 2003 EU Accounts Modernisation Directive.  Many major companies already publish an OFR on a voluntary basis and the ASB is keen that they should continue to do so, which is why it has issued the statement as an up-to-date and authoritative source of best practice guidance for companies to follow. The guidance set out in the statement is more specific than the requirements set out in legislation, in particular with regard to forward-looking information.  In preparing this statement, the ASB has sought to limit the changes to those required as a consequence of the repeal of the OFR legislation and to make the language consistent with a voluntary statement of best practice rather than a standard. Given the extensive consultation that took place in developing RS 1, and the need to continue to give entities guidance in preparing voluntary OFRs, the ASB is issuing this as a final Reporting Statement, rather than engaging in a further round of consultation.  The Financial Reporting Council (FRC) intends to monitor developments in this area. As part of it's 2006/07 Plan and Budget, which is currently out for consultation, the FRC will undertake a review of the quality of narrative reporting in company reports.  The Statement is available on the [FRC website](http://www.frcpublications.com/" \t "_new).  **1.9 Survey reveals computer-based risks, foreign trade and corporate governance as the top corporate risk concerns**   On 25 January 2006 at the World Economic Forum's Annual Meeting, Swiss Re announced the results of its survey on what senior leaders at multinational corporations see as main risks in 2006 and beyond. The survey polled senior executives in six large, industrial countries: France, Germany, Italy, Japan, the UK and the US. The study, entitled "Swiss Re Corporate Risk Survey: A Global Perspective", highlights computer-based risks, foreign trade and corporate governance as causing the most concern.  The study found that, while risk assessment is becoming a more prominent concern among many senior executives, there is a discernable gap between assessing risk and adopting comprehensive risk mitigation strategies.  Key findings from the survey include:   * Some risks spanned all countries surveyed:  The greatest risk concern among global executives is the threat of computer-based risks (defined as hackers, unauthorised disclosures, viruses/worms, piracy, disruption of electronic infrastructure, data storage and/or telecommunications) which placed in the top three for executives in all six countries; * Other risks were more sector specific:  Concern over corporate governance issues ranked high (2nd place) among executives in the financial sector, whereas executives in manufacturing rated the same risk much lower (ranked 11th); * Risk mitigation tools were similar:  Executives favour internal controls as their primary risk management tool, though insurance and financial hedges are also important; and * Executives have a shared focus on emerging risks:  Natural disasters, computer-based risks and potential global pandemics, such as avian flu, top the list of emerging risk concerns.   Most of the risks mentioned in the survey are seen by executives to have a long shelf life that will persist for years to come. However, some risks, such as accounting rule changes and civil unrest or disturbances, were viewed by senior business leaders as short-term (extending over a period of approximately two years).  The full survey is available on the [Swiss Re website](http://www.swissre.com/INTERNET/pwswpspr.nsf/fmBookMarkFrameSet?ReadForm&BM=../vwAllbyIDKeyLu/bmer-6lckaj?OpenDocument" \t "_new).  **1.10 Guidelines on supervisory co-operation for cross-border banking and investment firm groups**  On 25 January 2006, the Committee of European Banking Supervisors (CEBS) published final guidelines on cooperation between supervisors of EU banking groups and investment firms. The guidelines are designed to promote an efficient supervisory framework for groups that operate in several EU jurisdictions, by enhancing the practical operational networking of national supervisors.  Market developments such as the trend towards centralisation of risk management and other functions within financial groups, the integration of EU financial markets, and the increasing importance of certain subsidiaries and branches call for a more integrated, coordinated, and risk-based approach to prudential supervision. The guidelines use new operational mechanisms, along with well-established methods of cooperation, to promote efficient and cost-effective supervision and enhanced convergence in supervisory practices.  The guidelines were developed after extensive dialogue with market participants, including a formal public consultation which ended on 8 November 2005 and a public hearing with market participants on 5 October 2005. CEBS received twelve responses from industry associations and international banking groups. The responses were generally positive and supportive of CEBS' work. Some respondents would like to see the role of the consolidating supervisor further enhanced, but this was not possible under the legal framework created by the new Capital Requirements Directive. However, CEBS is fully committed to work towards convergence and enhanced cooperation to achieve effective and an efficient supervisory framework within the EU.  More information is available on the [CEBS website](http://www.c-ebs.org/standards.htm" \t "_new).  **1.11 UK FSA publishes financial risk outlook**  On 25 January 2006, the UK Financial Services Authority (FSA) published its Financial Risk Outlook 2006. It highlights the risks that the FSA believes will be most important in the next eighteen months and how these could affect its ability to achieve its statutory objectives and strategic aims. The Financial Risk Outlook therefore provides the background against which the FSA sets its priorities for the year.  The FSA's central assumption for macroeconomic conditions for the next 12-18 months is that the relatively benign conditions experienced in 2005 will continue: that there will continue to be strong world economic growth, without substantial change to the economic and financial stability which characterized 2005. This assumption is in line with consensus forecasts. But these relatively benign conditions are accompanied by large and growing imbalances which are in the long term unsustainable, and whose correction, if it were to occur in a rapid or disorderly manner, would pose risks to both providers and users of financial services. The Financial Risk Outlook examines in particular three possible sources of instability which could affect firms, markets, consumers and the FSA's own work. These are:   * a significant and sustained rise in oil prices; * a slow-down in global consumption; and * a large and disorderly depreciation of the US dollar.   The Financial Risk Outlook also identifies and discusses a number of particular risks which would adversely affect the FSA's ability to discharge its statutory responsibilities if they were to materialize. Many would also affect financial markets. Some of these risks are events, others trends. The risks identified are:   * It is important for firms to evaluate how they would respond to extreme risk scenarios, such as a global pandemic or a major corporate bankruptcy, despite the current period of relatively low market volatility. * The threat of terrorism poses a range of financial-crime, operational and insurance risks. * Valuation problems with illiquid financial instruments, such as complex derivatives and structured products, raise operational and conflicts of interest risks. * The level of outstanding credit-derivative trade confirmations presents operational and legal risks for firms; due to the rapid growth in the credit-derivatives markets, a backlog in unconfirmed credit-derivatives transactions has built up. * The risk of financial fraud is increasing. * The volume of international regulatory reform creates challenges for the financial-services industry. * High levels of consumer borrowing may create financial problems for a significant minority of consumers. * Increasingly complex financial decisions will pose a challenge for many consumers. * Consumers are being required to take more responsibility for financing their retirement.   The Financial Risk Outlook emphasizes the need for the senior managers of financial service firms to carry out stress tests to identify how their firms would respond to these and other risks materializing, and the adverse conditions, including a sudden drying up of liquidity, that they might cause. The FSA is encouraging firms to fully embed stress testing into their day-to-day management processes. The ability to aggregate risks in stress testing will give firms a more complete sense of the risks they face, including hidden correlations across portfolios. Evidence suggests that this remains a key challenge for many firms that, if it is not addressed, leave them vulnerable to sudden events.  A copy of the 2006 Financial Risk Outlook is available on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  **1.12 IFAC issues new guidance on developing codes of conduct**  Recognizing the critical role of ethical values and standards on protecting the public interest, the International Federation of Accountants (IFAC) has developed new proposed guidance for corporate accountants and management worldwide.  On 24 January 2006, the Professional Accountants in Business (PAIB) Committee issued an exposure draft, Guidance for the Development of a Code of Corporate Conduct, proposing guidance to assist professional accountants and others in establishing and implementing codes of conduct in their organizations.  The proposed guidance highlights the benefits of an effective code of conduct and identifies the professional accountant's role in the development, monitoring, reinforcement, and reporting of such codes in their organizations. To assist in the creation of codes of conduct, the guidance includes information on presentation and content, organizational and management challenges, and implementing a code of conduct in a global organisation.  The new guidance identifies a three-stage approach to the development and implementation of codes of conduct: managing for compliance, managing stakeholder relations and creating a values-based organization, in which the values and principles permeate the organization and are enduring.  The exposure draft is available on the [IFAC website](http://www.ifac.org/EDs" \t "_new).  **1.13 Venture capital data**  Venture capitalists matched 2004 by investing $21.7 billion in 2,939 deals in 2005, according to a survey published on 24 January 2006, by PricewaterhouseCoopers, Thomson Venture Economics and the National Venture Capital Association. Full-year 2004's $21.6 billion marked the first increase in venture capital investing after three years of consecutive declines (all figures are in US$).  Funding for later stage companies rose markedly to $9.7 billion, while the number of companies getting venture capital for the first time increased to 901, continuing a steady year-over-year rise. Both measures were four-year highs. Some hot sectors began to emerge, though they still accounted for a relatively small proportion of overall activity. The Wireless sub-sector of Telecommunications jumped to a four-year high of $1.3 billion. First-time investing in Internet-specific companies across all industry categories nearly doubled to $840 million.  Investments in the fourth quarter of 2005 totalled $5.1 billion in 709 deals, down slightly from $5.4 billion in Q3 2005, but well in within the range of investments levels seen over past 14 quarters.  **(a) Stage of development and 12-month average valuations**  The continuing shift toward Later stage investing over the past five years reflects venture capitalists ongoing support of existing portfolio companies via additional follow-on rounds. Given the lacklustre IPO market, portfolio companies may be waiting longer to exit than in previous years. For full year 2005, Later stage funding rose 22% to $9.7 billion in 952 deals compared to $8.0 billion in 2004. More notably, Later stage accounted for 45% of all venture capital dollars, the highest proportion in the 11-year history of the survey. Commensurately, the average post-money valuation rose to $81.9 million for the 12 months ending Q3 2005 compared to $73.0 million for the period ending Q3 2004. (Note that valuation data lags investment data by one quarter.)  Funding for Start-Up and Early stage companies slipped only slightly to $4.1 billion in 922 deals compared to $4.4 billion in 2004 indicating sustained interest in longer term investment horizons. Average post-money valuations of Early stage companies slipped to $12.9 million for the 12 months ending Q3 2005 compared to $15.4 million for the period ending Q3 2004.  Investing in Expansion stage companies fell to its lowest point in nine years: $7.8 billion in 1065 deals. In 2004, 1,195 Expansion stage deals amounted $9.3 billion. Average post-money valuations dropped to $42.3 million versus $53.8 million for the year-ago period.  **(b) Sector and industry analysis**  The Life Sciences sector (Biotechnology and Medical Devices industries, together) inched up to a five-year high in 2005 with $6.0 billion in 608 deals compared to $5.8 billion in 589 deals in 2004. For the year, Life Sciences accounted for 28% of all venture capital investments.  Software investments slipped 10% in 2005 to $4.7 billion in 840 deals. However, Software easily held its position as the largest single industry category with 22% of total dollars and 29% of all deals. The Networking industry continued its slide, ending at $1.4 billion in 2005, an eight-year low point.  Although the Telecommunications industry category has languished in recent years, the Wireless sub-category has become a hot spot. For full year 2005, 152 wireless-related companies received $1.3 billion, a 24% increase over 2004's $1.1 billion. This increase pushed the Telecommunications category to a three-year high of $2.1 billion in 2005.  Major industry categories that experienced increases in 2005 were IT Services, Industrial/Energy and Financial Services. Other major categories were either relatively flat or experienced modest decreases.  'Internet-specific' is a discrete classification assigned to a company whose business model is fundamentally dependent on the Internet, regardless of the company's primary industry category such as Software or Telecommunications. Internet-specific investing has grown slowly over the last three years with 2005 ending at $2.9 billion in 450 deals, up slightly from $2.8 billion in 2004. Companies classified as Internet-specific represented 13% of all venture dollars and 15% of all deals in 2005.  **(c) First-time financings**  New investments by venture capitalists hit a four-year high with 901 companies receiving their first round of institutional venture capital for a total of $5.3 billion in 2005. Last year, 865 companies attracted $4.6 billion. The increase reflects venture capital firms' appetite for fresh ideas to balance existing investments.  The most notable jump in first-time financings was among Internet-specific companies. A total of $840 million went to 161 companies, increases of 89% and 68%, respectively over 2004's $443 million in 96 companies. The boost recognizes the potential of new companies across all standard industry classifications and the viability of new business models that rely on the Internet.  Among the standard industry classifications, the Software industry attracted the most first-time activity with $1.2 billion going to 238 companies. Life Sciences followed with $1.0 billion going to 176 companies. All figures were similar in 2004.  First-time Telecommunications investing reached a four-year high with 72 deals, directly reflecting the renewed interest in the wireless arena. Media & Entertainment increased to 64 companies compared to 43 in 2004. Industrial/Energy followed with 51 deals, roughly the same as 2004. First sequence investing in other industries generally mirrored the pattern of overall industry investing.  In terms of stage of company development, the most first-time financings in 2005, 67% of all first-time deals, went to Start-Up and Early stage companies. Expansion stage companies were 28% and Later stage 5%. All figures were in line with recent historical norms.  **1.14 Interactive map of corporate governance**  Maplecroft (a network of practitioners and academics in the field of corporate responsibility) has launched an interactive map of corporate governance.  Maplecroft's Global map profiles countries' corporate governance frameworks, covering both the existing legal structures and the extent to which the law is enforced. The index addresses this through the inclusion of perception indicators of corporate governance and corruption.  Features of the Global map of corporate governance include:   * Risk analysis – a Corporate Governance Index (CGI), derived by Maplecroft, measuring risks to corporate governance in 132 countries. * Analysis of the wider issue of corporate governance and specific risk implications for business and other stakeholders. * Hotspots identifying countries where low standards of corporate governance are especially significant. * Spotlights describing examples of attempts by business, governments or regulators to improve corporate governance standards. * Flashpoints profiling examples of serious corporate governance related incidents. * Access to Transparency International’s daily corruption news.   The maps were researched, designed and developed by Maplecroft. The project was informed by data from publicly available sources, including the World Bank and Transparency International.  More information is available on the [Maps website](http://maps.maplecroft.com/noflash.html" \t "_new).  **1.15 Study examines the corporate governance views of both companies and investors**  The quality of communication that companies now provide the investment community has improved dramatically over the last few years according to research published in a joint KPMG/Lintstock report on 23 January 2006. However, companies are still sceptical about what this achieves.  The study entitled, The Corporate Governance Report: Investor Policies and Corporate Practice surveyed the views of fund managers and FTSE 100 and FTSE 250 company secretaries and drew on Lintstock's and KPMG's respective databases on voting policies and governance structures.  On Communication and transparency - Whilst companies argue that they have responded to the calls for greater transparency and disclosure, they point out that the investment community has done little to improve their channels of communication. This has led to some companies criticising investors and calling for better communication and transparency from them.  On the NED Talent Pool - In contrast to suggestions that it is proving increasingly difficult to find non-executive directors willing to take on the ever-increasing responsibility of the role, this report suggests there is no shortage of talented and experienced non-executive directors for company boards to draw upon. The respondents in the KPMG/Lintstock report admit to the talent pool widening but had no complaints about companies finding the right people for these important roles.  On pay – It seems relations have significantly improved when it comes to boardroom pay. Investors feel that companies are more willing to engage and be open on remuneration issues and as a result, investors are more inclined to accept the companies' rationale.  The publication is available on the [KPMG website](http://www.kpmg.co.uk/news/detail.cfm?pr=2417" \t "_new).  **1.16 Overview of US fund governance practices 1994 - 2004**  In January 2006 the Investment Company Institute (ICI) published a report titled "Overview of US Fund Governance Practices 1994 – 2004". The ICI has collected data on board practices of US mutual funds biennially since 1995. The most recent study, which reported year-end 2004 data, was conducted on behalf of the Independent Directors Council.  The focus of the report is on a number of mutual fund board structures and practices common across the industry. Data is included on matters such as numbers of independent directors and independent chairs, frequency of board meetings, attendance at board and committee meetings, separate meetings without management and board retirement policy.  The full report is available on the [ICI website](http://www.ici.org/statements/ppr/rpt_fund_gov_practices.pdf" \t "_new).  **1.17 Information quality and governance**  In January 2006 CFO Research Services published a report titled "IQ matters: Senior finance and IT executives seek to boost information quality". According to the report, a majority of business decision makers do not have ready access to high-quality, reliable, useful information on operating and financial performance at their companies. The authors of the report surveyed 385 senior finance and IT executives from US, Canadian, European and Chinese companies in a global study of information quality (IQ). As a result of this IQ shortcoming, decision makers are forced to spend time building special reports and analyses and reconciling the "multiple versions of the truth" provided by their disparate, non-integrated business processes and IT systems.  But finance and IT executives see real value and investment return in improving the quality of their management information—in boosting its timeliness, accuracy, and transparency. They foresee broad benefits, including the ability to make better operating decisions more quickly, better annual planning, and greater confidence in business process controls.  To remedy their uneven quality of information, companies are investing in process simplification and tighter integration of their IT systems. Doing so, say survey respondents and executives interviewed for this study, requires not just time, money, and attention, but also a new and much closer collaborative relationship between the CFO, the CIO, and their teams. This new relationship calls on finance to take greater responsibility for information quality and for companies to instil accountability for IQ throughout their organisations. Collaboration, responsibility, and accountability may not be enough, however, to solve the IQ problem effectively. Companies' IQ and the collaborative relationship between finance and IT will benefit from the CFO and the CIO building their real knowledge of the other’s discipline.  The report is available on the [CFO website](http://cfoenterprises.com/research.shtml" \t "_new).  **1.18 Mapping the global capital market**  In January 2006 McKinsey & Company Global Institute (MGI) published a report titled "Mapping the global capital market 2006". In MGI's second annual review of the financial assets of more than 100 countries since 1980, several notable observations emerge. First, the global capital market is huge: MGI found that the world's financial assets now total more than US$136 trillion and will exceed US$228 trillion by 2010 if current trends persist. The stock of global financial assets has grown faster than the world's GDP, indicating that financial markets are becoming deeper and more liquid.  Second, one of the biggest stories remains the world's debt levels. Debt has increased across all major countries and regions. While the 1980s saw a rapid expansion of government debt, the 1990s were fuelled by growth in private debt. Since 2000, the story so far appears to be the return of more government debt. Together, government and private debt securities account for more than half of the overall growth in the global financial assets from 2000-2004.  Third, the roles that major countries and regions play in capital markets continue to be in flux. The United States, which has the largest stock of financial assets, saw a recent slowing of growth in financial stock in the past year, as did China, while Europe's capital markets continued to integrate, grow, and deepen. In Japan, MGI detected a slight pickup in the growth of its financial stock, reflecting an expansion of public debt.  The report is available on the [MGI website](http://www.mckinsey.com/mgi/publications/gcmAnnualReport.asp" \t "_new).  **1.19 Report on the auditing profession**  In January 2006 the US Chamber of Commerce released a report on the auditing profession titled "Auditing: A Profession at Risk". Following is a summary of the report.  Auditing plays a unique role in the economy. By law, all companies whose securities are available to the general public through US exchanges are required to have their financial statements audited by an independent registered public accounting firm. The goal has historically been to provide confidence to investors and bring standardisation and discipline to corporate accounting, thereby increasing the liquidity and economic potential of US capital markets.  While there are legitimate debates about the meaning of financial statement audits, there are certain facts about the auditing profession that are hard to deny:   * Not only is auditing required by law, but recent regulations and legislation (most notably the Sarbanes-Oxley Act of 2002) greatly increased its role in public companies. The political determination has been made that auditing is central to public confidence in the capital markets. * The pressure for auditors to do more when conducting audits means that the auditor-client relationship is becoming more involved and continuous, with much more frequent interactions, rather than simply holding periodic discussions geared around financial statement reporting cycles. * The auditing profession faces a number of significant legal challenges. It is subject to new regulation under the auspices of the Public Company Accounting Oversight Board (PCAOB). More important, the profession finds itself the target of a difficult litigation and regulatory enforcement environment, where business losses by a client can result in lawsuits, and a single indictment even without a conviction can result in the destruction of thousands of jobs. * Because of the Sarbanes-Oxley Act and other requirements, auditing expenses have increased tremendously. At the same time, many clients believe that they are receiving less overall advice and support from their auditors. Audit firms feel that they are caught in a no-win situation between the demands of regulators, law enforcement, the plaintiffs bar, and their clients. * The process of developing accounting principles remains in flux, even as business transactions become ever more complex. In addition to the respective roles of FASB, the PCAOB, and the SEC, there are many emerging issues related to international harmonization and the IASB. * There remain significant misunderstandings about the meaning and nature of accrual accounting systems and the level of precision inherent in such systems. Changes of 1 or 2 cents per share in a company's earnings can have a great market impact and create significant litigation risk even if such changes indicate nothing about the health of a company’s underlying business. * The profession through voluntary mergers as well as through the elimination of Andersen is severely contracted, with only four major firms serving a large majority of the listed and actively traded public companies in the United States. While four appears to be a sustainable number, any further contraction in this industry would present a major challenge to the viability of the profession, with potential for a negative effect on public confidence in the markets.   There continue to be debates about the role that the auditing profession itself has played in bringing about some of these circumstances, and what it can do on its own to address the current challenges. Nevertheless, the simple facts are that (i) confidence and stability are critical to the success of capital markets, and (ii) auditing helps bring these attributes to the markets. Instead of risking a crisis, it is important to act now to try to bring some stability back to the auditing profession. At the same time, action must be taken to ensure that the needs of companies are met and that they have access to high-quality, reasonably priced auditing services.  The US Chamber of Commerce is committed to supporting policies that enhance the value of audits and ensure the long-term viability of the auditing profession. In that regard, the Chamber proposes the following three-part action plan: (i) help the profession become insurable; (ii) clarify PCAOB standards; and (iii) support expansion of and competition among the Big Four firms.  The full report is available on the [US Chamber of Commerce website](http://www.uschamber.com/publications/reports/0601auditing.htm" \t "_new).  **1.20 New Centre for Corporate Law Research Report - An Empirical Study of the Statutory Derivative Action**  The University of Melbourne's Centre for Corporate Law and Securities Regulation has published a new research report titled "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action". The report is written by Professor Ian Ramsay and Benjamin Saunders. The statutory derivative action (Part 2F.1A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)) came into operation on 2 March 2000. It enables current and former members and officers of a company to bring an action on behalf of the company, or intervene in legal proceedings to which the company is a party. The research report examines the effectiveness of the statutory derivative action during the 5 years it has been in operation. The report evaluates Part 2F.1A in light of the reasons for its introduction and assesses whether it has made a significant improvement on the previous common law position.  The research report is available on the [Centre for Corporate Law website](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new).  **1.21 Seminar on the AWB inquiry**  The Corporate Law and Accountability Research Group in the Department of Business Law and Taxation at Monash University is holding a seminar titled "The AWB Scandal; A Case Study in Corporate Pathology and the failure of Corporate Capability". The seminar will be held on 23 March 2006 from 6 to 8pm at the Monash University Law Chambers, 472 Bourke Street, Melbourne. The two speakers are Michael Short, Business Editor, The Age and Leon Gettler, Reporter, The Age.  Please RSVP to Julia Snip by Friday 17 March 2006, telephone 9903 1156 or email [julia.snip@buseco.monash.edu.au](mailto:julia.snip@buseco.monash.edu.au). |
| **2. Recent ASIC Developments** |
| **2.1 ASIC relief on measuring remuneration**  On 21 February 2006, the Australian Securities and Investments Commission (ASIC) announced relief to assist listed companies in measuring and reporting director and executive remuneration in their annual reports.  The relief is provided under ASIC Class Order CO 06/105 Calculation of director and executive remuneration.  ASIC is granting short term relief to assist listed companies by addressing potential confusion as to the bases for calculating remuneration of directors and executives for disclosure in directors’ reports and financial reports. The relief will remove any doubt over the ability of companies to disclose an individual director or executive remuneration using a single measurement basis.  **Background**  There are two requirements for listed companies to disclose remuneration of individual directors and executives in their annual reports. Paragraph 300A(1)(c) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) requires disclosures in the directors' report and the accounting standards pursuant to s296(1) of the Act require disclosures in the financial report.  Regulation 2M.3.03 continues to require the measurement requirements of accounting standard AASB 1046 "Director and Executive Disclosures by Disclosing Entities" (AASB 1046) to be applied for the purposes of disclosing remuneration of directors and executives in the directors’ reports of listed companies in accordance with s300A(1)(c).  On 20 December 2005, a new accounting standard AASB 124 "Related Party Disclosures" (AASB 124) containing remuneration disclosure requirements was issued. The new AASB 124 replaced AASB 1046 for years ending on or after 31 December 2005 for the purposes of s296(1), but not for the purposes of s300A(1)(c). Unlike AASB 1046, AASB 124 doesn't specify a basis for measuring remuneration.  ASIC took the view that because AASB 124 doesn’t specify a basis for measuring remuneration, it would be possible to make both the disclosures under s300A(1)(c) and the new AASB 124 using the measurement basis in AASB 1046. This measurement basis provides a ready source of comparative information, and continues to be used by at least some companies.  AASB 2 "Share-based Payment" (AASB 2) and AASB 119 "Employee Benefits" (AASB 119) can be used as a source of guidance for measuring remuneration under AASB 124. However, the requirements of AASB 2 and AASB 119 are intended for determining expense and income relating to groups of employees. In ASIC’s view, the AASB 2 and AASB 119 measurement requirements should be modified for determining remuneration.  However, ASIC has recently become aware of a view that AASB 124 requires a strict application of the measurement basis for expenses and income in accounting standards AASB 2 and AASB 119 in measuring remuneration. Some companies may also have applied the AASB 2 and AASB 119 measurement requirements but with some modifications.  The strict AASB 2/AASB 119 measurement basis differs in some respects from the basis required by AASB 1046. For example, for the value to be included in relation to options it is not necessarily assumed that employees will meet service based conditions, and any amounts recognised in prior years can be reversed if those conditions aren’t met. For members of defined benefit superannuation funds, actuarial gains and losses recognised in relation to the fund are relevant rather than contributions.  A copy of the Class Order CO 06/105 is available on the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.2 ASIC provides financial reporting relief to foreign licensees**  On 17 February 2006, the Australian Securities and Investments Commission (ASIC) issued a class order to ease current requirements on foreign licensees regarding their financial reporting and record keeping obligations.  Class Order CO 06/68 relieves foreign licensees, (with the exception of foreign authorised deposit-taking institutions (foreign ADIs), from the requirement under Division 6 of Part 7.8 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to prepare and lodge audited financial statements and keep certain financial records in relation to their financial services businesses. This relief is available to foreign licensees irrespective of whether the foreign licensee is regulated by the Australian Prudential Regulation Authority (APRA).  ASIC Director of Applications, Advice and Licensing, Mr John Price, said the relief has been provided in response to concerns that the financial reporting obligations under Division 6 of Part 7.8 are disproportionately burdensome for foreign entities who are already subject to a requirement to lodge their foreign financial statements under subsection 601CK(1) of the Act.  Class Order [CO 06/68] does not apply to foreign ADIs because these entities are already granted relief under existing Class Order [CO 03/823].  A copy of the Class Order CO 06/68 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.3 ASIC releases draft guidance on shorter, better prospectuses**  On 8 February 2006, the Australian Securities and Investments Commission (ASIC) released draft guidelines for issuers and advisers on the preparation of prospectuses.  The draft policy statement, Better prospectus disclosure, includes advice about the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) requirement that prospectuses be worded and presented in a clear, concise and effective manner.  Under the draft guidance, ASIC recommends issuers:   * make prospectuses as short as possible; * leave out extraneous material; * highlight critical information; * organise information in a logical way - e.g. cascade the story from the simple to the more detailed; * provide clear navigation around the document; * consider incorporating technical and detailed financial information by reference; * use plain and direct language; and * use a range of communication tools, including simple graphical illustrations.   The policy statement also provides guidance on some specific prospectus content issues that have arisen in the past such as:   * risk disclosure; * high-yield debentures; * use of proceeds of the fundraising; and * share allocation policy.   **2.4 Trans-Tasman regulatory alignment moves a step closer**  Companies operating on both sides of the Tasman can expect simplified regulatory obligations in the future, with the signing of a Memorandum of Understanding between the New Zealand Companies Office and the Australian Securities and Investments Commission (ASIC).  The MOU, designed to promote greater regulatory cooperation between the two countries, was signed by Registrar of Companies, Mr Neville Harris and Mr Jeffrey Lucy, Chairman of ASIC, in Wellington on 8 February 2006.  The agreement reflects an ongoing interest in aligning the regulatory functions of both agencies and allows for cooperation and the exchange of information to assist each regulator, particularly on operational and enforcement matters.  A proposal around alignment of corporate registration processes, compliance and disclosure activities between the Companies Office and ASIC will be progressed further under the terms of the Memorandum of Understanding.  Other issues discussed included:   * progress in operational and technology cooperation; * key regulatory developments in each jurisdiction and the importance of alignment; * joint enforcement strategies; and * planning a program of work to be shared by the two regulators.   ASIC is responsible for enforcing and regulating company and financial services laws to protect consumers, investors and creditors. ASIC regulates the financial markets, securities, futures and corporations.  The New Zealand Companies Office maintains the registry for all corporate bodies including New Zealand and overseas companies, co-operative companies, incorporated societies, friendly societies and credit unions.  A copy of the Memorandum is a available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.5 ASIC relief on reporting remuneration disclosures**  On 30 January 2006, the Australian Securities and Investments Commission (ASIC) announced relief to assist listed companies in reporting director and executive remuneration disclosures.  **(a) Transfer of remuneration disclosures**  ASIC Class Order [CO 06/50] Transfer of remuneration information into directors' report will apply to listed companies preparing financial reports under Chapter 2M of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  The class order will allow listed companies to transfer remuneration information required to be disclosed in the financial report under accounting standard AASB 124 Related Party Disclosures into the directors' report. This will enable listed companies to combine the remuneration disclosures required by accounting standards with those already required to be included in the directors' report under s.300A of the Act.  Companies will be able to reduce the duplication of remuneration information between the directors' report and the financial report, and present the information in a manner that is more convenient to users of their annual reports.  The class order will replace regulations that provided similar relief up to, but not including, years ended 31 December 2005.  Regulation 2M.6.04 and Schedule 5B to the Corporations Regulations allowed the transfer of remuneration information required by AASB 1046 Director and Executive Disclosures by Disclosing Entities into the directors' report. When AASB 1046 was replaced by a new version of AASB 124 on 20 December 2005, the regulations ceased to have effect.  The relief provided by ASIC Class Order [06/50] will be on similar terms to the regulations that it replaces. In particular, the information required under AASB 124 transferred into the director's report will still be required to be audited and a separate statement of the auditor's opinion on this information must be given in the auditor's report.  The ASIC relief is of an interim nature. The Government is considering the operation of the regulations following the withdrawal of AASB 1046.  Class Order [06/50] will apply for financial years ending from 31 December 2005 to 31 March 2006 inclusive.  **(b) Basis of calculation**  Regulation 2M.3.03 requires remuneration under s.300A to continue to be calculated in accordance with AASB 1046. ASIC does not intend to provide class order relief to allow remuneration under s.300A to be calculated in accordance with AASB 124 rather than AASB 1046.  The basis of calculation under AASB 1046 is consistent with AASB 124 however AASB 124 contains substantially reduced requirements and guidance on calculating remuneration. Any ASIC relief could be inconsistent with the intent of Regulation 2M.3.03 in the absence of a new source of requirements or guidance on calculating remuneration.  **(c) Rounding of amounts**  ASIC Class Order [98/100] Rounding in financial reports and directors' reports has been varied by ASIC Class Order [CO 06/51] Variation and revocation of financial reporting class orders to continue the required level of rounding for director and executive related disclosures, despite the replacement of AASB 1046 requirements with the remuneration requirements in the new AASB 124.  The rounding of amounts relief has also been extended to apply to the financial reports of Australian Financial Services licensees under Chapter 7 of the Act. Previously, the relief applied to financial reports prepared under Chapter 2M of the Act. In particular, this will benefit entities wishing to lodge the same financial report for the purposes of both Chapter 2M and Chapter 7.  **(d) Other matters**  Class Order 05/0640 ADIs – related party transactions and balances provided relief to Approved Deposit Institutions (banks, building societies and credit unions), their parent entities and controlled entities from disclosing in their financial reports information on arms length transactions and balances with certain related entities and related persons of directors and executives of the bank under AASB 1046. CO [05/0640] has ceased to have effect and won't be replaced as the disclosures to which it applied are not required under AASB 124.  Class Order [06/51] includes some minor changes to Class Order [98/1417] Audit relief for proprietary companies, Class Order 98/1418 Wholly-owned entities and Class Order [CO 05/637] Additional month for first financial reports under AIFRS.  The Class Orders are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new). |
| **3. Recent Takeovers Panel Developments** |
| **3.1 Citect Corporation Limited – decision**  On 27 February 2006, the Takeovers Panel advised that it has made a declaration of unacceptable circumstances, and orders in an application from Schneider Electric Australia Holdings Pty Limited (SEAH) in relation to the affairs of Citect Corporation Limited (Citect).  Citect is currently the subject of two acquisition proposals:  a. a scheme of arrangement proposed by SEAH (SEAH Scheme); and  b. a conditional takeover bid by Thoma Cressey Equity Partners, Inc. (Thoma Cressey) (a US based private equity firm) made through a subsidiary TCEP Australia Pty Ltd (TCEP).  The application followed an announcement by Thoma Cressey on Friday 10 February 2006, that TCEP Australia LLC had acquired 15.1% of the voting shares in Citect (15.1% Parcel) in off-market transactions for $2.00 cash from certain institutional holders (Selling Shareholders). Thoma Cressey had advised that the acquisitions meant that the offer price under TCEP's bid was "automatically increased" to $2.00 cash per share and that it would vote against the SEAH Scheme.  The Panel considered that in acquiring the 15.1% Parcel unconditionally in off-market transactions on 9 February 2006, TCEP Australia LLC (the indirect parent of TCEP) gave benefits to the Selling Shareholders which were likely to induce them to dispose of shares in Citect to TCEP Australia LLC, and which were not offered to all holders of securities in the bid class under the TCEP bid. The Panel considered that this constituted or gave rise to a contravention of section 623 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and therefore to unacceptable circumstances.  The Panel noted that TCEP Australia LLC did not make its offers to the Selling Shareholders on-market. There is a specific exception to the benefits prohibition in section 623, which allows acquisitions to be made on-market. Making the offers on-market would have allowed all Citect shareholders the possibility to sell their shares at the higher price to TCEP Australia LLC, and would have allowed the market to assess its position in the circumstances of TCEP Australia LLC's offer.  The Panel also considered that TCEP or TCEP Australia LLC not giving a substantial holding notice by 9.30 a.m. on Friday 10 February 2006 in relation to the acquisition by TCEP Australia LLC of some or all of the 15.1% Parcel the previous day constituted or gave rise to a breach of section 671B of the Corporations Act and therefore to unacceptable circumstances.  Having considered the purposes of the takeovers chapter, (including the principle of equality of opportunity, and the interests of an efficient competitive and informed market for shares in Citect) and the public interest, the Panel decided to make a declaration of unacceptable circumstances.  The Panel has made the following orders to remedy the unacceptable circumstances:  1. That TCEP declare its bid free of all conditions.  The Panel considered that this would protect the interests of the shareholders of Citect by providing to all Citect shareholders the benefit of certainty of contract which TCEP Australia LLC had given to the Selling Shareholders.  2. That TCEP, or TCEP Australia LLC, pay the difference between $2.00 per share and any lesser amount for which any person sold Citect shares on 10 February 2006, during the period when TCEP had failed to lodge a substantial holding notice. The Panel expects this will be about $0.08 per share in respect of the 4,450 shares traded before a trading halt was applied in the stock. The Panel considered that this would protect the interests of those shareholders who sold shares on-market during the period when TCEP or TCEP Australia LLC had failed to inform the market of its 9 February acquisitions, and would remedy any harm caused to these shareholders by that failure.  As part of the resolution of the proceedings, the Panel also accepted an undertaking from TCEP Australia LLC that it would not vote the shares in the 15.1% Parcel against the SEAH Scheme unless the Citect board of directors had withdrawn its recommendation for the SEAH scheme.  The Panel considered that this undertaking would protect the interests of SEAH, as a rival bidder, and would remedy any unfair advantage which TCEP might be considered to have gained in the competition for control of Citect, by the off-market, unconditional acquisitions.  The Panel considered that this combination of orders and undertaking would best protect the interests of Citect shareholders while not inhibiting competition for Citect.  **3.2 Dromana Estate Limited – decision**  On 14 February 2006, the Takeovers Panel (Panel) announced that it had declined the application by Mr John Hempton, a shareholder in Dromana Estate Limited (Dromana), and Mr Simon Maher, a director of a corporate trustee for a trust that is a shareholder of Dromana (together known as Shareholders), in relation to a 1 for 1 non-renounce able rights issue (Rights Issue) to be conducted by Dromana. During the Panel's proceedings, Dromana advised that a proposed underwriting of the Rights issue would not proceed, and Dromana revised certain aspects of disclosure in the prospectus for the Rights Issue. Following Dromana's advice concerning the underwriting and after receiving a revised draft of the Rights Issue Prospectus, the Panel decided to decline the application.  **(a) Background - initial terms of prospectus**  The initial terms of the Rights Issue were set out in a prospectus dated 11 January 2006. If fully subscribed, the Rights Issue sought to raise $1.5m by the issue of 22,382,705 ordinary shares at 7 cents each. The Rights Issue was to be jointly underwritten by entities associated with three of the four directors of Dromana and was initially underwritten by these Directors (and associated entities) to the extent of $1m. The Rights Issue also contained a shortfall facility under which Dromana shareholders could apply for additional ordinary shares in excess of their entitlement. Under the shortfall facility, Directors retained a discretion to reject an application for additional shares should the shortfall be insufficient to meet all applications for additional shares.  The Shareholders' application alleged that unacceptable circumstances existed in relation to the Rights Issue and the above underwriting agreement. The Shareholders submitted that the Rights Issue and the underwriting agreement were likely to deliver control of Dromana to the Directors at a deflated price.  **(b) Decision**  The Panel has declined to make a declaration of unacceptable circumstances in relation to the application as a result of:  (a) Dromana advising that the underwriting agreement will be terminated, with the consent of the underwriters, and without cost to Dromana. The Panel was concerned that the disclosure in the prospectus in relation to the underwriting agreement did not sufficiently disclose the potential effect of the underwriting agreement on control of Dromana, for instance by giving examples of the size and significance of the effect of the underwriting on control of Dromana if shareholders do not take up the Rights Issue and the underwriters were required to subscribe for all the underwritten shares. On the information supplied by Dromana in its submissions and based on a conservative assumption that the Rights Issue proceeds and only the underwritten shares were issued, the voting power of two of the directors would increase above 20%. On Dromana advising it would terminate the underwriting agreement, the Panel considered that the concerns which it had in relation to the underwriting agreement were no longer relevant.  (b) In relation to the shortfall facility, Dromana advising that it will:  (i) remove the retention of a discretion by Dromana’s directors in relation to the operation of the shortfall facility; and (ii) give shareholders the right to apply for additional shares up to a maximum of 300,000 each, on the basis that if there are insufficient shortfall shares to satisfy all applications for additional shares, applications will be scaled back pro rata.  The Panel was initially concerned that the section in the Prospectus which described the shortfall facility did not clearly state how the Dromana board intended to allocate shares under the shortfall facility and what factors the board intended to take into account when exercising such a discretion. As a result, Dromana shareholders who wished to apply for ordinary shares in excess of their entitlement would not know how the directors would exercise their discretion in relation to their application.  (c) Dromana including in a replacement prospectus additional information in relation to the Tuerong Park Unit Trust (Tuerong Trust) to allow Dromana shareholders to make an informed decision on whether or not to take up their rights or subscribe for additional rights. Other than inventory and property, plant and equipment, the units held by Dromana in the Tuerong Trust are its most significant existing asset. In addition, the property on which Dromana conducts the majority of its business and on which its cellar door and winery was constructed is rented from the Tuerong Trust. The trustee of the Tuerong Trust is Jinalec Pty Ltd (Jinalec). Jinalec has two shareholders and two directors, both of whom are directors of Dromana. The Panel believed that Dromana shareholders would not be able to make an informed decision because the disclosure in relation to the Tuerong Trust to date has been inadequate. The prospectus represents the largest offering of shares in Dromana since its inception and as such, shareholders who are thinking of subscribing for shares under the Rights Issue are entitled to know the financial details of one of its most significant assets. This would include the disclosure which discloses Dromana's dependence on the Tuerong Trust in order to operate its business including issues such as the relationship between Dromana (and its directors) and the Tuerong Trust and any material contracts between Dromana (including its directors and their associates) and the Trust. At the Panel's request, Dromana has included in the prospectus additional information about the finances of the Tuerong Trust and Dromana's commercial relationship with an investment in the Tuerong Trust.  As a result of the above structural changes to the Rights Issue and the additional disclosures which Dromana undertook to make, Dromana withdrew its prospectus dated 11 January 2006 and provided the Panel with a revised draft incorporating the above information. The Panel advised Dromana that it would not object to Dromana issuing the revised prospectus.  **3.3 Bridgewater Lake Estate Ltd - decision**  On 10 February 2006, the Takeovers Panel (Panel) advised that it had considered the application by Lowell Pty Ltd (Lowell) in relation to the affairs of Bridgewater Lake Estate Ltd (Bridgewater).  The Panel has declined to make a declaration of unacceptable circumstances as requested in the application by Lowell in relation to acquisitions of shares in Bridgewater by Glebe Asset Management Ltd and Glebe Administration Board (together Glebe) and Harvest Living Ltd (Harvest Living).  **(a) Background**  Glebe has a relevant interest in 22.23% of the voting power in Bridgewater and holds 893,690 Bridgewater convertible notes, which it has acquired via a series of transactions over a number of years. Harvest Living recently agreed to acquire 9.8% of the voting power in Bridgewater.  In summary, Lowell's application alleged that the acquisition of a parcel of 148,280 shares in Bridgewater by Glebe in 2004 resulted in a contravention of section 606 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and the recent acquisition by Harvest Living of shares in Bridgewater resulted in a contravention of section 606 when Harvest Living and its associates voting power in Bridgewater is aggregated.  Lowell's application alleged that a number of the parties to the transactions, and their representatives, including Harvest Living and Glebe, were associates of each other and that they had been acting in concert to obtain control over Bridgewater without offering other shareholders an equal benefit, and that in so doing they had breached the 20% threshold in section 606 of the Corporations Act.  **(b) Decision**  The Panel declined to make a declaration of unacceptable circumstances in relation to the application by Lowell primarily on the basis that it did not accept Lowell's submissions in relation to association between the various parties given the evidence which Lowell was able to put before it, nor did it consider any breach of section 606 had occurred.  The Panel did not consider, when looking at the series of transactions referred to by Lowell, that there was a convincing case made out that the persons referred to by Lowell had acted in concert to acquire or consolidate control of Bridgewater. The Panel considered that for each of the relevant transactions, on an individual basis, and for the pattern of transactions overall, there were reasonable commercial bases or explanations.  On that basis, the Panel considered that Lowell had not provided sufficient argument and evidence to justify the Panel in not accepting those reasonable commercial explanations for the transactions and patterns of behaviour.  As it has previously said in a number of matters relating to associations, the Panel recognises the difficulties which an external person such as Lowell will have in providing hard evidence of associations and agreements which will frequently not be written or formal, and which will (if they are illegal), usually be hidden. On that basis, the Panel was prepared to consider Lowell’s submissions as to what conclusions and inferences the Panel should take from patterns of behaviour where individual transactions might not of themselves be clearly impugnable.  However, even taking a broad view of the series of transactions and relationships which Lowell submitted to the Panel were evidence of association and concerted action, the Panel was not convinced that it should not accept the submissions of the other parties that the transactions were reasonable, commercial, and not part of any agreement or concerted action to acquire control of Bridgewater.  That is not to say that Lowell's submissions were unreasonable, farfetched, or devoid of reasonable concern. However, given the plausible responses by the other parties, the Panel was not convinced that it should accept Lowell's submissions as to association and unacceptability over the submissions of the other parties in the absence of firm evidence to the contrary from Lowell.  The Panel also declined Lowell's application for an extension of time in relation to the alleged breach of section 606 in 2004 by Glebe on the basis that it considered that that limb of the application would not succeed even if an extension were granted. |
| **4. Recent Corporate Law Decisions** |
| **4.1 Defaulting participant under a Joint Venture Agreement**  (by Chris Skordas, Phillips Fox)  Pauls Trading Pty Ltd v Norco Co-Operative Ltd [2006] QSC 015, Supreme Court of Queensland, Chesterman J, 8 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/february/2006qsc015.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/february/2006qsc015.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 plaintiffs, Pauls Trading Pty Ltd ('PT') and Dairyfields Pty Ltd ('DP') had entered into a Joint Venture Agreement ('JVA') with the defendant, Norco Co-operative Ltd ('Norco') for the purpose of operating and expanding each of their existing businesses. The JVA provided a mechanism by which each of the participants could acquire the interest in the joint venture of another participant where a change in effective control occurred in the latter participant (the 'defaulting participant') without the consent of each other participant.  In December 2003, the ultimate parent of the group of companies of which both plaintiffs were subsidiaries went into administration. Ultimately the assets of that parent, including shares held in the subsidiaries of the group, were transferred to a new entity, Parmalat SpA, which became the ultimate holding company.  The plaintiffs brought an application seeking a declaration that neither of them was a 'defaulting participant' within the meaning of the JVA by reason of the transfer of shares. The defendant counter-claimed for a declaration in the converse terms.  His Honour Justice Chesterman dismissed the plaintiffs' application and instead made the declaration sought by the defendant, namely that each plaintiff became a defaulting participant on the transfer of the shares to Parmalat SpA. His Honour concluded that there had been a change in effective control of each plaintiff within the meaning of the JVA. Because the change in effective control had occurred without the defendant's consent, the defendant was entitled to exercise its option to acquire the interests of each of the plaintiffs under the JVA.  **(b) Facts**  Each of the plaintiffs and the defendant operated separate businesses involving the processing, packaging and marketing of milk in Queensland and New South Wales. By a Joint Venture Agreement ('JVA') dated 27 June 1996 the parties agreed to associate themselves in an unincorporated joint venture, to jointly operate and expand each of their existing businesses.  Clause 9 of the JVA provided a mechanism by which a party could acquire the option to purchase the interest of a 'defaulting participant' in the JVA. Under clause 9.1(a)(15), a participant became a 'defaulting participant' if effective control of that participant was altered without the prior written consent of the other participants. Clause 9.1(a)(15) further provided that effective control altered from that subsisting at the commencement date where any person (together with their associates):  (a) becomes entitled to exercise (directly or indirectly) voting power at a general meeting of a participant in excess of 50% of the votes which may be cast; or (b) acquires the capacity to appoint at least half of the number of directors of a Participant.  All of the shares in PT were held by Parmalat Australia Limited ('PA'). In August 1998, all of the shares in PA were acquired by Parmalat Pacific Holdings Pty Ltd ('PPH'), which was in turn wholly owned by Parmalat Belgium SA. All of the shares in Parmalat Belgium SA were held by Dalmata SrL, which was wholly owned by Parmalat Finanziaria Spa, the ultimate holding company of the group.  At the same time, the first plaintiff, PT, acquired all of the shares in the second plaintiff, DF. Upon the acquisition, DF became part of the same group of companies. The defendant consented to the change in effective control in DF, and therefore did not have the right at that time to acquire the interests of DF under clause 9 of the JVA.  In December 2003, an administrator was appointed to Parmalat Finanziaria SpA.  On 1 October 2005, and pursuant to a composition proposal approved and given effect by the Civil and Criminal Court of Parma in Italy, the assets of Parmalat Finanziaria SpA were transferred to a new company, Parmalat SpA. The assets of Parmalat Finanziaria SpA included shares in Dalmata SrL and Parmalat Belgium SA, two of its subsidiaries. Therefore upon the transfer, Parmalat SpA became the new ultimate holding company of the group.  The defendant argued that the transfer constituted a change in effective control of PT. Further, the defendant contended that because it had not given prior written consent to the change in effective control, it was entitled to exercise its option to acquire the interests of PT. For the purposes of the proceedings, each of the plaintiffs and the defendant agreed that if effective control of PT had altered, the same conclusion applied to DF, because DF was wholly owned by PT.  There were three main issues before the court:   * Whether on the proper construction of clause 9.1(a)(15) there could only be one effective change of control from that subsisting at the commencement date, with the result that there could only be one opportunity to exercise the option to acquire a defaulting participant's interests. The plaintiffs contended that clause 9.1(a)(15) could only operate once in the case of each joint venture participant, because of the words "from that (state of control) subsisting at the Commencement Date". Accordingly, the plaintiffs submitted that clause 9.1(a)(15) was exhausted by reason of the acquisition by PT of all of the shares in DF in August 1998 (to which the defendant had consented). * Whether effective control of the plaintiffs was altered by the change in control of a company at least 4 steps removed in the corporate hierarchy. The plaintiffs contended that Parmalat SpA was not an 'associate' of Parmalat Australia (which held all shares in PT) and therefore Parmalat SpA had not become entitled, by reason of becoming the new ultimate holding company, to exercise voting power at a general meeting of PT in excess of 50% of the votes which may be cast. * If effective control was altered, on what date it was altered. The plaintiffs argued in the alternative that if effective control had altered, it altered at the time the administrator was appointed to Parmalat Finanziaria SpA, rather than on the later date upon which the transfer took effect. Accordingly, the plaintiffs submitted, PT ceased to be a defaulting participant by reason of clause 9.6 of the JVA, which provided that if a period of six months elapsed without the option to acquire being exercised then the defaulting participant ceased to be a defaulting participant.   **(c) Decision**  **(i) Could there be more than one effective change in control under clause 9.1(a)(15)?**  His Honour Justice Chesterman rejected the plaintiffs' submission that clause 9.1(a)(15) only operated once for each participant. According to his Honour, the phrase "from that (state of control) subsisting at the Commencement Date" identified the state of effective control against which any subsequent alteration was to be compared.  His Honour commented that the commercial purpose of clause 9.1(a)(15) was to protect a participant against the risk that its partners in the joint venture may change against its wish. In his Honour's opinion, the commercial purpose could not be achieved by the plaintiffs' interpretation of the clause, as on subsequent changes of effective control of a participant, a continuing joint venturer may be obliged to do business with an incompatible joint venturer.  **(ii) Was effective control altered in this case?**  His Honour held that effective control had altered by reason of Parmalat Finanziaria SpA transferring its assets, including the shares it held in two subsidiaries, to Parmalat SpA. Further, his Honour found that as a result of the transfer, Parmalat SpA became indirectly entitled to exercise more than 50% of the voting power at any general meeting of PT.  His Honour dismissed the plaintiffs' contention that the substitution of Parmalat SpA as the ultimate holding company did not make it an 'associate' of PA (PT's direct holding company). In his Honour's opinion, the term 'associate' was not limited to company’s two steps apart in the group's chain. Rather, each of the companies in the Parmalat corporate structure was an associate of each other.  The plaintiffs contended that PA was the only entity having 'actual' voting power at a meeting of PT. Rejecting this contention, his Honour held that Parmalat SpA, as the ultimate holding company, was able to control all the companies subsidiary to it. Further, his Honour commented that although it was true that the directors of each subsidiary must, in deciding what course of action to follow, act in the best interests of the company rather than the interests of the group as a whole, there would be few occasions when the interests of the subsidiary would differ from the interests of the group as a whole, or the interests of the ultimate holding company. Accordingly, by reason of the transfer of shares, Parmalat SpA, along with its associate PA, became entitled to exercise more than 50% of the voting power at a general meeting of PT.  **(iii) On what date had effective control altered?**  His Honour held that effective control had altered at the time of the transfer of shares from Parmalat Finanziaria SpA to Parmalat SpA, not on the date of appointment of the administrator. His Honour rejected the plaintiffs' submission that the transfer of shares was merely a 'culmination of a process' which commenced with the administrator's appointment.  In support of the finding, his Honour outlined numerous steps which were required to be satisfied before any transfer of shares could be effected, and the uncertainty existing as to whether the proposals put forward by the administrator would be approved by the creditors and the court. In his Honour's opinion, it was not inevitable that when the administrator was appointed the restructure in the form it eventually took would occur.  Therefore, because six months had not passed from the date of the transfer of shares to the date on which the defendant exercised the option to acquire the plaintiffs' interest in the JVA, the plaintiffs had not ceased to be 'defaulting participants' under clause 9.1(a)(15) of the JVA. Accordingly, the defendant was entitled to acquire the interests of both PT and DF under the JVA.  **4.2 When an assisting creditor will be entitled to priority over other creditors - Corporations Act section 564**  (by Jane Mevel and Justin Fox, Corrs Chambers Westgarth)  Australia and New Zealand Banking Group Ltd v TJF/EBC Pty Ltd [2006] NSWSC 25, Supreme Court of New South Wales, Barrett J, 6 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc25.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc25.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**  Barrett J held that the court had the power, under section 564, to make an order that an assisting creditor should rank ahead of any creditors with priority claims under section 556(1).  Further, the court is entitled, in making an order under section 564, to cause the debts of the creditor who is benefited by the order to be ranked anywhere on the ladder of priority that is created by section 556(1). However, any advantage given to assisting creditors must be proportionate to the risk assumed by them.  In this case, as the creditor had assumed a risk that another creditor (who was ranked on the order of priorities created by section 556(1)) declined to take, it was just that the creditor taking the risk should rank higher on the ladder of priorities under section 556(1) than the non-risk taking creditor.  **(b) Facts**  The applicant was the court appointed liquidator of a company. The applicant applied to the court for an order in favour of Australia and New Zealand Banking Group Limited (ANZ), which had provided funds to the liquidator in order for the liquidator to issue proceedings against the Deputy Commissioner of Taxation.   These proceedings were ultimately successful.  This application was made pursuant to section 564 of the Act, which states that: "Where in any winding up:  (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;  the court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them."  The Commonwealth of Australia (Commonwealth) also made submissions, with the concurrence of the liquidator, in this case. Its submissions related to its General Employee Entitlements Redundancy Scheme (GEERS). Under GEERS, the Commonwealth may advance funds in relation to employees’ entitlements so that the advance enjoys, due to section 560 of the Act, the same right of priority in a winding up of the employer company as would have been enjoyed by the employees entitled to receive the entitlements themselves. In this instance, it was common ground that the Commonwealth was entitled to priority for certain amounts it had advanced in respect of employee entitlements.   The court was required to determine whether the debts and claims of the assisting creditor should rank ahead of those of the Commonwealth.  **(c) Decision**  As a preliminary issue, the court was required to decide whether an order under section 564 enables the creditor benefited by the order to claim a higher position on the scale of priorities than a creditor within one of the classes under section 556(1). The court held that it had the power, under section 564, to make an order causing the assisting creditor to rank ahead of any one or more creditors with claims under section 556(1). This is because section 556(1) is expressed to operate subject to Division 6 of Part 5.6, and section 564 is within this Division.  In Barrett J's view, that conclusion is further supported by the fact that section 564 allows the court to make orders giving the assisting creditor an "advantage over others". The language of the section does not restrict the class of creditors over whom an advantage may be given to, for example, "some others".  Further, the court is entitled, in making an order under section 564, to cause the debts of the creditor who is benefited by the order to be ranked anywhere on the ladder of priority that is created by section 556(1). This is because section 564 gives the court complete discretion to make such orders as it deems just.  In determining whether ANZ should be given an advantage pursuant to section 564, the court noted that it will be rare for an assisting creditor to be awarded 100% of the net recovery of the action that was successfully pursued with its assistance. Any advantage given to assisting creditors must be proportionate to the risk assumed by them. Therefore, the extent and nature of the risk must be assessed.  In the present case, the court held that, whilst there was advice that the litigation had "good prospects of success", there was a risk that ANZ would lose all or some of the money provided by it. Of particular importance was the fact that the Commonwealth was asked to provide financial assistance but chose not to, therefore declining to take the risk ANZ assumed.  Barrett J considered and rejected an argument put forward by the Commonwealth that an applicant seeking to interfere with the ordinary priorities of section 556(1) carries a particularly heavy onus in establishing that the requested outcome is "just". Barrett J noted that the question "must be approached without pre-conceptions about the abstract importance of particular kinds of debts and claims as compared with others." He concluded that there is nothing in the legislation indicating the weight of the burden carried by an applicant in different factual situations and that it was up to the court to decide what, in particular circumstances, is just.  In this case ANZ had provided support and undertaken risk when a successful outcome would benefit substantially the Commonwealth, a creditor that occupied a higher position on the scale of priorities but refused to assume any of the risk. In those circumstances, it was just that ANZ's claim should rank higher in priority than the claim of the Commonwealth.  **4.3 Effective service of statutory demands**  (by Svetlana Zarucki, Clayton Utz)  Jin Xin Investment and Trade (Australia) Pty Ltd v ICS Property Pty Ltd [2006] NSWSC 7, Supreme Court of New South Wales, Barrett J, 31 January 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/january/2006nswsc7.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/january/2006nswsc7.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 far ranging dispute existed between two business groups referred to as the "Zhong interests" and the "Jin interests" in relation to financial dealings involving a home unit development.  The Zhong interests moved to initiate compulsory winding up of certain companies owned by the Jin interests. The Jin interests filed originating processes and supporting affidavits under section 459G of the [Corporations Act (Cth) 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") seeking an order setting aside the statutory demands. A dispute arose regarding the date of service of the originating processes and supporting affidavits, that matter being crucial to section 459G(2) and (3) of the Act.  Barrett J held that effective service of the originating processes and supporting affidavits had not occurred because:   * depositing the documents in a letterbox in the ground floor foyer of an office building did not amount to service at "Suite 103 Level 1" of the office building; * the documents did not reach the place of service and remain there in the power of the person having control of the place of service; and * the documents had not been delivered with the intention that possession of them should pass to the intended recipient.   **(b) Facts**  The Zhong interests were represented by Mr Kam, a solicitor. The Jin interests were represented by Mr Lu and to a lesser extent, his colleague, Mr Chan.  On 30 August 2005, the Zhong interests served statutory demands under section 459E of the Act on companies owned by the Jin interests.  Each statutory demand contained a paragraph stating that: "the address of the creditor for service of copies of any application and affidavit is David Kam & Co, solicitors and migration agents, Suite 103 Level 1 The Chambers, 370 Pitt Street, Sydney NSW 2000".  Each recipient of a statutory demand filed an originating process and supporting affidavit under section 459G of the Act seeking an order setting aside the statutory demands served by the Zhong interests. The originating processes and supporting affidavits of the Jin interests "travelled together" in the sense that all three sets of documents were dealt with as a whole.  The Zhong interests contended that the originating processes and supporting affidavits were served on 23 September 2005. The Jin interests contended that service of the originating processes and supporting affidavits occurred on either 19 or 20 September 2005. If service occurred on 23 September 2005, service occurred outside the time limit prescribed by section 459G(2) and (3) of the Act. If service occurred on either 19 or 20 September 2005, service occurred within the requisite time limit.  The Jin interests contended that service of the originating processes and supporting affidavits took place on one of three occasions:   * Firstly, on 19 September 2005 when the father of the solicitor, Mr Lu Senior, placed an envelope containing the documents in a letter box on the ground floor of the foyer of the office building at 370 Pitt Street, Sydney. * Secondly, on 20 September 2005, when the documents were physically delivered to Mr Kam within Mr Kam's office premises at Suite 103 Level 1, 307 Pitt Street. At that time, Mr Kam took the documents into his hands, read them, then gave them back to Mr Chan who later gave them, within Suite 103 Level 1, 307 Pitt Street, to Mrs Zhong (a director of each of the companies which had served the statutory demands) who in turn gave them back to Mr Chan with the result that Mr Chan left the premises carrying the documents. * Thirdly, on 20 September 2005, when Mr Chan handed the documents to Mrs Zhong (at Suite 103 Level 1, 307 Pitt Street) who read them and gave them back to Mr Chan informing him that she needed to consult her solicitor. Mr Chan later approached Mr Kam querying whether he had instructions to accept service of the documents in question.   The Zhong interests disputed issues of fact concerning the relevant events as contended by the Jin interests.  **(c) Decision**  Barrett J considered each alleged service attempt in turn (on the basis that the evidence of the Jin interests was true and accurate).  In relation to the service attempt by Mr Lu Senior on 19 September 2005, Barrett J held that whilst a place of business or a place of abode may be taken to include or to be accessible by means of delivery facilities not within its physical boundaries, the precise specification and reference in the statutory demands to Suite 103 Level 1 meant that the documents which had been put into the ground floor letterbox had not been delivered to Suite 103 Level 1.  In relation to the service attempt by Mr Chan on Mr Kam on 20 September 2005, after consideration of section 109X of the Act, section 28A(b) of the [Acts Interpretation Act (Cth) 1901](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default) and rule 10.5 of the Uniform Civil Procedure Rules, Barrett J held that:   * a document could not be regarded as served at a place, within any of the statutory specifications mentioned above or as a matter of general law, unless the process undertaken in relation to it causes it not only to reach the place but also to remain there within the power of the person having control of the place; * if, as Mr Chan's evidence suggested, he took copies of the originating processes and supporting affidavits to Suite 103 Level 1, 370 Pitt Street on 20 September 2005 and then left those premises with the documents still in his possession (having handed them or attempted to hand them to Mr Kam and Mrs Zhong in succession), the documents were simply not left at those premises.   In relation to the service attempt by Mr Chan on Mrs Zhong on 20 September 2005, after consideration of the meaning of the words "by ... delivering … to" referred to in section 109X(1)(b) of the Act, Barrett J held that:   * as Mr Chan did not conclude his contact with Mrs Zhong on the basis of transfer of possession of the documents by him to her (the end result being that he retained possession of the documents) the documents were not delivered to Mrs Zhong; * as Mr Chan had later asked Mr Kam whether he had received instructions to accept service of the documents on behalf of the Zhong interests, it was clear that the matter of service was unresolved after the interchange with Mrs Zhong; * Mr Chan had not put the documents into the possession of Mrs Zhong and accordingly service of the copies of the originating processes and supporting affidavits on Mrs Zhong did not take place on 20 September 2005.   Regardless of the disputed issues of fact, the onus on the Jin interests of proving that the documents were served within the 21 days prescribed by section 459G(3) of the Act had not been discharged.  Although service for the purposes of section 456G(3) of the Act can be established by showing delivery to a solicitor having the actual authority of the relevant party to accept service, Barrett J concluded that it was not necessary to come to any view about that issue because, on Mr Chan's account, Mr Kam never professed to have relevant instructions from the Zhong interests.  **4.4 Removal of a liquidator facing conflict of interest issues**  (by Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Handberg, in the matter of Greight Pty Ltd (in liq) [2006] FCA 17, Federal Court of Australia Melbourne, Finkelstein J, 25 January 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/january/2006fca17.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/january/2006fca17.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 an application under section 503 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by National Personnel Pty Ltd (NP Pty Ltd) and its liquidator for an order to remove Mr Anthony Cant as liquidator of two companies, Greight Pty Ltd (Greight) and Stafford Services Pty Ltd (Stafford Services). Mr Cant, who was also acting as liquidator of another company, Burns International Security Services (Burns International), found himself in a position of conflict as the three companies, whilst not related entities, were connected with, and controlled by, Mr Cardamone.  Finkelstein J held that NP Pty Ltd, as possible creditor of either Greight or Stafford Services had standing to make the application. His Honour ordered the appointment of new liquidators to Burns International and Greight respectively.  His Honour refused Mr Cant's application to have a special purpose liquidator appointed to each company to address the issues in conflict.  **(b) Facts**  Through a structure involving two trusts (NP Trust and National Personnel Trust), NP Pty Ltd as trustee, conducted a labour hire business, the profits from which were split between Mr Cardamone and Mr Vassilopoulos (who controlled NP Pty Ltd).  NP Pty Ltd incurred debts of about $17 million to the Commissioner of Taxation, as a result of its dealings as trustee of the NP Trust. However, in early 2005 Mr Cardamone removed NP Pty Ltd as trustee of the NP Trust and NP Pty Ltd could no longer exercise its right of indemnity in relation to the NP Trust assets. Greight was substituted as trustee. Finkelstein accepted that depending on facts not known, there was a possibility that NP Pty Ltd was a creditor of either Greight or Stafford Services.  **(c) Decision**  Finkelstein J held that possibility that NP Pty Ltd was a creditor of either Greight or Stafford Services was sufficient to give it standing to make the application. Although section 503 of the Corporations Act 2001 does not indicate who is able to make an application to have a liquidator removed, Finkelstein J stated that it should be "any person with a real interest in the winding up of a company". His Honour noted that there is "no hard and fast rule … in the end it will depend on the circumstances of the case."  In relation to Mr Cant's application to regularise the conflict of interest by way of appointing special purpose liquidators, Finkelstein J cited two problems with this approach. First, there was a high possibility that as the liquidations proceeded, further problems would come to light with which Mr Cant would be unable to deal, and which could require court applications to resolve. Second, the appointed special purpose liquidators would be required to go over some of the ground already covered by Mr Cant and may be required to do so on a continuing basis.  It was noted that both these issues would add to the costs of the liquidations.  Finkelstein J raised the issue as to which two of the three companies Mr Cant should resign as liquidator from. It was observed that Stafford Services was the most complex liquidation, and as Mr Cant was on top of some litigation facing this company, Finkelstein J agreed that he should remain liquidator of it. Orders were made to appoint new liquidators to Greight and Burns International. Finkelstein made further orders that his judgment be provided to the Australian Taxation Office so it could ascertain if it had any objection to Mr Cant remaining the liquidator of Stafford Services.  **4.5 Restitution of moneys paid under a void business sale contract**  (by Catherine Henderson, Mallesons Stephen Jaques)  Ethnic Earth P/L v Quoin Technology P/L (receivers & managers appointed) (in liq) (No 3), [2006] SASC 7, Supreme Court of South Australia, Bleby J, 18 January 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/january/2006sasc7.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/january/2006sasc7.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 considers the availability of common law restitution in circumstances where a purchaser pays money under a business purchase contract which is later rendered void by legislation.  **(b) Facts**  Ethnic Earth P/L (Ethnic Earth) and Quoin Technology P/L (Quoin) entered into a contract (sale contract) for the sale of a website services and electronic products business previously carried on by Quoin. The sale contract was executed on 15 February 2002, shortly after receivers and managers had been appointed to Quoin on 6 February 2002.  Upon execution of the sale contract, Ethnic Earth paid a $100,000 deposit to Quoin. The balance of the purchase price was due on the completion date, which was scheduled for 28 March 2002.  Under two subsequent variations to the sale contract, the completion date was extended. The reason for the extensions was that Ethnic Earth was experiencing delays in obtaining finance to fund its purchase of the business.  The first variation (under which the completion date was extended to 1 May 2002) was agreed by the parties on 28 March 2002, subject to Ethnic Earth making a $50,000 "non-refundable payment" to be "forfeited by Ethnic Earth in the event of default". Ethnic Earth also agreed to pay interest on the unpaid part of the purchase price from 28 March 2002 until the date of payment.  The second variation (under which the completion date was ultimately extended to 14 June 2002) was eventually agreed on 13 May 2002, with Ethnic Earth having obtained finance on 7 May 2002. Quoin requested that, as a condition of the second variation, Ethnic Earth authorise and direct PricewaterhouseCoopers (PwC), the counterparty to one of the contracts the subject of the sale of business, to make certain payments owed by PwC after the date of the sale contract directly to Quoin in reduction of the purchase price. Quoin also requested an acknowledgment that it was the absolute owner of the $150,000 paid to date as a deposit under the sale contract and that it would be the absolute owner of all amounts received from PwC.  Ethnic Earth was not willing to agree to the condition on the terms proposed by Quoin. Mr Challen, the solicitor for and a director of Ethnic Earth explained that, since the contract with PwC was in fact being performed by Quoin Technology Services Pty Ltd (QTS) (a company connected with Ethnic Earth) and not Ethnic Earth itself, the moneys payable by PwC were owed to QTS and not to Ethnic Earth. In light of this, Ethnic Earth proposed that it would borrow and pay to Quoin the same amounts as PwC paid to QTS within 3 banking days of the payments being received from PwC. Quoin accepted this proposal in writing.  Four days after the second variation had been agreed, Ethnic Earth wrote to Quoin asserting that the sale contract was void due to the first variation. Ethnic Earth asserted that only the initial $100,000 paid by Ethnic Earth constituted a deposit and that the $50,000 subsequently paid in consideration of the first variation constituted an instalment in payment of the purchase price. This, Ethnic Earth claimed, rendered the sale agreement void under section 6 of the [Land and Business (Sale and Conveyancing) Act 1994 (SA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28634" \t "Default) (the Act).  Section 6 of the Act provides, relevantly, that:   * a contract for the sale of a business which provides for payment of part of the purchase price (except a deposit) before the settlement date is void (see section 6(1)); and * money paid under such a void contract "may be recovered by action in any court of competent jurisdiction" (see section 6(2)).   From 17 May 2002, Ethnic Earth refused to complete the sale contract and demanded repayment of the $150,000 it had already paid under it.  Bleby J stated in his recital of the facts that it was apparent that "sometime between 28 March 2002, the date of the first variation, and 17 May 2002, Ethnic Earth decided that it no longer wished to proceed with the sale contract" and that "by 3 May 2002 Mr Challen was laying the foundation for an assertion that the sale contract was void and for Ethnic Earth's right to recover the moneys paid, rather than to forfeit them for being in default."  Ethnic Earth sought an order that Quoin repay to Ethnic Earth the $150,000 paid pursuant to what was now (by virtue of an earlier decision of Bleby J - see (2004) 89 SASR 337) a void contract. Quoin counterclaimed for the value of the business less the $150,000 already received.  **(c) Decision**  **(i) The effect of section 6(2) of the Act**  Bleby J was first required to consider whether section 6(2) of the Act confers an unqualified and automatic right of recovery of moneys paid over under a contract which is void under section 6 or merely preserves the common law position where a contract is void at common law.  On this question Bleby J held that section 6(2) is drafted in such a way as to make it clear that "such recovery is not prevented, and that ordinary common law principles of restitution are intended to apply"; that is, that "notwithstanding the statutory disapproval of such contracts, money paid under them may nevertheless be recovered in accordance with ordinary common law principles".  Bleby J contrasted section 6(2) with other instances where Parliament has manifested a very clear intention that, not only is a contract to be void as a matter of policy, but also that no amounts paid under it are recoverable. His Honour noted the "well entrenched principle" of statutory interpretation that legislation is not presumed to take away a common law right unless it is not capable of any other reasonable construction.  **(ii) Common law claim for restitution**  In the absence of any detailed principles in the Act for the treatment of moneys paid over under a contract rendered void by section 6(1), Bleby J was required to determine Ethnic Earth's claim for recovery in accordance with the common law principles of restitution.  A claim for restitution is based on the concept of "unjust enrichment". The three elements of that concept are, as stated in Carter and Harland's 'Contract Law in Australia':   * an element of benefit received, retained, realised or realisable by the defendant; * the benefit having been at the plaintiff's expense and not at the expense of some other person; and * an element of injustice, that is, some recognised circumstance showing that it was unfair, unconscionable or inequitable for the defendant to obtain (or retain) the benefit.   It was the third of these elements that was in issue in the present case.  In examining High Court authority on the element of injustice as it applies to claims of restitution of amounts paid under a void contract, Bleby J concluded it requires that there be a mistake (of fact or law), duress or some manifest statutory policy demanding restitution. Bleby J expressly considered whether total failure of consideration might also be sufficient to make out the element of injustice, but concluded that it was not. Instead, His Honour treated total failure of consideration as a defence to a claim for unjust enrichment; that is, if Ethnic Earth's claim of unjust enrichment was made out, but Quoin could show that Ethnic Earth had received all or part of what it had bargained for, this would amount to a successful defence to the claim.  Given that the facts did not show any evidence of duress and that total failure of consideration was to be treated only as a defence, Bleby J regarded mistake and evident legislative policy as being the only factors which could give rise to a successful claim by Ethnic Earth based on unjust enrichment.  On the question of mistake, Bleby J found that, at the times the two payments of $100,000 and $50,000 were made, they were made under what was then a valid and binding obligation on Ethnic Earth and not by virtue of any mistake.  On the question of legislative policy, Bleby J found that the policy of the Act was to protect purchasers who paid the purchase price (or part of it) for a business without obtaining title and who later discovered that the vendor was unable to make title and give an effective transfer. Ethnic Earth was not in that situation. Instead, Ethnic Earth had received advice from a solicitor who was aware that the sale contract was probably void due to the second variation and had apparently negotiated that variation for the specific purpose of rendering the contract void.  Given that there was no basis on which Ethnic Earth was entitled to restitution, Bleby J was not strictly required to consider the defences raised by Quoin. His Honour did, however, go on to conclude in obiter dicta that several of Quoin's defences would be made out, since there had not been a total failure of consideration and Quoin had acted to its detriment in good faith in agreeing to the variations to the sale contract.  Quoin's counterclaim for the value of the business less the $150,000 already received was also unsuccessful. However, Bleby J ordered Ethnic Earth to return any of those assets described in the sale contract which remained in Ethnic Earth's possession to Quoin.  **4.6 Exoneration provisions for corporate officers and the dynamics of discretion**  (by Rebecca Hanley, Freehills)  ASIC v Vines [2005] NSWSC 1349, New South Wales Supreme Court, Austin J, 23 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/december/2005nswsc1349.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/december/2005nswsc1349.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**  In examining whether the relief offered by the "exoneration provisions" of the former Corporations Law should be granted to corporate officers who had contravened their statutory duty of care and diligence, Justice Austin provides a thorough commentary on the factors which comprise the court's discretion.  **(b) Facts**  The defendants, officers of GIO Insurance Limited, were held to have breached their statutory duty of care and diligence during a takeover bid by AMP Insurance Holdings in 1998. The breaches occurred through the failure of the defendants to disclose material information to the Board of Directors and the Due Diligence Committee. Both the first defendant and the second defendant sought to rely on sections 1317JA and 1318. These sections allow a defendant to be excused from liability where they have acted honestly and where the circumstances of the case dictate that they should be excused. The question before the court was whether in the exercise of its discretion the court should relieve the defendants wholly or partly from the liability that would otherwise arise because of their breaches of duty.  **(c) Decision**  For the court's jurisdiction to be engaged under sections 1317JA and 1318, the so-called "exoneration provisions", the following considerations must be satisfied:   * that the person has acted honestly; and * whether, having regard to all the circumstances of the case, the person ought fairly to be excused for the negligence or other wrongful conduct.   When having regarding to all the circumstances of the case, Austin J observed that some of the considerations the courts are able to weigh up include:   * the degree of care with which a person has acted; * the extent to which the defendant has fallen short of discharging their duties; * the degree to which the conduct of the defendant was unreasonable; and * the presence or absence of contrition.   In particular, Justice Austin underlines the relevance of the seriousness of the contravention, the factor which was determinative in this case. According to his Honour, there are three components to the seriousness of the contravention. Firstly, the importance of the provision contravened, in terms of public policy; secondly, the degree of flagrancy of the contravention; and thirdly, the consequences of the contravention in terms of harm to others.  Citing the failure of the first defendant to present the Board of Directors with material information which was crucial to their decisions on important matters relating to disclosure to investors, Justice Austin held that this was unreasonable conduct, amounting to a substitution of the defendant's own decisions for board decisions. It was held that contraventions of this nature undermine the efficacy of corporate boards, which meant the first defendant could not be excused from liability. Similarly, the failure of the second defendant to make sufficient disclosures to the Due Diligence Committee resulted in the court refusing to grant relief under sections 1317JA and 1318.  In concluding that the seriousness of the contraventions outweighed other factors such as the honesty of the defendants, Austin J noted that some of the matters raised in the defendants' favour may be addressed in the exercise of the court's discretion as to the appropriate orders to be made against the defendants because of their breaches of duty. The proceedings were stood over for directions as to a separate hearing on the question of orders.  **4.7 The circumstances in which the just and equitable ground for winding up a company will apply**  (by Daniela Skotnicki, Phillips Fox)  ASIC v Kingsley Brown Properties Pty Ltd [2005] VSC 506, 23 December 2005, Supreme Court Victoria, Mandie J, 23 December 2005  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/december/2005vsc506.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/december/2005vsc506.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**  ASIC sought to have Kingsley Brown Properties Pty Ltd ("Properties") wound up on the grounds that it was just and equitable that the company be wound up and that the company was insolvent pursuant to section 461 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'). Mandie J held that based on the company's financial position it was not insolvent. However, in the court's opinion, the circumstances of the case justified the company being wound up on the just and equitable ground. The court considered the activities of the Kingsley Brown Group ("the Group") in reaching its decision as it was held that Properties financial affairs could not be isolated from those of the Group.  **(b) Facts**  ASIC initially sought orders for the winding up of Properties and the three other companies in the Group, Kingsley Brown Finance Pty Ltd ("Finance"), Kingsley Brown Holdings Pty Ltd ("Holdings") and Kingsley Brown (Cowes) Pty Ltd ("Cowes"). By the hearing date, all companies other than Properties were in liquidation and a provisional liquidator had been appointed to Properties. The application was opposed by Mr Brown, the sole director and secretary of each of the companies and the holder of the single ordinary share issued by each of the companies.  **(i) ASIC investigation**  An ASIC investigation commenced in March 2003 into the activities of the Group in relation to three property developments at Cowes, Phillip Island. The Group raised funds by issuing redeemable preference shares for which there was no prospectus or other disclosure documents. After receiving a complaint in relation to share issues and property development projects by Holdings, ASIC served statutory notices requiring the Group to produce various documents including financial records. ASIC officers attended the Group's registered office and took possession of various books and records but no financial records or statements were produced. ASIC commenced an investigation into various suspected contraventions of the Corporations Act specifically, allegations that the Group had breached section 727 (offering securities without a disclosure document) and section 286 (failure to keep financial records). In response to statutory notices, Properties and Holding produced a list of company bank account transactions but no other records or statements.  **(ii) Development projects**  Kingsley Brown Group had completed two, and commenced a third, property development project on Philip Island. The first project comprised shops, a restaurant and apartments. The second project was a larger complex of retail and residential units. The third project was a planned hotel development.  The first and second development projects in Cowes were conducted in Holding's name. According to Mr Brown's testimony, Finance and Holdings were partners in relation to the first project however there was no official partnership agreement. Properties was the registered proprietor of the land and completed the work on the first project. Mr Brown claimed that it was acting as a trustee for Holdings; however, there was no Trust Deed in place. Holdings owned the land on which the second project was completed.  **(iii) Fundraising**  Prospective shareholders in Finance were identified through Mr Brown's accountancy firm, friends and relatives. An 'Operational Overview' document was distributed to these parties. It indicated that Finance operated two lines of business: the ownership of commercial property, and a debt factoring business.  The document stated that the property investment was a land development site in Cowes with a recommended development. The document also indicated that a large proportion of profits would be retained and reinvested in the company. The expected dividends were 10% in year 1, 15% in year 2 and 20% in year 3. The shares were issued at $10 including a premium of $9, however the articles of association of Finance refer to preference shares of $0.20 each in the authorised capital of Finance. Under the articles of association there was no guaranteed dividend, as the amount to be paid was to be determined by the directors.  Dividends were declared and paid to holders of preference shares in Finance after the completion of the first project. Mr Brown used his discretion as to how much was paid by Properties to Finance and then distributed as dividends. Mr Brown claimed that the dividends paid to shareholders actually consisted of interest on a loan from Finance to Properties and therefore Finance was not required to withhold tax. The retained dividends were to be invested in the second project built by Holdings; however, no documents reflected that the shareholders had any interest in Holdings. The shareholders could redeem their shares in Finance by submitting their share certificates. There was evidence that redemptions of $339,000 had been requested but not paid.  Holdings also issued preference shares to members of the public by means of an Operational Overview document. There were 40 redeemable preference shareholders with an investment total of $1,692,850. They were entitled to one-half of the net profits of the second project. No financial records had been kept and dividends were paid based solely on Mr Brown's estimate of 'how things appeared to be going'. 32 of the 40 shareholders had requested redemption and not been paid.  **(iv) The association of Properties with the group**  Mr Brown claimed that Properties was 'a family company and not a trading company' and that there had been no allegation of fraud or dishonesty made against it. As the company had not raised funds there had been no lack of disclosure or failure to comply with the documentation required for public fundraising and it had not required a license of authority for its fundraising activities. Therefore there was no need to protect the public from the activities of Properties.  ASIC submitted that the Group had operated as a single entity and that there had been a mixing of funds right from the incorporation of the companies. There were no accounts or disclosure but funds had been taken from Finance and paid to Properties. Properties had acted as a trustee for Finance but the profits had not been accounted for. There was additional evidence that the companies acted as a Group and made all payments necessary on behalf of the Group.  In response to a redemption request a letter was sent with the Group name in the header and signed by Mr Brown but with the names of Finance and Holding so it would appear that the letter had been sent on behalf of these companies. The letter informed shareholders as to the state of the various projects and ended by informing them that current redemption requests were being deferred until the funds became available to pay these out.  **(c) Decision**  Mandie J considered the grounds on which ASIC claimed that the company should be wound up.  **(i) Insolvency**  The court held that Properties, if assessed as a separate company, was not insolvent as it had assets of at least $62,509 and no liabilities.  **(ii) Winding up on the just and equitable ground**  Mandie J reviewed the relevant authorities and extracted the following principles in relation to an application to have the company wound up on the just and equitable ground:   * there must be a lack of confidence in the conduct and management of the company's affairs; * there must be a sufficient nexus between the facts or conduct and the management or administration of the company affairs or the business; * fairness is a relevant consideration; * relevant public interest considerations include the protection of investors and the prevention or condemnation of repeated breaches of the law; * a stronger case may be required if the company is prosperous, or at least solvent; and/or where there is an established business being carried on; and * the classes of conduct which justify the order are not closed and there is no necessary limit to the generality of the words "just and equitable".   Mandie J held that there was a justifiable lack of confidence in the management of the company based on the lack of financial records and trust accounts held or prepared by Properties and its involvement in the Group. There was found to be a sufficient nexus between Properties and Finance in relation to: the fundraising without the required prospectus or other disclosure documents, the lack of disclosure to shareholders regarding the projects and Properties interest in them, the lack of records explaining Finance's affairs and the tax bill owed by Finance as a result of dividends paid. Mandie J referred to Mr Brown's 'cavalier approach to his responsibilities'. Even though Properties had no current trading activity it was found to be in the public interest to protect investors and wind up the company.  His Honour held that the shareholders of Properties and Mr Brown would not be unduly prejudiced by the winding up of the company, and he ordered the company wound up on the ground that it was just and equitable to do so.  **4.8 Improper use of position by company director**  (by Lisa Billington, Articled Clerk, Clayton Utz)  Doyle v Australian Securities and Investments Commission [2005] HCA 78, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ, 17 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/december/2005hca78.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2005/december/2005hca78.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 test for assessing whether a director or officer of a company has improperly used his or her position to gain an advantage for themselves or someone else, or cause detriment to the corporation is an objective test. The person's intention or purpose is irrelevant. The courts will look objectively at whether the defendant's conduct in the circumstances of the case was improper. This case serves as a reminder that a director can be liable for improperly using his or her position even if the other directors are aware of and don't object to the director using his or her position to gain an advantage.  **(b) Facts**  Mr Doyle was a director and 50% shareholder in Doyle Capital Partners Pty Ltd ("DCP") and at the relevant times either a director or alternate director of Chile Minera Ltd (the "Company"), a company listed on the ASX. The Company issued shares to DCP and two other investors in return for payment of $400,000, on the understanding that the shares would rank “pari passu” with the existing shares of the Company.  ASX informed the Company that the allotment of shares was invalid due to a breach of ASX Listing Rule 7.1 which prohibits a company from issuing more than 10% of its capital in one class in any 12 month period without shareholder approval. The Company conceded that the allotment exceeded 10% and planned to ratify retrospectively the allotment at the Company's upcoming AGM. The Australian Securities Commission (now the Australian Securities and Investments Commission) also took action to prevent votes from the new shares being counted on certain key resolutions passed by the Company.  Due to the intervention by the ASX and the ASC, Doyle argued that DCP's shares did not rank "pari passu" with the Company's existing shares with respect to voting rights. On this basis, Mr Doyle, on behalf of DCP, wrote to the Company's directors demanding repayment of the $400,000. At the Company's board meeting, which Mr Doyle attended and voted, the board resolved to cancel the shares and return the money to DCP.  After the money was returned to DCP, the Company's financial condition rapidly deteriorated and the Company became insolvent, culminating with the appointment of an administrator. The trial judge held that the payment to DCP was a "dominant contributing factor" to the Company's insolvency. The Company requested DCP to return the money, however DCP refused to do so.  In the Supreme Court of Western Australia, Roberts-Smith J determined that Mr Doyle, by his presence and voting at the board meeting, had made improper use of his position as a director to gain an advantage for DCP, in breach of section 232(6) of the Corporations Law 1990 (Cth) ("Law") (now section 182(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act")). As section 232(6) was a civil penalty provision, Roberts-Smith J ordered that Mr Doyle pay $30,000 to the Commonwealth and be prohibited from managing a corporation for 2 years.  The Full Court (Wheeler, McLure and Jenkins JJ) reduced the period of prohibition to 6 months but otherwise dismissed the appeal.  Mr Doyle then appealed to High Court seeking to set aside the finding that he had breached section 232(6). The High Court also dismissed Mr Doyle's appeal.  **(c) Decision**  McLure J of the Full Court set out the elements required to establish a breach of section 232(6):   * the defendant was at the relevant time an officer or employee of the corporation; * he used his position as such an officer or employee; * his use of his position was improper; * he made that improper use for the purpose of gaining, directly or indirectly, an advantage, or alternatively he made that improper use for the purpose of causing detriment; and * the advantage was either for himself or for another person, or alternatively, the detriment was to the corporation.   The first two elements were clearly present. The third element was the key matter in dispute.  Before the High Court, Mr Doyle submitted that he had not made improper use of his position by being present and voting at the board meeting. He submitted that his interest in DCP had been disclosed to, and was known to, the other directors of the Company. Further he submitted that the decision to repay the money to DCP was neither unlawful nor improper, because it was arguable that DCP was entitled to the return of its money because DCP did not receive pari passu voting rights.  The test for impropriety stated by the High Court is an objective test. The High court considered that Mr Doyle's conduct would be improper if it consisted of:  "a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of his position as director, and the circumstances of the case, including the commercial context" [paragraph 35].  The High Court held that the director's intention and purpose is not relevant when assessing improper use of position.  The circumstances at the time of the board meeting included:   * shareholder dissent in relation to the Company's activities in Chile; * ASX disputing the allotment of shares to DCP; * the Federal Court granting interim relief preventing the Company's acquisition of a mineral prospect in Chile; * an unresolved question as to whether the return of money to DCP was an unauthorised reduction in share capital; and * the threat of delisting.   Given these circumstances, the High Court concluded that Doyle had improperly used his position.  Further, whilst the other directors of the Company may have been aware of Mr Doyle's interest in DCP, the board had not passed a resolution specifying Mr Doyle's interest and stating that the board was satisfied that the interest should not disqualify Mr Doyle from voting on the matter, as required by section 232A(3) of the Law (now section 195(2) of the Act). Accordingly, Mr Doyle's presence at the board meeting and his voting on a resolution in which he had a material personal interest constituted a breach of section 232A(1) of the Law (now section 195 of the Act) and the similar provision in Article 15.15 of the Company's Articles. The breach of section 232A and Article 15.15 further compelled the conclusion that Mr Doyle had improperly used his position.  Mr Doyle also argued that the fourth element of section 232(6) was not present, as he had not sought to gain an "advantage" but rather to recoup the money that DCP had at least an arguable claim (ie a legitimate claim) to. The High Court disagreed. The High Court readily found that there had been an advantage sought and gained. Prior to the return of money, DCP had only an unsecured claim to the return of its money. The effect of Mr Doyle's actions was that DCP held the refunded money, which constituted an obvious advantage to DCP.  **4.9 Is rescission necessary before a subscribing shareholder can recover from an issuer under section 729(1) of the Corporations Act?**  (by Nicola Charlston, Mallesons Stephen Jaques)  Cadence Asset Management Pty Ltd v Concept Sports Limited [2005] FCAFC 265, Federal Court of Australia, Full Court, Merkel, Weinberg and Kenny JJ, 16 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/december/2005fcafc265.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/december/2005fcafc265.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 issue for consideration by the court was whether a subscriber for shares offered pursuant to a prospectus can recover from the company that issued the prospectus the loss suffered as a result of the subscription, without the subscriber rescinding the contract to acquire the shares. The importance of this issue stems from the fact that a subscriber can no longer rescind the contract pursuant to which it acquired the shares if the shares have been sold by the subscriber, or if the company that issued the prospectus is in liquidation.  The appellant subscribed for shares in Concept Sports under a prospectus and subsequently commenced a group proceeding against Concept Sports and its directors, claming that it, and certain other shareholders in Concept Sports, suffered loss and damage as a result of contraventions of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") in relation to the prospectus. The appellant sought to recover that loss and damage pursuant to, inter alia, section 729(1) of the Act.  The court concluded that, under section 729(1) of the Act, a subscribing shareholder can recover from the company issuing a prospectus the loss suffered as a result of the subscription without rescinding the contract to acquire the shares. However, by reason of section 563A of the Act, if the company is in liquidation, the subscriber’s right to be paid the loss is postponed until the claims of persons made otherwise than as members have been satisfied.  **(b) Facts**  Concept Sports issued a prospectus offering shares. Pursuant to the offer contained in the prospectus, a company acting as trustee for the appellant subscribed for 100,000 shares in Concept Sports at $0.50 each. The shares were issued to the trustee on 7 June 2004 and on 21 and 22 September 2004 the appellant sold the shares to a third party at an average price of 11.5 cents.  The appellant commenced a group proceeding against Concept Sports and its directors, claming that it, and certain other shareholders in Concept Sports suffered loss and damage as a result of contraventions of the Act in relation to the prospectus and sought to recover that loss and damage pursuant to, inter alia, section 729(1) of the Act.  Section 729(1) of the Act provides that a person who suffers loss because an offer of securities in a prospectus contravenes section 728 of the Act may recover that loss from the person making the offer. Section 728 of the Act essentially prohibits a person from offering securities under a disclosure document if there is a misleading or deceptive statement or omission in the disclosure document or related documents.  The primary judge held that section 729(1) is subject to the rule in Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317 ("Houldsworth"). The rule in Houldsworth protects creditors as it maintains the capital of a company by preventing a shareholder, whether directly or indirectly, from receiving back any part of the shareholder’s contribution to the capital of the company.  Applying the rule in Houldsworth, the primary judge determined that the rule barred the claims of the appellant as it was suing in its capacity as a subscribing shareholder. The primary judge considered that a shareholder wishing to rely on section 729(1) of the Act to sue a company to recover loss suffered in its capacity as a shareholder must first rescind the contract to acquire the shares, which the appellant could no longer do as the shares had been sold by the appellant to a third party.  **(c) Decision**  **(i) Issue on appeal**  The issue on appeal was whether the statutory entitlement of a shareholder to recover compensation under section 729(1) of the Act in respect of the prospectus issued by Concept Sports is qualified by the rule in Houldsworth.  **(ii) The rule in Houldsworth and section 563A of the Act**  The court discussed the application of the rule in Houldsworth in previous cases, in particular State of Victoria v Hodgson [1992] 2 VR 613 and Webb Distributors (Aust) Pty Ltd v The State of Victoria (1993) 179 CLR 15.  The court noted that the rule in Houldsworth prevents a person who is a shareholder from claiming a debt, or making a claim, against the company in that person's capacity as a shareholder of the company if payments of the debt or claim will directly or indirectly recoup the money subscribed by the shareholder for the shares acquired by it. The court noted that the rule received statutory recognition in Part 5.6 of the Act which applies to the winding up of a company. In particular, section 563A of the Act provides that payment of a debt owed by a company to a person in a person’s capacity as a member of the company, whether by dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.  **(iii) Applicability of the rule in Houldsworth to section 729(1) of the Act**  The court noted that the present statutory regime differed from that applied in the Webb and Hodgson cases, the most significant change being the specific conferral in section 729(1) of a statutory cause of action in favour of shareholders, including subscribing shareholders, against a company that has failed to meet the Act's requirements in respect of a prospectus.  The court noted several features of the statutory scheme in respect of disclosure documents including that there are no qualifications on a person’s right to compensation under section 729(1) other than that:   * the person suffers loss and damage because an offer of securities under a disclosure document contravenes section 728(1); * the loss and damage sought to be recovered is one that the table in the sub-section makes the persons specified liable for; and * an action under the sub-section is commenced within 6 years after the date on which the cause of action arose.   The court noted that, in contrast to the statutory regime considered in Webb and the limited rights available at common law, section 729(1) provides for a company issuing a prospectus to be liable to any person who suffers loss if the prospectus contravenes section 728(1). One of the objects of conferring an entitlement on investors to recover the loss they suffered from the company that issued the prospectus is to ensure full disclosure in offer documents or prospectuses.  The court also noted that:   * there is nothing in the terms of sections 728 and 729 that suggests the entitlement to compensation is qualified by any requirement that is not set out in those sections. Additionally, there is plainly a tension between applying the rule in Houldsworth to section 729(1) to limit a company's liability for contraventions of section 728 in the case of subscribing shareholders to those who have rescinded their contract of acquisition, and the objective of making a company liable for all such contraventions to ensure full disclosure; * the scheme of Chapter 6D of the Act clearly and precisely prescribes the circumstances in which liability under section 729(1) arises and separately provides for the specific defences that are available in respect of a claim made under section 729(1) - the defences do not include a defence based on Houldsworth which would require a subscribing shareholder to rescind the contract by which the securities are acquired; * the legislature has specifically considered the remedy of rescission and specifically provided for its equivalent in certain provisions of the Act (for example, sections 724 and 736), but not for a breach of section 728. It would be an odd result that any right to compensation under section 729 is qualified without the statutory scheme providing for a right of rescission in that situation; and * the rule in Houldsworth is usually applied when the company being sued for the recovery of loss and damage in relation to a prospectus is in liquidation. This is not a situation with which sections 728 or 729 are concerned, but is the situation with which section 563A is concerned. It appears that the legislature has modified the rule in Houldsworth by providing for the vice the rule was designed to avoid by enacting section 563A.   **(iv) Court's conclusion**  The court was of the view that that there were no contextual or textual considerations that would suggest that the legislature intended to qualify the entitlement conferred by section 729 by reference to the rule in Houldsworth. The court noted that the rationale for the rule is to prevent shareholders, directly or indirectly, receiving back any part of their contribution to the capital of the company, thereby defeating the interests of creditors. The court considered that the protection the rule in Houldsworth was to afford is now enshrined in section 563A and there is no reason therefore to qualify any entitlement under section 729 by reference to that rule.  The court concluded that under section 729(1) of the Act, a subscribing shareholder can receive from the company issuing a prospectus the loss suffered as a result of the subscription without rescinding the contract to acquire the shares. However, by reason of section 563A of the Act, if the company is in liquidation, the subscriber’s right to be paid the loss is postponed until the claims of persons made otherwise than as members have been satisfied.  The appeal was therefore allowed and the order of the primary judge dismissing the appellant's claim for damages under section 729(1) and the consequential costs order were set aside.  **4.10 Articles of Association governing transfer of shares and principles of construction**  (by Mark Filipovic, Freehills)  Lion Nathan Australia Pty Ltd v Coopers Brewery Limited [2005] FCA 1812, Federal Court of Australia, Finn J, 13 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/december/2005fca1812.html](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/december/2005fca1812.html" \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 case concerns the proper interpretation to be given to the words "any transfer of shares" in Article 38 of Coopers Brewery Ltd's Articles of Association ("Articles"). Article 38 states that no member may make any transfer of shares without complying with a detailed three level pre-emptive rights regime, noted in Articles 40 – 53.  The Applicant, Lion Nathan Australia Pty Ltd ("Lion Nathan"), argued that "any transfer" within the context of Article 38, encompasses a share buy-back by Coopers Brewery Ltd ("Coopers"). The consequence of this is that the pre-emptive rights regime had to be complied with before Coopers could implement the buy-back scheme. In contrast, Coopers contended that "any transfer" means a transfer to a third party, therefore leaving the buy-back provisions unaffected by the pre-emptive rights regime.  The court concluded that a reasonable person in the position of Coopers and its members would understand that the language of Article 38 was addressed to transfers to third parties alone.  **(b) Facts**  **(i) Background**  In 1962, South Australia Brewing Holdings Ltd (SABH) became the registered owner of shares in Coopers. In July 1993 SABH sold the entire brewing division of its business to Lion Nathan. This included an economic interest in 19.9% of the issued shares in Coopers held by SABH.  The sale of the economic interest in the Coopers' shares from SABH to Lion Nathan was affected by the "Coopers' Deed", dated August 1993. In late 1993 Coopers threatened SABH and Lion Nathan with litigation. Coopers challenged SABH's (now Southcorp Holdings Ltd) right to sell the economic interest in the Coopers shares to Lion Nathan.  Coopers asserted that the sale of the shares triggered the provision of the pre-emptive rights regime contained in its Articles. The pre-emptive rights were intended to privilege the holders of A, B and C class shares should a member wish to transfer shares. Article 38 stated that "No member may make any transfer of shares and the Directors must not register any transfer of shares without complying with Articles 40-53".  Articles 40-53 established a detailed three level pre-emptive rights regime with the intention of regulating prospective membership of the company. Only after this pre-emptive rights regime was exhausted were the shares to be made available for sale to the public at large.  Coopers' threatened litigation against Southcorp and Lion Nathan in relation to the Coopers Deed was resolved by negotiation and formalised in the Coopers Shares Agreement of March 1995.  **(ii) Coopers shares agreement**  The Coopers Shares Agreement between Coopers and Lion Nathan provided for the grant of a third tier pre-emptive right to Lion Nathan in return for Lion Nathan giving up the 19.9% interest which it held in the Coopers' shares. Lion Nathan would sell its interest in the Coopers shares back to Southcorp and the two parties would terminate the Coopers Deed.  In return, Coopers would amend its Articles to reflect Lion Nathan's third tier pre-emptive rights. Under these amendments additional pre-emptive rights would be triggered if no A, B, C or D shareholder or a members' relative sought to purchase available shares. In particular the shares would then be offered in order of priority to:   * the superannuation fund for Coopers' employees; * Lion Nathan; and * if refused by Lion Nathan, to the public.   **(iii) The 2003 buy back**  In September 2003, Coopers forwarded to each of its members an offer to buy back up to 10% of its shares. Lion Nathan disagreed with Coopers' right to utilise the power to buy back its own shares under section 257A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Lion Nathan contended that the pre-emptive rights regime prohibited the company from exercising its buy-back power. In particular, it pointed to Article 38 of Coopers' Articles.  Lion Nathan claimed that by affecting a buy-back without complying with its Articles, Coopers acted in breach of the March 1995 Shares Agreement. It contended that "any transfer", as noted in Article 38, encompassed a transfer to any legal person including Coopers. Therefore Article 38 applied to the share buy back by Coopers. In contrast, Coopers argued that "any transfer" meant a transfer to a third party, thus leaving the buy back provision unaffected by the pre-emptive rights regime.  **(iv) Section 125(1) of the Corporations Act 2001**  As well as contending that Coopers was in breach of the Shares Agreement, Lion Nathan contended that Article 38 constituted an express prohibition or restriction on Coopers exercising its buy back power. It was argued that exercise of the buy back power was in contravention of section 125(1) of the Corporations Act. Section 125(1) provides that if a company has a constitution, it may contain an express restriction or prohibition of its exercise of any of it powers, to which it would otherwise be entitled.  Coopers contended that the pre-emptive rights regime was not an express restriction on its buy back power. Coopers also asserted that the transfer of shares envisaged by Article 38 did not extend to the buy-back offer.  Because of the view Justice Finn took on the construction of Article 38, he considered it unnecessary to express a concluded view on section 125(1). However, he did note that the application of section 125(1) would be "unduly cramped" if a company’s constitution was expected to refer explicitly to the statutory power to prohibit or restrict the company’s powers.  **(v) The construction of Article 38**  In considering what constituted "any transfer" with regards to Article 38, Justice Finn considered several principles of statutory and contractual construction. Ultimately he decided that the "Pacific Carriers' principle" (Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451) provided the appropriate approach to be adopted in considering the Coopers Articles. On the basis of this approach, not only is the text of the Article considered, but so too are the surrounding circumstances known to the parties as well as the purpose and object of the transaction involved.  Applying this approach Justice Finn found that the pre-emptive rights regime within Coopers' Articles was not intended to apply to a share buy-back. By reviewing previous versions of the Articles, Justice Finn stated that the primary purpose of Article 38 and its related Articles was to regulate company membership. Justice Finn noted that while a share buy-back might affect membership, in this case its purpose was not to do this.  **(c) Decision**   * The purpose and intent of Article 38 was such that it did not apply to a share buy-back. The pre-emptive rights regime did not apply to a share buy-back. Consequently, Coopers did not breach either the Share Agreement or section 125(1) of the Corporations Act. * Section 125(1) does not require that, before a provision in a company's constitution can properly be characterised as an express restriction or prohibition of the company's exercise of a particular power, it must refer explicitly to that particular power and to the prohibition or restriction imposed. * In assessing the construction of Coopers' Articles not only is the text of the Article considered, but so too are the surrounding circumstances known to the parties as well as the purpose and object of the transaction involved.   **4.11 Implying terms into a constitution and other attempted penalty shots**  (by Jonathan Stewart, Blake Dawson Waldron)  St George Soccer Football Association Inc v Soccer NSW Ltd [2005] NSWSC 1288, New South Wales Supreme Court, Barrett J, 13 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/december/2005nswsc1288.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/december/2005nswsc1288.html" \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) Introduction**  This case involved claims by two members of a company against the company.  St George Soccer Football Association Inc ("St George") and Bonnyrigg White Eagles Sports Club Ltd ("Bonnyrigg") were excluded from the first division competition of the 2006 season by a decision of the board of directors of Soccer NSW Ltd ("Soccer NSW"), a company limited by guarantee. The 2005 season involved 16 clubs. Soccer NSW reduced that to 10 clubs for the 2006 season. Soccer NSW had required potential participants in the 2006 season, including St George and Bonnyrigg, to submit applications to participate in the 2006 season. In Soccer NSW's business plan it was stated that the applications would be assessed in accordance with certain criteria. St George’s and Bonnyrigg’s applications were unsuccessful.  St George and Bonnyrigg brought action in the New South Wales Supreme Court alleging that the decision by the board of Soccer NSW involved either:  1. a breach of contract by Soccer NSW; 2. oppressive and / or unfairly prejudicial or discriminatory conduct by Soccer NSW; or 3. misleading and deceptive conduct by Soccer NSW.  Barrett J dismissed all these claims.  **(b) Contract claim**  St George and Bonnyrigg claimed that Soccer NSW breached a contract between them and Soccer NSW. The plaintiffs alleged that this contract was either a "process contract" or a statutory contract between members and a company under section 140(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  St George and Bonnyrigg argued that the series of process contracts required Soccer NSW to assess the applications in accordance with the criteria laid down in the business plan and to carry out the assessment of the applications fairly and in good faith. However, Barrett J held that there was no process contract as the decision whether a club could participate in a competition is a function, under Soccer NSW’s constitution, that is left to Soccer NSW’s board. Barrett J considered that this excluded the possibility of a separate or parallel set of contractual rights that related to participation in a competition.  Barrett J held that the constitution of Soccer NSW was, due to section 140(1), a contract between Soccer NSW and its members.  However, Soccer NSW's constitution contained no express provisions concerning standards of conduct or process to be applied to decisions made by the board of Soccer NSW. Barrett J considered that there was no reason in principle why such terms could not be implied into the statutory contract on the same basis as for other contracts (though he noted that courts were reluctant to do so due to the nature of the constitution). In any event, Barrett J held that it was not possible to imply a term that Soccer NSW would act fairly and in good faith into the contract between Soccer NSW and each of its members. He considered that it was not a term that could be implied as a matter of business efficacy. He also considered that there was "no room" to imply the term into contracts of that nature as the constitution, general law and statutory provisions contained a comprehensive and exhaustive set of rules in which the constitution operates. Accordingly, a term of good faith and / or fair dealing could not be implied into Soccer NSW's constitution.  Barrett J considered that the directors' exercise of a power reposed in them by the statutory contract did not breach the statutory contract. He held that the decision to exclude St George and Bonnyrigg from the 2006 season was the furtherance of a specific object of Soccer NSW by means of the corporate processes provided for in the constitution of Soccer NSW.  **(c) Oppressive / prejudicial conduct**  St George and Bonnyrigg relied on sections 232 and 233 of the Corporations Act to found a claim that Soccer NSW had acted unfairly or prejudicially to exclude them from the 2006 season.  Barrett J noted that the approach of courts under provisions such as sections 232 and 233 was to only interfere with decisions made by directors of a company if the decision was one that no board acting reasonably could have made.  Barrett J held that there was no evidence that the "harsh" decision to exclude St George and Bonnyrigg from the 2006 season was an unreasonable or irrational decision. He considered that subjective judgments by the directors were necessary in this context and the board was required to only apply the criteria set out in the business plan in its decision making. There was no evidence of improper purpose, dishonesty, fraud, malice or recklessness on the part of Soccer NSW's directors. Accordingly, Barrett J dismissed the claim based on section 232 and 233 of the Corporations Act.  **(d) Misleading conduct**  St George and Bonnyrigg also alleged that Soccer NSW had engaged in misleading and deceptive conduct (either under the [Trade Practices Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) or the [Fair Trading Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default)) or, alternatively, was stopped from making the decision to exclude St George and Bonnyrigg from the 2006 competition under estoppel principles.  These claims were predicated on proving two misrepresentations by Soccer NSW. Firstly, the plaintiffs alleged that Soccer NSW represented that the 2006 competition would involve 12 teams (not 10). Secondly, the plaintiffs alleged that Soccer NSW represented that the clubs' applications would be assessed solely in accordance with the criteria laid down in the business plan.  Barrett J held that the "12 team representation" was not made out. It was clear from the business plan that the context in which references were made to "12 teams" by Soccer NSW was always to the maximum number of teams that would be involved in the 2006 season. Accordingly, Barrett J held that there were no misleading representations that more than 10 teams would be involved in the 2006 season.  The "criteria representation" was also held by Barrett J to not be a misrepresentation as it was true at the time at which it was made by Soccer NSW. Barrett J held that Soccer NSW abandoned the commitment to assess the clubs' applications solely in accordance with the criteria on 10 October 2005; the board determined on that date that if the criteria were strictly applied, the 2006 competition would only involve 5 or 6 teams. Barrett J held that Soccer NSW's change of position did not constitute misrepresentation.  As there was no misrepresentation by Soccer NSW, the plaintiff's claims based on the Trade Practices Act (or the Fair Trading Act) and estoppel failed. Barrett J also held that St George and Bonnyrigg had failed to show any detriment on which to base the estoppel claim.  **4.12 Unquantifiable price and no apparent authority in contract for services**  (by Bethany Sharman, Blake Dawson Waldron)  Durban Roodepoort Deep, Limited v Newshore Nominees Pty Ltd [2005] WASCA 231, Supreme Court of Western Australia, Court of Appeal, Steytler P, McLure JA and Murray AJA, 6 December 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/december/2005wasca231.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/december/2005wasca231.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**  Durban Roodepoort Deep, Limited (Appellant) appealed a decision of the District Court of Western Australia that awarded Newshore Nominees Pty Ltd (Respondent) approximately $38,000 pursuant to a contract for services entered into by the two parties in May 2000.  The Appellant challenged the trial judge's decision on the ability of a former officer of the Appellant to enter into the contract as well as the decision on the quantum payable by the Appellant under the contract.  The Respondent cross-appealed by claiming the trial judge erred in not awarding it the full amount of its claim and all of the costs of the trial. The Respondent also relied on sections 128 and 129 of the former Corporations Law 1990 (Cth) to argue that the relevant officer of the Appellant had authority to enter into the service agreement.  The court upheld the appeal on the quantum payable by the Appellant under the contract and held that a trial judge ought to dismiss the Respondent's claim for want of evidence or award nominal damages.  The court dismissed the cross-appeal as without merit and upheld the appeal against the officer of the Appellant having apparent authority to bind the Appellant to the services contract.  **(b) Facts**  The Appellant is a foreign registered company in Australia, and Mr Charles Mostert was at all material times a director of the Appellant. The Respondent is a trustee company through which Mr Roger Bryer, its managing director and chief operating officer, provided financial consultancy services.  At first instance it was held that Mr Mostert and Mr Bryer had entered into a contract for services on behalf of the Appellant and Respondent respectively.  The trial judge described the terminology of the services contract as vague and open-ended. There was no clear description of the scope of the contractual services the Respondent was to provide or the means of determining the amount of remuneration payable to the Respondent. Similarly, invoices provided by Mr Bryer to Mr Mostert pursuant to the contract did not disclose how Mr Bryer's fees were calculated, and the invoice billing periods overlapped.  At trial, the Respondent failed in its primary claim that the parties agreed that the Respondent would be paid $3,500 per day. Rather, the trial judge held that it was an implied term of the services agreement that the Appellant would pay the Respondent reasonable remuneration for the time spent by Mr Bryer performing relevant services. It was determined that a rate of $250 per hour was a reasonable rate of remuneration in all the circumstances. Based on documentary evidence of time worked by Mr Bryer in one of his invoices, the trial judge made an assessment of the fees owed to the Respondent by the Appellant as $33,200, plus expenses of approximately $5,000.  The trial judge found that Mr Mostert was not expressly authorised to enter into the services agreement on behalf of the Appellant but that he did have apparent authority to do so.  **(c) Decision**  **(i) Quantum payable by the Appellant under the services agreement**  The Court of Appeal noted that it was incorrect to characterise the action as one for damages for breach of contract; it was rather an action for money payable under the terms of the contract. The court stated that the law relating to certainty in the assessment of damages applied by way of analogy to this alternative claim, but what was sufficient certainty in quantification depended upon the nature of the loss and how it could be proven.  The Appellant's challenge to the trial judge's findings on the appropriate hourly rate of remuneration and the expenses incurred by the Respondent was dismissed as without merit. However, as there was no documentary or other evidence itemising or detailing the work done by the Respondent or the time spent in doing it, the court held that it was not on the evidence open to the trial judge to make an assessment of the quantum of remuneration payable to the Respondent.  **(ii) Cross-appeal**  The court held that the grounds of the cross-appeal that the court ought to award the Respondent a certain sum payable under the services contract (plus costs) based on evidence given by Mr Mostert, and that sections 128 and 129 of the Corporations Law 1990 (Cth) applied were without merit. In particular, the sections of the Corporations Law cited by the Respondent were shown not to apply to registered foreign companies such as the Appellant. The cross-appeal was dismissed.  **(iii) Authority**  The court found that the trial judge had not considered the conduct of the Appellant, or the effect of that conduct on the Respondent, when determining the issue of apparent authority. The trial judge had rather focused on Mr Bryer's course of dealings with Mr Mostert in particular, Mr Mostert requesting and paying for the Respondent's services. The subject matter of the services was the Appellant's capital structure and share price stability, which was not within the usual authority of an officer in Mr Mostert's position (as finance director). There was no finding that the Appellant knew, or ought reasonably to have known, of Mr Mostert's course of dealings with Mr Bryer or Mr Bryer's activities for the Appellant. The court concluded there was nothing about the mere fact of a course of dealing that itself justified a finding that the Appellant held out Mr Mostert as having the authority to enter into the services contract on its behalf. |
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