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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Hong Kong review of codes on takeovers and mergers and share repurchases**  On 22 August 2005, the Hong Kong Securities and Futures Commission (SFC) released the Consultation Conclusions Paper on the Review of the Codes on Takeovers and Mergers and Share Repurchases. The main revisions to the Codes will take effect on 1 October 2005.  On 30 November 2004, the SFC issued a Consultation Paper inviting public comments on proposed changes to the Codes. The consultation period was extended by one month to end on 14 February 2005 in response to respondents' requests.  The main revisions are:   * "Low-ball" offers - such offers might be used as a tactic to frustrate the offeree company's business where there is no genuine intention to take over the offeree company. The new provisions provide that a voluntary offer at a discount of more than 50% to the market price of the shares will not normally be allowed to proceed. * Frustrating actions - the Codes have been amended to address concerns about risks to shareholders arising from an incumbent board taking deliberate but lawful action to frustrate a successful offeror. The revised Codes provide that once a successful offeror calls a general meeting to appoint directors of the offeree company, the existing board must co-operate fully and convene a general meeting as soon as possible. During this period the existing board will also be restricted from taking any frustrating action such as issuing new shares, or selling or acquiring assets of material amounts without shareholder approval. * Telecom mergers - the Codes have been amended to provide a broad framework for dealing with telecom mergers that are subject to review by the Telecommunications Authority under the laws introduced in July 2004. The SFC will keep this area under review and may amend the Codes further in light of experience in dealing with such takeovers.   The Consultation Paper also asked for submissions about whether the Codes should be amended to provide for whitewash waivers of general offer obligations triggered as a result of on-market share repurchases. The majority of respondents disagreed that such waivers should be permitted. Some suggested that the uncertainties as to the price and timing of on-market repurchases contributed to the undesirability of such an amendment. One respondent emphasised that, in light of the prevalence of the controlling shareholder environment in Hong Kong, Hong Kong regulations have historically and justifiably placed greater attention on ensuring that the interests of minority shareholders are not unfairly prejudiced than regulations in other markets.  There is a concern that minority interests may be prejudiced in the guise of increasing shareholder value if the proposal were allowed. The Takeovers Executive agrees with these concerns and believes that it is in the overall best interests of minority shareholders not to amend the Codes in this respect.  The Consultation Paper also recommended a number of changes to the Codes relating to the vetting of documents in order to shorten the vetting process where appropriate. The comments received supported the proposed changes which have been adopted.  The Conclusions Paper is available on the SFC [website](http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/05/takeovers_code_conclusions_200508_eng.pdf" \t "_new).  **1.2 Delaware Chancery Court decision on the termination payments received by former Disney President Michael Ovitz**  On 9 August 2005, the Court of Chancery of Delaware handed down its judgment in the case In re Walt Disney Company Derivative Litigation (No CIV.A. 15452).  Michael Ovitz was President of Disney for only about 14 months in 1995-96. When he left the company, he received termination payments of US$140 million. Shareholders of Disney sued Ovitz, and the directors, CEO, and general counsel of Disney for breach of duty in relation to the termination payments and made other legal claims.  The court held that none of the defendants had breached their duties and dismissed all the plaintiffs' claims (it is to be noted that the content of these duties is not the same under Delaware and Australian law). Of particular interest are the observations of the judge concerning the difference between the legal duties imposed on directors and corporate governance standards, and the role of the court in reviewing decisions made by directors:  "As I will explain in painful detail hereafter, there are many aspects of defendants' conduct that fell significantly short of the best practices of ideal corporate governance. Recognizing the protean nature of ideal corporate governance practices, particularly over an era that has included the Enron and WorldCom debacles, and the resulting legislative focus on corporate governance, it is perhaps worth pointing out that the actions (and the failures to act) of the Disney board that gave rise to this lawsuit took place ten years ago, and that applying 21st century notions of best practices in analyzing whether those decisions were actionable would be misplaced.  "Unlike ideals of corporate governance, a fiduciary's duties do not change over time. How we understand those duties may evolve and become refined, but the duties themselves have not changed, except to the extent that fulfilling a fiduciary duty requires obedience to other positive law. This Court strongly encourages directors and officers to employ best practices, as those practices are understood at the time a corporate decision is taken. But Delaware law does not—indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal—rather than competent or standard—medical treatment practices, lest the average medical practitioner be found inevitably derelict.  "Fiduciaries are held by the common law to a high standard in fulfilling their stewardship over the assets of others, a standard that (depending on the circumstances) may not be the same as that contemplated by ideal corporate governance. Yet therein lies perhaps the greatest strength of Delaware’s corporation law. Fiduciaries who act faithfully and honestly on behalf of those whose interests they represent are indeed granted wide latitude in their efforts to maximize shareholders' investment. Times may change, but fiduciary duties do not. Indeed, other institutions may develop, pronounce and urge adherence to ideals of corporate best practices. But the development of aspirational ideals, however worthy as goals for human behavior, should not work to distort the legal requirements by which human behavior is actually measured. Nor should the common law of fiduciary duties become a prisoner of narrow definitions or formulaic expressions. It is thus both the province and special duty of this Court to measure, in light of all the facts and circumstances of a particular case, whether an individual who has accepted a position of responsibility over the assets of another has been unremittingly faithful to his or her charge.  "Because this matter, by its very nature, has become something of a public spectacle commencing as it did with the spectacular hiring of one of the entertainment industry's best-known personalities to help run one of its iconic businesses, and ending with a spectacular failure of that union, with breathtaking amounts of severance pay the consequence-it is, I think, worth noting what the role of this Court must be in evaluating decision-makers' performance with respect to decisions gone awry, spectacularly or otherwise. It is easy, of course, to fault a decision that ends in a failure, once hindsight makes the result of that decision plain to see. But the essence of business is risk-the application of informed belief to contingencies whose outcomes can sometimes be predicted, but never known. The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions on behalf of the shareholders, untainted by self-interest. Where they fail to do so, this Court stands ready to remedy breaches of fiduciary duty.  "Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary. The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court. Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of post hoc penalties from a reviewing court using perfect hindsight. Corporate decisions are made, risks are taken, the results become apparent, capital flows accordingly, and shareholder value is increased."  The full judgment is available at:  [http://courts.delaware.gov/opinions/(bhmrs4ng4gu4105535nfe455)/download.aspx?ID=64510](http://courts.delaware.gov/opinions/%28bhmrs4ng4gu4105535nfe455%29/download.aspx?ID=64510" \t "_new)  **1.3 FRC confirms that 'true and fair' remains a cornerstone of financial reporting in the UK**  On 9 August 2005, the UK Financial Reporting Council (FRC) published its analysis of the implications of the new accounting and auditing standards on the 'True and Fair View' and auditors' responsibilities.  Significant changes in financial reporting in the UK have taken place from 2005 as a result of the EU requirement for listed companies to adopt international accounting standards (IAS). Furthermore, the standards that auditors in the UK have to follow have also changed following the introduction in the UK of new standards based on International Standards on Auditing (ISAs). Those changes will potentially affect preparers, auditors and users of financial statements.  The move to IAS will result in changes in key measures such as profit and net assets, the format of financial statements, and the terminology used in the statements. One change in terminology that has received particular prominence is the replacement of "true and fair" by "fair presentation" as the over-arching test that financial statements should satisfy.  The FRC has concluded that, although the introduction of "presents fairly" into the accounting framework by the adoption of IAS and ISAs (UK and Ireland) will result in changes to the format and content of both company accounts and audit reports:   * the concept of the "true and fair view" remains a cornerstone of financial reporting and auditing in the UK; * there has been no substantive change in the objectives of an audit and the nature of auditors' responsibilities; and * the need for professional judgment remains central to the work of preparers of accounts and auditors in the UK.   The FRC is inviting views on both its analysis of the current framework for financial reporting and auditing in the UK and how they should evolve in the future. Views on the future development will be taken into account in the development of the FRC's Plan & Budget for 2006/07 which is expected to be published in January 2006.  A copy of the full report is available on the FRC website at:  [http://www.frc.org.uk/press/pub0854.html](http://www.frc.org.uk/press/pub0854.html" \t "_new)  **1.4 Inconsistent sustainability reporting fails Australian companies, investors and the public-report**  Sustainability reporting by Australian companies lacks consistency and fails to match the rigour of financial reporting. Consequently, investors are unable to compare 'apples with apples' in their investment decision making or in evaluating corporate reputation, according to 'Sustainability Reporting Practices, Performance and Potential', a research report released on 5 August 2005 by CPA Australia.  According to CPA Australia President Mark Coughlin, sustainability / triple bottom line (TBL) reporting aims to inform stakeholders about the economic, social and environmental aspects of the company. The research found shareholders; stakeholders and the investment community are deprived of reliable and comparable information on sustainability practices of Australian listed companies.  The research also finds that share markets are yet to value sustainability disclosures, which is in keeping with international trends that companies are not being rewarded for any concerted sustainability practices they undertake.  Other key findings of the research are:   * sustainability / TBL reporting is often an opportunity for companies to share with stakeholders information they already report under state or federal laws or industry codes; and * companies of a certain type - characterised by a healthy financial position and recognition that its corporate governance obligations extend to a wider set of corporate social responsibilities - tend to undertake sustainability / TBL reporting.   The research report is available from the CPA website at: [http://www.cpaaustralia.com.au/cps/rde/xchg/SID-3F57FEDF-DD281111/cpa/hs.xsl/14131\_15386\_ENA\_PRINT.htm](http://www.cpaaustralia.com.au/cps/rde/xchg/SID-3F57FEDF-DD281111/cpa/hs.xsl/14131_15386_ENA_PRINT.htm" \t "_new)  **1.5 Survey of NYSE listed-company CEOs**  Global markets offer plenty of opportunities for growth, but they also pose some risks, according to a new survey of more than 100 New York Stock Exchange (NYSE) listed-company CEOs published on 2 August 2005. The NYSE CEO Agenda 2006 is a new initiative designed to gain the views of CEOs of NYSE-listed companies on topics impacting and shaping the current and future business climate.  The survey results indicate that CEOs are generally optimistic in finding new markets and new products for growing their companies and serving customers. The United States is seen as the most promising market for growth, followed by Japan and Western Europe, while emerging markets present an opportunity rather than a threat. The study also finds that the CEO role is becoming more demanding, and that CEOs spend substantially more time on compliance. A majority of respondents said that corporate boards are more engaged and better informed. The more than 100 CEOs who participated in the study represent a cross-section of NYSE listed companies with a combined market value of nearly US$1 trillion.  **(a) Opportunities and risks**  A majority of NYSE CEOs said that management teams will have the greatest impact on company performance, followed by operational efficiency and new product development. They are concerned about regulation, energy, health care costs and the changing global economy. The greatest budget increases were expected to be in the areas of capital expenditures, energy costs and technology. More than half of the group (52%) expects M&A activity to increase, while the greatest revenue growth is seen coming from new products, new markets and acquisitions.  **(b) Globalization**  Emerging markets are viewed as an opportunity by a majority of NYSE CEOs (62%). When it comes to operating on the world stage, NYSE CEOs see plenty of opportunity for growth, even though a majority (55%) views the current global trade environment as unfavourable. More than half (53%) of the CEOs also said their companies have moved, are currently moving or plan to move some operations offshore. The key, CEOs insist, is determining which functions can be done from a distance, and which need to stay at home. Among those that have moved, 64% say the results were "very successful."  **(c) Governance and compliance**  Compliance and governance issues have become a major preoccupation with CEOs. Eighty percent say they spend more time on regulatory and compliance issues than five years ago. Almost 70% find compliance with section 404 of Sarbanes-Oxley the most demanding governance task, and while a majority of CEOs question the balance between the investment required and the resulting benefits, most CEOs agree that Sarbanes-Oxley and Exchange governance rules have contributed to board members being more informed (66%) and better engaged (72%).  More than one-third (37%) of respondents said it is easier to attract investors than it was five years ago. About another third (31%) said it is about the same. The level of understanding among global investors is greater today than ever, and shareholder benchmarks are not necessarily the same as five years ago. Investors today focus more on traditional performance measures such as free cash flow, operating income, share price and cash flow from operations.  **(d) Human capital**  NYSE CEOs value the quality of their workers, with 62% citing employees as one of the three most important sources of new business ideas. Approximately half of CEOs find it easier to attract new employees, and about one-third find it easier to retain them. Workplace diversity is an increasing driver in managing human capital, and 42% of CEOs say their companies have diversity hiring goals.  A copy of the NYSE CEO Agenda 2006 executive summary, research presentation and NYSE magazine special report is available on the NYSE website at: [http://www.nyse.com/ceoagenda](http://www.nyse.com/ceoagenda" \t "_new)  **1.6 Enhancing corporate governance for banking organisations**  On 29 July 2005, the Basel Committee on Banking Supervision issued for public comment revised guidance to help promote the adoption of sound corporate governance practices by banking organisations.  Entitled "Enhancing Corporate Governance for Banking Organisations", it builds on guidance published by the Committee in 1999. Since the publication of the original paper, which drew from the Organisation for Economic Co-operation and Development's (OECD) principles of corporate governance, issues related to corporate governance have continued to attract considerable national and international attention. In light of these issues - some of which have involved banks - as well as revised OECD principles published in 2004, the Committee is bringing its guidance up to date.  In particular, the paper highlights the importance of:   * effective management of conflicts of interest; * the role of internal and external auditors and other control functions; * the role of boards of directors (with greater emphasis on the role of independent directors) and senior management; * governing in a transparent manner; and * the role of supervisors in promoting sound corporate governance.   In addition, it presents some considerations for corporate governance related to the activities of banking organisations that are conducted through structures that may lack transparency, or in jurisdictions that pose impediments to information flows.  **1.7 US shareholder class action study**  On 18 July 2005, a study was published indicating that shareholder class action settlements in the US are at all-time highs. The study examines federal class action litigation filings, settlement values, and dispositions between January 1991 and 15 June 2005. According to the study, the latest growth is being fuelled by settlements in the WorldCom and Enron cases, which are setting new standards for shareholder compensation.  Topping $6.1 billion (all figures are in US$), the WorldCom shareholder class action settlement is close to double the previous record of $3.5 billion established five years ago in the Cendant Corp. settlement. In addition, the settlement expected at the conclusion of Enron's shareholder class action may be even larger, with preliminary settlement agreements already approaching $5 billion.  The study's key findings include:   * Large settlements are likely to continue as lawsuits filed during the bear market of 2000-2002 progress toward settlement. * Investor losses continue to be the single most powerful, publicly available determinant of settlements. * A sharp decline in settlements of under $3 million is also fuelling new highs in median settlements. In the first six months of 2005 alone, the median settlement value of securities class action cases jumped nearly 30% to $6.8 million. * Bigger settlements are yielding lower percentage fees for plaintiffs' counsel, though total plaintiffs' attorneys' fees continue to rise. The average settlement in 2005 will yield over $6 million in fees to plaintiffs' counsel, compared to $3.6 million five years ago. * Federal class action filings are down by 17 percent for the first half of 2005, though the slowdown may be temporary. * In the first six months of 2005, the mean settlement value for securities class action reached $25.8 million, exceeding the prior high of $23.5 million in 2002; these statistics exclude the WorldCom, Enron, and Cendant settlements.   The authors note that the settlement of the WorldCom and Enron shareholder class actions will bring to an end two of the cases that epitomized the alleged mega frauds that occurred during the stock market bubble and were revealed by its bursting. But these cases are part of a broader process in which shareholder class action cases with class periods ending during the bear market of 2000-2002 are reaching settlement.  The study is available on the NERA website at: [http://www.nera.com/publication.asp?p\_ID=2544](http://www.nera.com/publication.asp?p_ID=2544" \t "_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC consults on proposed relief and guidance for online calculators**  On 23 August 2005, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting comment on proposed relief and guidance for providers of online calculators.  The consultation paper has been issued as part of one of ASIC's projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation (2 May 2005). ASIC is working on eight refinements projects as set out in ASIC Information Release [IR 05-22]: ASIC provides details on financial services refinement projects (12 May 2005).  The consultation paper is the second step in implementing Refinement Proposal 10.3, which notes that ASIC will provide guidance and/or relief on the provision of basic online calculators to promote their use. ASIC has already provided relief and guidance for providers of online superannuation calculators (ASIC Information Release IR 05-32 ASIC provides relief and guidance for providers of superannuation calculators (22 June 2005)). The consultation paper also considers proposals for relief and guidance for other types of online calculators.  After considering comments on the paper, ASIC plans to issue its final relief and guidance by the end of November 2005.  The ASIC consultation paper asks for feedback on proposals to:   * provide relief from licensing and related provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) for providers of generic calculators (i.e. mathematical tools that do not relate to specific financial products); * provide relief from the Statement of Advice provisions and guidance on the suitability of advice provisions under Part 7.7 of the Act for providers of product-specific calculators (i.e. mathematical tools that relate to specific financial products); and * provide guidance on when the licensing provisions of the Act apply for risk profilers (i.e. tools that assess a consumer's tolerance to risk).   A copy of the consultation paper is available from the ASIC [website](http://www.asic.gov.au" \t "_new) or by calling the ASIC Infoline on 1300 300 630.  **2.2 ASIC provides guidance about giving general financial product advice**  On 5 August 2005, the Australian Securities and Investments Commission (ASIC) issued guidance to help advisers comply with some of the financial product advice provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The guidance is provided in answers to two frequently asked questions (FAQs), and:   * deals with compliance with general advice warning (GAW) requirements; and * provides further explanation about when advice is general, rather than personal.   The guidance has been provided as part of two of ASIC's projects implementing the Government's proposals paper Refinements to Financial Services regulation (2 May 2005). ASIC is working on eight refinement projects as set out in ASIC Information Release IR 05-22: ASIC provides details on financial services refinement projects.  The FAQs are available on the ASIC [website](http://www.asic.gov.au/fsrfaq" \t "_new). Copies can also be obtained by calling the ASIC Infoline on 1300 300 630.  **2.3 ASIC consults on authorisation requirements for general insurance arrangers**  On 4 August 2005, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting comment on proposed relief from the authorisation requirements for certain distributors of general insurance products.  The consultation paper has been issued as part of one of ASIC's projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation dated 2 May 2005. ASIC is working on eight refinement projects as set out in ASIC's Information Release IR 05-22: ASIC provides details on financial services refinement projects release on 12 May 2005.  The consultation paper is the first step in implementing Refinement Proposal 12.2. After considering comments on the paper, ASIC plans to issue its final policy by the end of October 2005.  ASIC's proposed relief would allow distributors to provide certain dealing services in relation to general insurance products without the need to be licensed or appointed as an authorised representative of an Australian Financial Services (AFS) licensee. The proposed relief would apply where, among other things:   * the distributor arranges for the issue of certain general insurance products of an Australian general insurer (the insurer); and * the insurer accepts responsibility for the conduct of the distributor.   A copy of the consultation paper is available on the ASIC [website](http://www.asic.gov.au" \t "_new).  **2.4 Super switching surveillance and shadow shopping**  On 2 August 2005, the Australian Securities and Investments Commission (ASIC) released the findings of a review of advice given in late 2004 and 2005 by financial advisers to more than 260 people thinking of switching superannuation funds.  The super switching surveillance sought to test the readiness of advisers to give complying super switching advice ahead of the implementation of super choice on 1 July 2005.  ASIC has used the findings to highlight to industry groups potential problem areas and to prepare the ASIC Guide Super Switching Advice: Questions and Answers, which was released in June.  The review looked at recommendations to switch superannuation funds from a diverse range of advisers, including advice to move into self managed superannuation funds.  In particular, it focused on the two main switching advice obligations relating to:   * conduct: an adviser who gives a switching recommendation must have a reasonable basis for their advice * disclosure: an adviser must disclose the costs of the switch, any loss of benefits and other significant consequences of making a switch.   ASIC found that much of the advice reviewed disclosed little or no consideration of the client's current fund.  ASIC also found that there was a strong tendency to recommend a client switch to a superannuation fund related to the licensee. This creates the potential for conflicts of interest that need to be carefully managed to avoid the risk of inappropriate advice.  A copy of ASIC's super switching surveillance report is available from the ASIC [website](http://www.asic.gov.au" \t "_new).  **2.5 ASIC issues first infringement notice for continuous disclosure breach**  On 1 August 2005, the Australian Securities and Investments Commission (ASIC), announced that Solbec Pharmaceuticals Limited (Solbec) had paid a penalty of $33,000 following a finding by ASIC that Solbec had infringed an obligation to disclose information to the Australian Stock Exchange Limited (ASX) under the continuous disclosure provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  Solbec, a listed pharmaceuticals company based in Perth, paid the penalty to comply with an infringement notice issued by ASIC on 14 June 2005 (the notice).  The finding by ASIC and the payment of the penalty by Solbec is the first use of the new provisions in the Act designed to deal with less serious infringements of the continuous disclosure obligations.  ASIC issued the notice because it believed that Solbec breached section 674(2) of the Act on 23 November 2004 in failing to notify the ASX about the structure, size and limited nature of the results of an animal study relating to its cancer drug, Coramsine.  In the announcement, Solbec told the ASX, among other things, that Coramsine brought about total remission of malignant mesothelioma in mice when combined with immunotherapy. Following that announcement, the share price of Solbec increased by some 92 per cent. Solbec later told the ASX that the study had tested Coramsine on five mice of which only two had gone into remission of malignant mesothelioma.  Solbec elected to comply with the notice. As provided under section 1317DAJ(3)(b) of the Act, compliance with the notice is not an admission of guilt or liability, and Solbec is not regarded as having contravened section 674(2) of the Act.  Further information about ASIC's administration of infringement notices is available from the ASIC website at: [http://www.asic.gov.au/clerp9](http://www.asic.gov.au/clerp9" \t "_new) and look under 'Continuous disclosure'.  **2.6 ASIC releases draft guide on using pro forma financial information**  On 29 July 2005, the Australian Securities and Investments Commission (ASIC) released a draft guide on use of pro forma financial information. The draft guide sets out proposed guidance on the use of pro forma financial information in financial reports, disclosure documents and announcements.  **(a) Proposed guidance**  ASIC has concerns with practices used by some listed entities of releasing financial reports containing alternative financial statements that are not in accordance with accounting standards. ASIC has found that some listed entities issued announcements and disclosure documents that gave prominence to profit figures that do not comply with accounting standards. This disclosed information often gives a materially better impression of the entity's financial performance than information in accordance with accounting standards.  An entity's financial report must include its single entity and consolidated financial statements prepared in accordance with the accounting standards. The [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (the Act) does not permit inclusion of any other financial statements, pro forma or otherwise.  The guide proposes that certain other pro forma financial information may only be included as additional information by way of note to the financial statements if it is necessary to give a true and fair view of the entity's financial position and performance.  The guide also proposes that pro forma information in disclosure documents and announcements should be accompanied by the corresponding information in accordance with accounting standards. The nature and amount of any differences between the figures should be explained.  Pro forma information should not be given greater prominence than information in accordance with accounting standards.  **(b) New class orders**  The Act requires an entity to only include the financial statements specifically required by accounting standards in its financial reports. Other financial statements can only be presented where ASIC provides relief.  ASIC has also released the following new class orders:   * Class Order [CO 05/0642] Combining financial reports of stapled security issuers to allow issuers of stapled securities to include their financial statements and the consolidated or combined financial statements of the stapled group in adjacent columns in one financial report; * Class Order [CO 05/0643] Combining registered scheme financial reports to allow related registered schemes with a common responsible entity to include their financial statements in adjacent columns in a single financial report where there is a facility for investors to switch monies between the related schemes; and * Class Order [CO 05/0644] Disclosing post balance date acquisitions and disposals to allow the presentation of a pro forma statement of financial position in the notes to the financial statements to explain the financial effect of material acquisitions and disposals of entities and businesses after balance date. * Class Orders [CO 01/1455] Continuously quoted securities and Class Order [CO 04/0672] Extension of on-sales exemptions have been amended by Class Order [CO 05/0641] Miscellaneous amendments to financial reporting class orders so that disclosing entities that take advantage of the abovementioned class orders are not prevented from using transaction-specific prospectuses or from taking advantage of the on-selling exemption from issuing a prospectus or product disclosure statement.   These class orders commence on the date they are registered under the [Legislative Instruments Act 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74901" \t "Default), which is expected to occur within the next few days.  Copies of the draft guide and the class orders are available from ASIC's [website](http://www.asic.gov.au/" \t "_new) or from ASIC's Infoline by calling 1300 300 630. The draft guide is open for comment until 30 September 2005.  **2.7 Changes to ASIC class orders, practice notes and guidelines relating to new financial reporting requirements**  On 27 July 2005, the Australian Securities and Investments Commission (ASIC) announced some changes to ASIC class order relief, practice notes and guidelines relating to the introduction of new accounting standards and other new financial reporting requirements.  For financial periods commencing on or after 1 January 2005, financial reports prepared in accordance with Chapter 2M of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) must be prepared in accordance with the Australian equivalents of International Financial Reporting Standards (AIFRS). The CLERP 9 legislation also introduced some changes to the requirements for directors' reports that accompany financial reports for years commencing on or after 1 July 2004.  **(a) Non-reporting entities**  ASIC has issued a new guide-Reporting requirements for non-reporting entities, for application for years commencing on or after 1 January 2005.  The guide replaces Information Release [IR 00-25] Reporting requirements for non-reporting entities issued on 20 July 2000.  The guide outlines the requirement for non-reporting entities to comply with the recognition and measurement requirements of all AIFRS.  The guide does not contain the [IR 00-025] concession from equity accounting for certain wholly-owned entities, as this concession is contained in one of the new accounting standards.  Additionally, the guide does not discuss the reporting requirements for Australian Financial Services licensees. These will be included in revised versions of ASIC Form 70 Australian Financial Services Licensee: Profit and loss statement and balance sheet and Form 71 Australian Financial Services Licensee: Audit report, which accompany financial reports lodged by licensees under Chapter 7 of the Act.  **(b) Relief for non-reporting entities**  Accounting standard AASB 1 First-time Adoption of Australian Equivalents to International Financial Reporting Standards provides some concessions on the adoption of AIFRS from reworking information to comply with the new recognition and measurement requirements of those standards.  These concessions would appear to be available only to entities that apply all of the requirements of the new standards, including all disclosure requirements. As non-reporting entities may not be required to comply with all disclosure requirements, the concessions may not be available to them.  ASIC Class Order [CO 05/639] Application of accounting standards by non-reporting entities addresses any anomaly by ensuring that the AASB 1 concessions available to reporting entities are also available to non-reporting entities. The class order will ensure that other exceptions available to reporting entities under accounting standards now or in future are also available to non-reporting entities.  **(c) Transfer of information from the directors' report**  ASIC Class Order [CO 98/2395] Transfer of information from the directors' report gives companies the flexibility to transfer certain information from the directors' report to a document attached to the directors' report where that will facilitate improved reporting of information to users of an annual report.  [CO 98/2395] has been varied by Class Order [CO 05/641] Miscellaneous amendments to financial reporting class orders to address new items required to be included in directors' reports for financial years commencing on or after 1 July 2004.  The following documents will be able to be transferred to a document that is attached to the directors' report, other than the financial report:  (a) the auditor's independence declaration; (b) any statements concerning information included in the financial report to give a true and fair view; and (c) the management discussion and analysis for listed companies (also known as 'financial and operating review').  Conditions of relief include a requirement that these items be provided with any full or concise financial reports sent to members and lodged with ASIC.  Information concerning non-audit services provided by an auditor can only be transferred from the directors' report into the financial report in accordance with s300(2) and (2A) of the Act.  **(d) Transfer of remuneration information**  [CO 98/2395] had permitted listed companies to transfer the director and executive remuneration disclosures required by s.300A of the Act from the directors' report to an attached document. The s.300A disclosures could then be included in the note to the financial statements containing remuneration disclosures required by accounting standard AASB 1046 Director and Executive Disclosures by Disclosing Entities.  [Corporations Amendment Regulations 2005 (No.4)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86236" \t "Default) (registered on 8 July 2005) allows listed companies to transfer the remuneration disclosures required by AASB 1046 from the notes to the financial statements. The AASB 1046 disclosures must then be included in the directors' report under the heading 'Remuneration report' with the s.300A disclosures. The 'Remuneration report' is the subject of a non-binding member vote under s.250SA of the Act.  In view of the new regulation, it is no longer necessary or appropriate for listed companies to transfer the s.300A disclosures from the directors' report. [CO 98/2395] has been varied by [CO 05/641] to remove this option.  **(e) Authorised trustee corporations**  ASIC Class Order [98/105] Authorised trustee corporations - trust liabilities provides authorised trustee corporations and their wholly owned subsidiaries with relief from the requirement to make note disclosure of trust liabilities and the right of indemnity from trust assets in their financial reports.  After seeking and considering public submissions, ASIC decided that it is not appropriate to provide similar relief under AIFRS. Consideration was given to factors such as changes in the relevant accounting standards over time, changes in the operations of authorised trustee corporations, and the objectives of convergence with the international standards.  **(f) ADIs and director and executive related transactions and balances**  ASIC Class Order [CO 98/110] ADIs related party balances and transactions relieves Authorised Deposit-taking Institutions or ADIs (banks, building societies, credit unions), their parent entities and their controlled entities from disclosing arms length balances and transactions between an ADI and the related entities and persons of directors and executives.  [CO 98/110] is replaced by Class Order [CO 05/640] ADIs – related party transactions and balances for years commencing on or after 1 January 2005. Consistent with international standards [CO 05/640] will not provide relief from disclosing balances and transactions between an entity and close family members of directors and executives who are key management personnel. Relief will still be available in relation to arms length transactions and balances involving more distant relatives.  AIFRS requires non-disclosing entities to disclose information relating to transactions and balances involving executives who are key management personnel or their close family members for the first time. [CO 05/640] does not provide relief from these new requirements.  ADIs, their directors and executives, should have less difficulty in obtaining information relating to close family members than more distant family members.  **(g) Rounding of amounts**  ASIC Class Order [CO 98/100] Rounding in financial reports and directors' reports has been varied by Class Order [CO 05/641] Miscellaneous amendments to financial reporting class orders to refer to certain disclosures required by the new accounting standards and directors' report requirements. The level of rounding permitted by [CO 98/100] for an entity of particular sizes and for particular types of financial information has not changed.  **(h) Comparative information**  ASIC Class Order [CO 98/1416] Comparative information relieves entities that do not prepare a financial report for the immediately preceding half-year or full year from including comparative information in their financial reports.  [CO 98/1416] addressed unintended consequences in some of the current accounting standards that require comparative information where an entity did not report in the immediately preceding half-year or year but did report in some earlier period. The relief is consistent with the general approach in the current accounting standards.  [CO 98/1416] will cease to apply for financial years commencing on or after 1 January 2005. Unlike the current standards, AIFRS requires entities that did not report in the immediately prior period to provide comparative information.  **(i) Half-year balance sheet format for certain financial institutions**  ASIC Class Order [CO 98/111] Half-year balance sheet format of certain financial institutions has been revoked as the relief it provided is now available in both current accounting standards and under AIFRS.  **(j) Withdrawal of practice notes and guidelines**  ASIC has withdrawn the following practice notes for years commencing on or after 1 January 2005 as they cease to be relevant under the new standards:  (a) Practice Note 36 Future Income tax benefits [PN 36], which provides guidance on applying the tests in current accounting standards for the recognition of future income tax benefits as AIFRS provides a different test for the recognition of deferred tax assets; and (b) Practice Note 39 Accounting for Goodwill [PN 39], which provides guidance on the amortisation of goodwill and on reviewing the unamortised balance of goodwill for impairment as under AIFRS goodwill is no longer amortised and there are new requirements for assessing the impairment of goodwill.  On 28 June 2004 ASIC issued Guidelines to valuing options in annual directors' reports as an attachment to Media Release 04-206 Valuing options for directors and executives. The guidelines provide that listed companies should include amounts in respect of the value options in director and executive emoluments under s300A of the Act using the provisions of accounting standard AASB 1046 Director and Executive Disclosures by Disclosing Entities.  The guidelines are withdrawn for years commencing 1 July 2004 as the legislation itself now applies the relevant requirements of AASB 1046.  Practice Note 68 New financial reporting and procedural requirements [PN 68] will also be amended to remove all references to s.300A of the Act. Section 300A has been replaced for years commencing on or after 1 July 2004 and the guidance in PN 68 is no longer relevant.  Copies of the new guide and the new class orders are available from ASIC's [website](http://www.asic.gov.au" \t "_new) or from ASIC's Infoline by calling 1300 300 630. |
| **3. Recent ASX Developments** |
| **3.1 ASX and Perpetual Agree to sell ASX Perpetual Registrars to Pacific Equity Partners**  Australian Stock Exchange (ASX) and its joint venture partner in ASX Perpetual Registrars Limited (APRL), Perpetual Trustees Australia Limited (Perpetual) have agreed to sell 100 per cent of APRL to Pacific Equity Partners (PEP) for $132 million. The agreement is subject to PEP securing bank finance, approval for which is well advanced. Settlement is expected by the end of August 2005.  ASX's accounting profit after tax for its 50 per cent interest is likely to be $9 million.  ASX Managing Director and CEO Tony D'Aloisio said that the agreement brought to a close an important phase in the development of the registry business.  ASX advised the market on 27 July 2005 that it was not intending to return capital in the 2005-2006 financial years beyond normal dividends. That policy will be reviewed in light of this sale and a market update will be provided at the next half-year results. |
| **4. Recent Corporate Law Decisions** |
| **4.1 Reasonable grounds for suspicion of insolvency-voidable insolvent transaction**  (By Sharon Burnett, Clayton Utz)  Spectrum Joinery Pty Limited (In Liquidation) v Turners Building Supplies Pty Limited [2005] ACTSC 70, Supreme Court of ACT, Gray J, 5 August 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/act/2005/august/2005actsc70.htm](http://cclsr.law.unimelb.edu.au/judgments/states/act/2005/august/2005actsc70.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The plaintiff, Spectrum Joinery Pty Limited (In liquidation) (Spectrum) applied under section 588FF of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for an order that the defendant, Turners Building Supplies Pty Limited (Turners), pay to Spectrum moneys paid by Spectrum during the relation back period before Spectrum went into liquidation. Spectrum asserted that those transactions were voidable as insolvent transactions of Spectrum.  The issue for the Court was whether Turners could rely on the defence provided by section 588FG (2) of the Act (namely, whether Turner became a party in good faith to the four transactions and there were no reasonable grounds, nor would a reasonable person have such grounds, for suspecting that Spectrum was insolvent or would become insolvent as a result of the transactions).  The Court held that, with the exception of one payment, Turners had established that defence.  **(b) Facts**  It was common ground between the parties that Spectrum was insolvent as at 1 July 2000 and continued to be insolvent up to and including 19 September 2001, the date the company was placed into voluntary administration. In this case the relation back date referred to in section 588FE of the Corporations Act was 19 February 2001, the day on which the administration of the company began.  The transactions said to be voidable transactions were payments made by Spectrum to Turners on 18 November 2000, 18 December 2000 and 22 January 2001 all being payments within the relation back period.  Turners had been a significant supplier of Spectrum's building needs for over 20 years. Over the period of time the parties traded, the credit for such supplies, according to the invoices, was in terms of payment within 30 days. However, the practice was for a significantly longer time than 30 days to be taken to pay the accounts. Schedules of payments for two consecutive periods of invoices, rendered July 1995 to May 1999 and June 1999 to July 2000, indicated that Turners' invoices were always paid on a significantly delayed basis with the norm being, for the initial period, 150-190 days from the rendering of the invoice and thereafter, from April 1997 between 50 to 90 days.  In respect of invoices for November, December 1996 and January, February 1997, a further arrangement for deferred payment was made. At that time, future invoices were to be subject to payment within 60-90 days and payment was also to be made of four invoices which were said to be frozen. Those frozen invoices were paid in full by November 1997.  In 1999/2000 Spectrum's business expanded and the monthly invoices increased, as did the time taken to pay them. In January 2000, Turners contacted Spectrum and requested that further payments be made in reduction of the running account. Turners was informed that Spectrum was awaiting progress payment from Sydney before the account could be settled.  In July 2000 discussions took place concerning the implementation of a cash on delivery regime. However, up to the end of September 2000, Spectrum continued to order goods on a credit basis. Payment for goods supplied on a cash on delivery basis commenced in October 2000 and on 18 November 2000 Turners received $29,806.36 from Spectrum. On 18 December 2000 Spectrum paid $21,408.77 to Turners and on 22 January 2001 a further $10,500.00 was received. No further payments were received before the company was placed into voluntary administration.  **(c) Decision**  The Court refused to grant the order in respect of all but the last payment.  **(i) Good faith requirement in section 588FG(2)**  A person acts in good faith when he or she acts with propriety or honesty. His Honour stated that he had no occasion to doubt the evidence of Turners' witness, Mr Willis, a director of Turners. Having regard to the past history of transactions between the parties, his Honour found that there were no reasonable grounds for Mr Willis to suspect that Turners would be preferred to the other creditors as a consequence of Spectrum paying the outstanding amounts owed to his company. His Honour noted that the evidence given by Spectrum's director, Mr McNamara, confirmed that he never said anything to Mr Willis to indicate that Spectrum was in financial difficulty. Rather, the explanation given for the delayed payments was that Spectrum adopted a mode of trading with Turners designed to ensure that it did not face liquidity problems brought about by waiting for accounts to be paid in respect of its ongoing projects.  **(ii) No reason to suspect insolvency requirement**  His Honour noted that the background to the transactions had implications for his assessment as to whether Turners had shown that it had no reasonable grounds for suspecting Spectrum to be insolvent at the relevant time, and as to whether a reasonable person in Turners' circumstances would have had no such grounds for so suspecting.  Referring to the decision of Stanton J in Sutherland v Eurolinx (2001) 37 ACSR 477, his Honour stated that the approach taken by Stanton J emphasised a necessity to look at the transaction as a whole in its commercial context. The fact that in this case the invoices contained stipulations of all terms being strictly 30 days net, clearly did not accord with the practice adopted by both the creditor and the debtor. The commercial reality was the acceptance by the creditor and debtor that payment of the invoices was not expected in terms of the stipulation of the invoice, but rather when the debtor received payment for the work done to which the supply of goods related.  The Court found, having regard to the pattern of trade between the parties, that the schedule of payments supported Turners' view that the pattern of payment had been broadly consistent and there was no cause to suspect insolvency.  The Court did not consider that the change in terms to cash on delivery, which commenced in September 2000, was anything more than a fact to be considered. The Court accepted the evidence of Mr Willis that at this time his concern was about his own cash flow, having regard to the impact of the goods and services tax and his generally low profit margin based on higher turnover. On the evidence before him, his Honour accepted that the arrangement which had existed, at least as far back as July 1995, demonstrated the practice of not insisting to adherence to the terms of the invoices. Gray J did not consider that this was an indulgence that was sought, but rather, an ongoing adjustment of terms of trading brought about by, and in recognition of, the increased business that Spectrum had undertaken over time. He considered that a reasonable person in Turners' circumstances would have viewed the matter in this way.  However, in relation to the last payment on 22 January 2001, his Honour noted that it could be fairly said that a reasonable person in Turners' circumstances would have grounds for suspecting insolvency. The payment on 22 January 2001 still did not satisfy the amount rendered under the July 2000 invoice, such that the hypothetical reasonable person would have cause to question the assumption upon which supplies were being made on cash on delivery basis. Further, a payment had been received the previous month of only about half the amount due for the July 2000 invoice and the sum now being paid did not satisfy an invoice that had, by now, been outstanding for well over 90 days. In those circumstances, there would be a suspicion that the low incidents of cash on delivery of supplies might be referrable to difficulty in paying past accounts.  **4.2 Officer's indemnity given by a corporation in settlement of a bona fide dispute not void**  (By Heidi Asten, Freehills)  Eastland Technology Australia Pty Ltd v Whisson [2005] WASC 144, Supreme Court of Western Australia, Court of Appeal, Malcolm CJ, Steytler P and McLure JA, 4 August 2005  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/august/2005wasca144.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/august/2005wasca144.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The case concerned a dispute over ownership of intellectual property in a number of patented inventions, where one of the inventors was a director of the appellant corporation. The corporation sought to have set aside a deed of settlement relating to an earlier dispute over the intellectual property, based on section 241 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and other arguments relating to breach of fiduciary and director’s duties. McLure JA gave the decision of the Court dismissing all aspects of the appeal, Malcolm CJ and Steytler P agreeing.  **(b) Facts**  Eastland Technology Australia Pty Ltd (Eastland) was incorporated in 1993 by a syndicate of people, including Dr Whisson, who licensed to Eastland a number of parenteral devices which he had invented and patented. Dr Whisson was appointed to Eastland's Board from 1993-1999.  In 1998, Dr Whisson and Mr Prestidge developed and jointly applied to patent 'Di-Med', a significantly different parenteral device, and in 1999 jointly entered a licence agreement with Eastland for its exploitation. Eastland later commenced an action against Dr Whisson, Mr Prestidge and the latter’s family company seeking declarations that intellectual property in Di-Med was the property of Eastland based on alleged breaches of fiduciary duty and confidence by Dr Whisson and breaches of confidence by Mr Presidge.  The claim was formally settled by a Deed of Settlement (Deed), under which the parties agreed that Eastland owned the intellectual property in the earlier patents, while Dr Whisson and Mr Prestige owned the intellectual property in the Di-Med patents. The Deed included a provision of mutual release in relation to the subject matter of the action and provided that the Deed could be pleaded as a bar to any subsequent action related to that subject matter. Later that year, Eastland commenced an action to have the Deed set aside and to pursue its initial claims.  **(c) Decision**  The Court's decision turned on the issue of whether the release and bar provision of the Deed was void because of section 241 of the Corporations Act. That section provides that a corporation may not indemnify an officer or a former officer against a liability incurred as such an officer, or exempt such a person from such a liability. An instrument or agreement is void in so far as it provides for a corporation to do such a thing.  The issue for the Court was whether a release for valuable consideration in the compromise of a disputed claim is outside the scope of section 241. The Court found that the section was not intended to apply to a release that forms part of the consideration given by a company in a bona fide settlement of a disputed claim relating to the subject matter of the liability, particularly where the release forms only part of the consideration given under the settlement agreement. In those circumstances, the agreement does not provide for an exemption from liability 'but rather a release from a bona fide disputed claim of liability'. The Court further considered the background of section 241 and the reasoning of the trial judge in deciding that section 241 is directed only at blanket exemptions from liabilities such as those found in corporate constitutions, but found it unnecessary to decide that question.  **4.3 Application to wind up managed investment scheme**  (By Chris Skordas, Phillips Fox)  Stacks Managed Investments Ltd [2005] NSWSC 753], New South Wales Supreme Court, White J, 29 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc753.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc753.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  An application was brought by Stacks Managed Investments Ltd ('the applicant') as responsible entity of the Premium Mortgage Income Fund ('the scheme'), seeking an order under section 601ND of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Corporations Act') to wind up the scheme and further orders under section 601NF to facilitate the winding up. The orders sought included the appointment of liquidators to take responsibility for the winding up, and the conferral of powers upon those liquidators similar to those of a company liquidator provided for in Chapter 5 of the Corporations Act. The primary reason for seeking the orders was the apparent difficulty the applicant was experiencing in obtaining documents from the previous responsible entity of the scheme.  His Honour Justice White rejected the application and held that the relevant sections of the Corporations Act do not allow the Courts to grant upon persons winding up registered schemes the same powers as applicable to company liquidators. Further, his Honour concluded that the applicant had the means of resolving the issues allegedly preventing it from winding up the scheme, including bringing proceedings against the previous responsible entity to compel the production of records.  **(b) Facts**  The scheme was established by way of deed on 24 July 2000 by Cromwell Property Securities Ltd ('Cromwell'), and registered with the Australian Securities and Investments Commission on 9 August 2000. The scheme was established to invite persons to invest in mortgage lending arrangements in accordance with a prospectus registered by the scheme. Cromwell, as the responsible entity of the scheme, held the assets on trust for the members, subject to the scheme's constitution and the Corporations Act. The constitution made provision for the winding up of the scheme which reflected the provisions in Part 5C.9 of the Corporations Act.  Cromwell was the responsible entity until 21 September 2001, on which date Mercator Funds Management Ltd ('Mercator') took over. On 8 September 2004 the members of the scheme passed an extraordinary resolution that Mercator be removed as the responsible entity and that the applicant be appointed to that role. The resolution further directed the applicant to wind up the scheme.  The applicant complained that Mercator had only partially complied with its requests for the production of documents, which the applicant contended were required in order to determine the member's entitlements to the assets of the scheme. Those documents included invoice and purchase orders, bank statements for numerous bank accounts, tax returns, loan agreements, documentation relating to remuneration paid to Mercator, and correspondence with auditors and legal advisers in relation to legal matters raised by the scheme or against it.  The applicant also identified various other difficulties in calculating members' entitlements under the scheme, including:   * the possible mixing of assets between classes of assets in the scheme, a situation not contemplated by the scheme's constitution; and * issues surrounding debts incurred by Mercator at the time it was acting as the responsible entity, and whether Mercator was discharged from its liability to the creditors in relation to those debts. The applicant contended that it could not determine whether the debts had been properly incurred without investigating more fully the actions of Mercator, including obtaining copies of records still held by Mercator.   To facilitate resolution of these issues, the applicant sought orders from the Court:   * to wind up the scheme; * to remove the applicant as the responsible entity of the scheme; * to appoint registered liquidators to take responsibility for ensuring the scheme is wound up; and * to confer upon those liquidators powers to require the production of documents and conduct examinations in the same way that liquidators of companies have those powers.   **(c) Decision**  His Honour noted that:   * the scheme's constitution made adequate provision for its winding up, as required by section 601GA(1)(d) of the Corporations Act; and * the members of the scheme had resolved to wind up the scheme by way of extraordinary resolution, in accordance with section 601NB of the Corporations Act.   The applicant brought the application under section 601ND, allowing for the winding up of a registered scheme by the Court, and section 601NF, which grants the Court powers to make any other orders it thinks necessary to ensure the scheme is wound up correctly.  His Honour commented that, in relation to orders for the winding up of unregistered as opposed to registered schemes, Courts have appointed receivers and liquidators and have conferred on those persons powers similar to those conferred on liquidators of companies by chapter 5 of the Corporations Act. Those powers include the right to obtain a summons for examination of persons who are officers of a corporation and for other persons not being officers but have nonetheless been involved with the relevant corporation.  However, according to his Honour, the basis for conferring such powers on liquidators of unregistered schemes has not been clearly explained by the Courts. In particular, his Honour observed that an uncertainty exists as to whether, as well as deeming a scheme to be a company, a person who managed the scheme is deemed to be an officer of the deemed company and thus subject to the provisions of the Corporations Act to which he or she was not otherwise subject.  However, given that the case before the Court was in relation to a registered scheme, his Honour did not express a conclusion on the scope of the Court's powers to make orders for the winding up of unregistered schemes.  His Honour commented that the winding up process in relation to a registered scheme differs from that of an unregistered scheme, as a registered scheme is wound up in accordance with its constitution. Further, his Honour noted that none of the provisions of the Corporations Act applicable to a company liquidator are expressly applicable to persons winding up registered schemes. According to his Honour, Parliament had deliberately decided not to apply the regime for winding up of companies to the winding up of registered schemes, by choosing not to implement the proposals contained in a joint report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee to make many of the powers available to company liquidators also available to scheme liquidators.  In relation to the application for an order to wind up the scheme under section 601ND, his Honour held that such an order was unnecessary as the members had already resolved that the applicant should wind up the scheme.  White J also rejected the application in relation to the second and third orders sought, being the removal of the applicant as the responsible entity and the appointment of registered liquidators. The resolution of the members of the scheme clearly required the applicant to wind up the scheme, and allowed the applicant to engage the liquidators as agents to assist in the liquidation. However, as there was no suggestion that the applicant was failing in its duty to wind up the scheme, his Honour refused to interfere with the resolution of the members.  Further, in his Honour's view, section 601NF does not authorise the Court to confer additional powers upon a responsible entity in winding up a registered scheme, particularly where the conferral of such powers would affect the substantive rights of third parties (i.e. prior responsible entities of the scheme and other parties, such as auditors and legal advisers engaged by those prior responsible entities).  Finally, his Honour held that the orders sought were not required for the applicant to resolve the outstanding issues and wind up the scheme. The applicant could bring proceedings against Mercator to compel the production of records which Mercator was required to deliver under the Corporations Act and pursuant to its fiduciary obligations to members of the scheme.  **4.4 D&O insurance and government inquiries**  (By Stephen Magee)  Intergraph Best (Vic) Pty Ltd v QBE Insurance Ltd [2005] VSCA 180, Supreme Court of Victoria, Court of Appeal, Charles and Buchanan, JJA and Osborn, AJA, 29 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/july/2005vsca180.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/july/2005vsca180.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  A D&O policy did not cover the costs of directors' and officers' legal representation at a Royal Commission where those costs were incurred by the company rather than the directors and officers.  **(b) Facts**  Intergraph Best was responsible for the operation of the telephone call system for the Metropolitan Ambulance Service in Victoria. The Governor of the State of Victoria established a Royal Commission to inquire into and report on certain matters relating to the Metropolitan Ambulance Service.  During the course of the conduct of the Royal Commission a number of directors and officers of Intergraph were legally compelled to attend the Royal Commission and give evidence.  At the Royal Commission, the directors and officers were represented by lawyers paid for by Intergraph.  Intergraph had a Directors and Officers Liability insurance policy with QBE. It claimed the costs of legal representation from QBE under that policy. Intergraph was seeking direct recovery for its own legal costs, without indemnity having been given to its directors and officers.  The two primary sources of QBE's obligations under the policy were in cl 1.1 and 1.2:   * a liability to pay directors and officers for losses for which they were not indemnified by Intergraph; and * a liability to pay, on behalf of Intergraph, all losses for which the company had indemnified its directors and officers in each case, arising from any claim made against the director or officer.   The policy had a number of extension clauses. These were subject to two qualifications:  "(a) each Extension is subject to the Schedule, Insuring Clauses, Conditions, Definitions, Exclusions, Deductibles and other terms of this Policy (unless otherwise stated herein); (b) the inclusion of an Extension shall not increase the Limit of Indemnity."  One extension was cl 2.3 of the policy:  "QBE agrees to pay Defence Costs arising out of any legally compellable attendance by an Insured Person at any official investigation, examination or inquiry in relation to the affairs of the Corporation where such investigation, examination or inquiry may lead to a recommendation in respect of civil or criminal liability or civil or criminal proceedings and which would be the subject of a Claim under this Policy.  For the purpose of this Extension, an official investigation, examination or inquiry includes an investigation, examination or inquiry by way of Royal Commission or conducted by a regulatory authority such as the Australian Securities Commission but does not include any investigation, examination or inquiry conducted by a parliament or any committee of a parliament."  QBE denied liability for Intergraph's costs. As a preliminary question, the judge at first instance ruled that cl 2.3 provided indemnity to Intergraph where its officers were compelled to attend the Royal Commission but did not incur defence costs. QBE appealed.  **(c) Decision**  The Court of Appeal upheld QBE's appeal.  In the view of the Court of Appeal the object of cl 2.3 was to extend the cover provided by the two primary insuring clauses to circumstances anterior to a claim against a director and officer by covering preliminary official inquiries. Cover was thus provided in circumstances and at a time at which there was no claim and might never be a claim.  However, cl 2.3 did not transform the policy into one which offered an entirely new category of cover, namely cover to Intergraph with respect to loss which did not arise out of a legal obligation of the officers and directors. The preamble to the extension provisions (including cl 2.3) made it clear that the extensions were subject to the insuring clauses unless otherwise stated. Clause 2.3 was thus to be understood as an extension of the cover provided by cl 1.1 and 1.2. This extension operated within the framework of those clauses. It did not provide for an entirely new category of risk, independent of loss founded in the legal obligations of the officers and directors. To construe the document that way would fundamentally transform the commercial circumstances which it addressed.  **4.5 ASIC v Vizard**  (Carl Hollingsworth and Richard Pu, Mallesons Stephen Jaques)  ASIC v Vizard [2005] FCA 1037, Federal Court of Australia, Justice Finkelstein, 28 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/july/2005fca1037.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/july/2005fca1037.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In 2000 the defendant, Stephen William Vizard, made improper use of confidential information obtained in his capacity as a director of Telstra Corporation Limited ("Telstra").  Having discovered that Mr Vizard used the confidential information to procure three investments (in an attempt to obtain an advantage for himself and his family), ASIC initiated proceedings in the Federal Court under section 183(1) and section 1317E of the former Corporations Law ("Law").  Mr Vizard had admitted his guilt and in accordance with his Honour's review of the relevant sentencing principles, Justice Finkelstein ordered that Mr Vizard:   * be disqualified from managing corporations for a ten year period; and * pay pecuniary penalties totalling $390,000.   Justice Finkelstein addressed notions of morality, public confidence and deterrence in his judgment, from which the following implications arise:   * the Court's view of the harm caused by so called "white collar" crimes reflect a recognition that great loss and suffering can be caused to investors and shareholders; * in cases concerning corporate crimes, which may be concealed in legitimate commercial transactions, the court's primary concern is general deterrence and the good character of the defendant will have little impact on punishment; and * the court may be inclined to impose more onerous obligations, such as longer disqualification orders and higher pecuniary penalties, to fortify the general deterrence function of the civil penalty provisions.   **(b) Facts**  Mr Vizard invested in listed shares through a company named Creative Technology Investments Pty Ltd ("CTI"). The sole director and member of CTI was Mr Lay, Mr Vizard's accountant.  CTI entered a loan agreement with Brigham Pty Ltd ("BPL"), a trustee company. Mr Vizard, his wife and their children beneficially held the shares in BPL and were beneficiaries of the related trust. Pursuant to the loan agreement, BPL would loan funds to CTI to purchase a share portfolio. CTI would pay BPL 90% of the proceeds derived from the sale of any shares after the deduction of certain expenses.  In 2000, Mr Vizard instructed CTI (through Mr Lay) to enter three transactions because, in his capacity as a director of Telstra, he had obtained confidential information which indicated to him that the trades would be profitable.  **(i) Transaction one, Sausage Software Ltd**  On 2 and 5 March 2000, the directors of Telstra were informed of confidential discussions between Telstra, Sausage Software Ltd ("Sausage") and Solution 6 Holdings Limited ("Solution 6") in relation to a potential merger of Sausage and Solution 6 and the acquisition by Telstra of a substantial interest in the merged entity. Mr Vizard was aware that Sausage's share price would increase when the proposed merger became public. On 7 March 2000, he instructed Mr Lay to purchase $500,000 worth of Sausage's shares at prices between $5.68 and $5.81. While the Sausage share price initially increased substantially, ultimately CTI suffered a loss of $150,719.96 on this transaction.  **(ii) Transaction two, Computershare Limited**  On 16 March 2000, the directors of Telstra were informed that Telstra's 15% shareholding in Computershare Limited would be sold to fund the merger of Sausage and Solution 6. Fearing that the sale would bring down the price, Mr Vizard instructed Mr Lay to sell 14,000 Computershare shares CTI held at prices between $7.40 and $7.58, returning a profit of $2,591.68.  **(iii) Transaction three, Keycorp Limited**  In early July 2000, the Telstra directors approved the acquisition of a 51% interest in Keycorp Limited. On the following day, but before the acquisition was announced publicly, Mr Vizard instructed Mr Lay (on behalf of CTI) to buy approximately $250,000 worth of Keycorp shares at a price below $13.40. CTI subsequently sold 2,713 Keycorp shares at $14.28 and continued to hold the remainder at the trial date, which on 27 July 2005 were listed at $2.04.  By virtue of these transactions, ASIC initiated proceedings against Mr Vizard for improper use of confidential information pursuant to sections 183(1) and 1317E (civil penalty provision) of the Act.  **(c) Decision**  Justice Finkelstein confirmed that the three transactions set out above amounted to improper use of confidential information in contravention of section 183(1) of the Law.  Justice Finkelstein considered the nature of so-called "white collar" crime and noted that the cost of these crimes is "often extremely high, causing many people to suffer greatly", citing numerous examples of corporate collapses including the Pyramid Group, Estate Mortgage, HIH and One Tel.  According to his Honour, an important purpose of section 183(1) is to "establish a norm of behaviour that is necessary for the proper conduct of commercial life and so that people will have confidence that the running of the marketplace is in safe hands". Accordingly, it follows that "a contravention of … s183 carries with it a significant degree of moral blameworthiness."  Justice Finkelstein stated that Mr Vizard deserved punishment for his moral culpability because his contravention involved a breach of trust. The fact that little or no profit was realised on the transactions was not relevant.  His Honour noted that the governing sentencing principle in cases of this nature is one of general deterrence, holding that:  "The sentence must be exemplary and sufficient so that members of the business community are put on notice that if they break the trust which has been reposed in them they will receive a proper punishment."  Finkelstein J also noted that the possibility of disqualification from office plays an important deterrent function, referring to High Court precedent that a disqualification order can be imposed not only to protect the company's shareholders but also by way of punishment and for general deterrence: Rich v Australian Securities and Investments Commission (2004) 50 ACSR 242.  Following a review of sentencing precedents, Finkelstein J confirmed the following principles:   * good character should play only a minor role in sentencing for this form of white collar corporate crime because the nature of the offence is the principal consideration; * mere shaming of the white collar offender is not a substitute for formal retribution by the court; * a "discount" from what would otherwise be the appropriate penalty is justified because of an offender's early acknowledgement of wrongdoing, cooperation and agreement not to contest the correctness of the elements of the offence.   Applying these mitigation principles to the facts, his Honour held that it would be inappropriate to impose the maximum available pecuniary penalty ($200,000) for each contravention, particularly as ASIC had only claimed $130,000 for each.  However, the disqualification period of 5 years suggested by ASIC was found to be insufficient. Finkelstein J found that disqualification for 10 years was necessary for retributive purposes and in particular for general deterrence.  According to Justice Finkelstein:  "Provided the period is proportional, it can be fixed to reflect the need to protect society from the kind of unlawful conduct engaged in by the defendant."  His Honour therefore ordered that:   * the Corporations Law had been contravened; * a ten year period of disqualification be imposed on Mr Vizard; * a pecuniary penalties totalling $390,000 be imposed on Mr Vizard; and * Mr Vizard must pay ASIC's costs of the court application and of its investigation.   **4.6 Written records for the purpose of section 597(13) of the Corporations Act**  (By Simon Martin, Phillips Fox)  Strarch International Limited (In Liquidation) v Loh [2005] NSWSC 769, Supreme Court of New South Wales, Barrett J, 28 July 2005  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc769.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc769.htm" \t "_new)  or:  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In October 2004, Peter William Keys, Herbert Ralph Moll and Mark Carl Langbein ('the applicants') appeared before the Deputy Registrar of the NSW Supreme Court ('the Deputy Registrar) under Part 5.9 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'). Subsequently they sought declaratory relief that the transcripts of these proceedings were written records under section 597(13) of the Corporations Act 2001.  Barrett J granted the application but changed the form of declaratory relief so that it was in a more particular form than that sought.  **(b) Facts**  On 22 and 25 October 2004 the applicants were examined before the Deputy Registrar under Part 5.9 of the Act. Part 5.9 of the Act concerns the examination of a person about a corporation. Section 597 of the Act regulates the conduct of examination of that person.  On 2 August 2005 the applicants subsequently sought declaratory relief that "the transcripts of examination of 22 and 25 October 2004 are written records under section 597(13) of the Corporations Act 2001."  Section 597 (13) of the Act concerns the written record of testimony and it provides that "the Court may order questions put to a person and the answers given by him or her at an examination to be recorded in writing and may require him or her to sign that written record".  The question for the Court was whether the documents brought into existence in relation to the examinations conducted in the earlier proceedings on 22 and 25 October 2004 were within the definition of section 597(13) of the Act, in particular a "written record of an examination so signed by that person". This was relevant because on 22 June 2005, the Court held in earlier proceedings concerning the same matter that a written record is, by virtue of section of 597(14A) of the Act, available for inspection by any person.  **(c) Decision**  The Court noted that material tendered to the Court showed that the examination of each witness on 22 and 25 October 2004 followed the same procedural pattern. Therefore, the conclusions reached concerning whether the transcripts of examination of one witness in these proceedings are written records under section 597(13) of the Act would apply to all witnesses in those proceedings.  The applicants argued that the Court should find the transcripts of those examinations, as signed by them and retained in the Court file, to be a "written record" for the purposes of section 597(14A) of the Act. His Honour noted that for the document to have this character, it must be found, having regard to section 597(13) of the Act, that the Deputy Registrar actually ordered the making of the written record of questions and answers represented by the transcript and further that the applicants were required to sign this record.  The parties agreed that the Deputy Registrar did not pronounce in Court that the questions put to the applicants and the answers given by them be recorded in writing. However, the applicants submitted that as the Deputy Registrar stated at the outset of the proceedings that they were being tape recorded and would be later transcribed and then at the conclusion of the proceedings stated that the applicants were to sign the written record, this was sufficient to demonstrate a finding of an implied order for recording of questions and answers in writing.  His Honour then considered whether a Court order can be found to be made by implication. His Honour reviewed relevant case law, particularly focussing on the observations of members of the High Court in Wu v The Queen (1999) 199 CLR 99. His Honour referred to the judgment of Gleeson CJ and Hayne J who had commented that, "the judge's orders … were not expressed but are to be inferred from what he said and the course that the trial took thereafter". His Honour then noted that this approach was followed in R v Phan [2001] NSWCCA 29, where Wood CJ found that "his Honour's remarks may be treated as amounting to an implied order".  His Honour then examined the facts of the case and found that the Deputy Registrar's indication at the start of the examination that "everything we say in Court" would be taped and "later transcribed" and her direction that at the end that "you sign a transcript of the evidence you've given today" carried an unmistakable message as to the procedure to be followed following the examination. Further, the reference to taping for later transcription indicated that the questions asked of the applicants were to be captured in a form capable of being converted into a written record and that such a record was to be made.  Therefore, his Honour found that the Deputy Registrar's instructions showed that she had turned her mind to the appropriate method of proceeding and had specified the method described in section 597(13) of the Act. This, combined with the relevant case law, was enough to demonstrate that the Deputy Registrar gave consideration to the matters with which section 597(13) of the Act is concerned and thus his Honour found the applicants had made out their case for declaratory relief. However, his Honour held that the declaration should be in a more particular form than that sought and so made a declaration that "the transcripts of the examinations on 22 and 25 October 2004 in the proceedings of Peter William Keys, Herbert Ralph Moll and Mark Carl Langbein, being transcripts signed by them respectively and held in the Court's file, are written records of those examinations made under section 597(13) of the Act".  His Honour also made orders that the liquidator pay the applicants' costs of the application, such costs being an expense of the winding up.  **4.7 The meaning of "civil proceeding" under section 500(2) of the Corporations Act**  (By Campbell Unsworth, Corrs Chambers Westgarth)  Watervale Pty Ltd v Abey [2005] TASSC 67, Supreme Court of Tasmania, Crawford J, 27 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/tas/2005/july/2005tassc67.htm](http://cclsr.law.unimelb.edu.au/judgments/states/tas/2005/july/2005tassc67.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Court considered in this case whether an action brought before a Commissioner of the Tasmanian Industrial Commission under the [Industrial Relations Act 1984 (Tas)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=32319" \t "Default) amounted to a "civil proceeding" under section 500(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Section 500(2) prohibits a party from beginning or proceeding with a "civil proceeding" against a company in liquidation after the passing of a resolution for voluntary winding up, unless leave of the Court (as defined in the Corporations Act) is obtained.  The Court found that a hearing before the Commissioner amounts to a civil proceeding for which the leave of the Court is required. In doing so, the Court contrasted the wording of section 500(2), which refers to "civil proceedings", with analogous provisions in the Corporations Act which apply only to a "proceeding in a Court".  **(b) Facts**  The applicant was a company in liquidation, having appointed a liquidator under a creditors' voluntary winding up, pursuant to section 497 of the Corporations Act.  The second respondent, Ms Manning, brought an application against the company under section 31 of the Industrial Relations Act 1984 (Tas) alleging unfair termination of her employment. The Tasmanian Industrial Commission, which heard that application, ordered the company to pay Ms Manning $22,865 by way of accumulated annual leave, long service leave and redundancy entitlements.  The company sought judicial review of the Commissioner’s decision in the Supreme Court of Tasmania on the basis that the Commissioner did not have jurisdiction to make the orders because of section 500(2) of the Corporations Act 2001 (Cth). Section 500(2) provides:  After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.  It was not contested that leave of the Court had not been obtained and that the timing of the application fell within the terms of section 500(2). The question to be decided was whether Ms Manning’s application before the Commissioner amounted to a "civil proceeding" under section 500(2) which required leave of the Court.  **(c) Decision**  Crawford J found that the proceedings before the Commissioner constituted a "civil proceeding" for the purposes of section 500(2). Crawford J noted that the term "civil proceeding" is not defined in the Corporations Act and that no assistance was provided from a search of the authorities. Crawford J was assisted however by comparing the words in section 500(2) to those in sections 440D and 471B of Corporations Act, which are analogous to 500(2) in that they impose similar restrictions on bringing or continuing with a proceeding against an externally administered company.  Section 440D, which deals with companies in administration, provides that leave of the Court or consent of the administrator is required to begin or proceed with any "proceeding in a Court" against the subject company. Similarly, section 471B which deals with the winding up of companies in insolvency or by a Court applies to a "proceeding in a Court".  Crawford J concluded that because section 500(2) did not restrict its application specifically to Court proceedings in the same way as sections 440D and 471B, it applied more broadly to civil proceedings generally. This, in Crawford J's view, includes an application brought before the Commissioner under the Industrial Relations Act 1984 (Tas).  The Court held that the Commissioner did not have jurisdiction to make orders against the applicant without leave of the Court pursuant to section 500(2). Therefore, the Court quashed the orders made against the applicant and held that Ms Manning’s application to the Commission could only be pursued once leave of the Court had been obtained under section 500(2).  **4.8 When has a liquidator become too close to a petitioning creditor?**  (By Sabrina Ng and Martin Squires, Corrs Chambers Westgarth)  Re Bettertiles Projects Pty Ltd [2005] NSWSC 717, New South Wales Supreme Court, Young CJ in Eq, 21 July 2005  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc717.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc717.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In this decision, Young CJ in Eq dismissed an application for an order for a liquidator to be removed where the petitioning creditor had funded the liquidator to enable the liquidator to pursue the directors of the company being wound up. His Honour concluded that the liquidation had not been compromised by the liquidator becoming too close to a creditor, as was alleged. Furthermore, the liquidator had become well acquainted with the business and affairs of the company and it would take a replacement considerable time and expense to reach the same point.  **(b) Facts**  On 2 August 2002 Bettertiles Projects Pty Ltd ("Projects") was wound up in insolvency for failure to comply with a statutory demand served by Granitek (Aust) Pty Ltd ("Granitek") claiming a judgment debt. The only persons proved in the liquidation were Granitek and Bettertiles Pty Ltd ("Bettertiles").  Kyri Kyriakouleas, the principal of Granitek, put the liquidator into funds to pursue the directors of the Bettertiles Group, paying the liquidator and his solicitors over $546,000 between 2002 and 2005.  The Bettertiles Group retained a new solicitor. This solicitor formed the view that the referee's report which led to Granitek obtaining the judgment (upon which the statutory demand was based) was defective, and requested the liquidator take action to remedy the defect. The liquidator replied he had no funds to do so and requested $15,000 from the Bettertiles Group to obtain advice from senior counsel, which was not forthcoming.  Furthermore, the liquidator was minded not to admit Bettertiles' proof of debt because it was unsupported by any substantial facts. Bettertiles brought an application under section 473(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for an order removing the liquidator.  **(c) Decision**  Young CJ in Eq decided that, on balance, he should not remove the liquidator.  Firstly, Young CJ in Eq stated the principles governing this sort of application were that a liquidator might be removed where:   * it might reasonably be perceived that the liquidator had yielded up some degree of initiative to the petitioning creditor and where there was some appearance of mere automatic acquiescence, or * where a reasonable bystander would consider the liquidator too close to a creditor and that the liquidator's impartiality was impaired, or * where the liquidator preferred certain interests.   However, it was not improper for a liquidator to accept funding from a petitioning creditor.  His Honour then addressed the reasons raised by Bettertiles for removing the liquidator. His Honour:   * acknowledged that Kyriakouleas had generously funded the liquidator, that substantial fees had been paid to the liquidator and that the liquidator had been zealous in pursuing directors; * noted that Bettertiles' proof had not been admitted, but that the liquidator had explained this was because it was unsupported by any substantial facts; * noted there was some, but not sufficient, evidence of undue pressure by Kyriakouleas on the liquidator; * considered that the liquidator was entitled to take the view that he would not be justified in obtaining further advice about the judgment debt unless he was funded; * noted in response to Bettertiles' complaint that the liquidator had failed to give any information to Bettertiles, that the liquidator justified not giving full information to Bettertiles because Bettertiles did not appear to be a creditor; and * noted in response to Bettertiles' complaint that the liquidator had not approached the Court for directions, that there did not appear any matters upon which the Court could have given meaningful directions.   Young CJ in Eq concluded that, had there been a large number of creditors and the liquidator was as close to Kyriakouleas as in the present case, he may have removed the liquidator. But on the whole facts, the liquidation had not been compromised by the matters raised by Bettertiles. In particular, the liquidator's vigour in pursing his duty to raise as much money as possible for creditors was partly in response to the stiff resistance he received from Bettertiles.  His Honour also concluded that it would take considerable time and expense for a replacement liquidator to become acquainted with the business and affairs of the company to the same extent as the liquidators.  **4.9 Applications by HIH liquidators for hearings in private**  (By Shirley Ching, Freehills)  McGrath re HIH Insurance Ltd [2005] NSWSC 731, New South Wales Supreme Court, Barrett J, 20 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc731.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/july/2005nswsc731.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The case involved applications under section 80 of the [Supreme Court Act 1970 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3748" \t "Default) that the hearing of several interlocutory processes filed in the Court be conducted in the absence of the public. The interlocutory processes had been filed in connection with the approval of agreements (which would have a duration longer than 3 months) and formed part of the winding up proceedings in respect of 41 companies which Justice Barrett referred to as "HIH companies". The applicants were each liquidators of one of the HIH companies. The section 80 applications for private hearings were made on the basis that the subject matter and context of the agreements were highly sensitive and confidential. The agreements were relevant to the initiation and conduct of certain legal proceedings by HIH companies involving claims of damages against persons outside the HIH group.  Justice Barrett determined that the circumstances of this case justified the applications being heard in private in order to achieve the paramount object that justice is done in accordance with the law.  **(b) Facts**  The applicants making the section 80 applications were each liquidators of one of the 41 HIH companies. They applied for the hearing of several interlocutory processes to be conducted in the absence of the public. These interlocutory processes were initiated under section 477(2B) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The liquidators submitted that the hearing of the section 477(2B) applications would, of necessity, involve adducing evidence and making submissions detailing steps that the liquidators had in mind to take in preparation for the litigation, and those were steps which, in the ordinary course of events, a plaintiff would keep confidential and would not be communicated to a defendant. On this basis the liquidators regarded the information as highly sensitive and confidential and submitted that they would be prejudiced if the section 477(2B) applications were heard in public.  **(c) Decision**  Justice Barrett ordered that the hearing of the interlocutory processes be conducted in the absence of the public. His Honour considered Scott v Scott [1913] AC 417 and the discussion in that case of the importance of justice being administered in public. Justice Barrett emphasised that the real determinant is the requirements of justice, as was recognised in Scott v Scott and in R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society [1984] Ch 227. He identified two public interests relevant to this case which competed with the public interest in open justice.  The first competing aspect of public interest is in the due and beneficial administration of the estates of insolvent companies under the Corporations Act by Court appointed liquidators for the ultimate benefit of creditors. This aspect of public interest weighed heavily because the HIH companies had thousands of creditors from all walks of life.  The second competing public interest is in the due administration of justice in litigation. This arises from the fact that the agreements concerned the pursuit of litigation for the benefit of creditors and they should be able to do so free from distortions of a kind that would not arise if litigation were pursued by an ordinary litigant in the ordinary way. His Honour explained that these were special circumstances because they involved liquidators who perform statutory functions and are required to go to Court to seek leave in a way that an ordinary litigant would not have to.  Upon weighing the abovementioned aspects of public interest with the competing public interest in open justice, his Honour took the view that the former aspects outweighed the public interest in maintaining open justice. He applied the terminology used by Viscount Haldane LC in Scott v Scott and concluded that the paramount object of securing that justice is done in both the windings up and interlocutory proceedings would be rendered doubtful of attainment if an order under section 80 was not made.  **4.10 Is a "warranty creditor" a "creditor" in Part 5.3A of the Corporations Act?**  (By Beth Midgley, Blake Dawson Waldron)  In the matter of Motor Group Australia Pty Ltd (Administrators Appointed) [2005] FCA 985, Federal Court of Australia, Hely J, 19 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/july/2005fca985.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/july/2005fca985.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The voluntary administrators of Motor Group Australia Pty Ltd (MGA) formulated a deed of company arrangement. They brought an interlocutory application seeking declarations, directions and orders that the deed of company arrangement be binding on warranty creditors.  Justice Hely relied on s 447A of the Act to make orders that MGA's warranty creditors were "creditors" for the purposes of its deed of company arrangement. His Honour declined to come to a conclusion as to whether warranty creditors fall within the definition of creditors in Part 5.3A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). Nonetheless, the outcome of the case suggests that the Courts may be tending toward an expansive definition of creditor in Part 5.3A that includes warranty creditors.  **(b) Facts**  The applicants were appointed joint voluntary administrators of MGA on 26 April 2005. Before going into administration, MGA imported cars from Europe and sold them in Australia. The cars were sold with a 24 month warranty, which was extended to 36 months in some circumstances. The applicants were aware of the likelihood that future warranty claims would arise in respect of vehicles sold before 26 April 2005. There were approximately 1900 vehicles which were potentially the subject of such claims.  Section 444D(1) of the Act provides that a deed of company arrangement binds "all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)", which in the case of MGA was 26 April 2005.  The applicants sought clarification as to whether the "warranty creditors" — persons who purchased a vehicle from MGA that had a motor vehicle warranty before 26 April 2005 and who had not made a warranty claim arising out of circumstances before that date were "creditors" of the company and within the scope of section 444D(1).  **(c) Decision**  Justice Hely considered the various authorities relevant to the definition of "creditor" in Part 5.3A of the Act. His Honour noted there is authority for the view that the definition of creditor in Part 5.3A should be the same as that in Part 5.6 of the Act (relating to liquidation): Brash Holdings Ltd v Katile Pty Ltd (1996) 1 VR 24; Selim v McGrath (2003) 47 ACSR 537. Part 5.6 of the Act provides that all claims for a company (present or future, certain or contingent, ascertained or sounding only in damages), where the circumstances giving rise to the claims occurred before the commencement of the winding up, are provable in liquidation (section 553). Applying this definition to Part 5.3A, the MGA warranty creditors would be creditors for the purposes of the deed of company arrangement.  A similar approach was adopted by the High Court in Community Development Pty Ltd v Engwirda Construction Company (1969) 120 CLR 455. In that case, it was held that a person towards whom the company may have become subject to a present liability on the happening of some future event was a "contingent" or "prospective" creditor who was entitled to prove in a winding up.  Justice Hely also referred to the contrary approach taken by the Full Federal Court in Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd (1976) 70 FCR 34 (Lam Soon). There, the Court held, in obiter, that "a right to sue for damages for a future breach of covenant" is not a contingent claim but a "mere expectancy and could not be subject of proof." Justice Hely noted that the approach in Lam Soon was criticised (although also in obiter) in Thiess Infraco (Swanston) Pty Ltd v Smith (2004) 50 ACSR 434.  Justice Hely declined to give a direction under s 447D of the Act (which allows an administrator to seek directions from the Court) that the MGA warranty holders should be treated as contingent creditors. He did so on the grounds that the direction would not be a "judicial determination of the issue". However, his Honour exercised his power under section 447A of the Act, which allows the Court to "make such order as it thinks appropriate about how [Part 5.3A] is to operate in relation to a particular company". His Honour made orders stating that, for the purposes of the deed of company arrangement, "creditor" includes those purchasers of MGA vehicles and their successors in title who had a vehicle warranty on 26 April 2005.  Justice Hely did not make a determination about the meaning of creditor within Part 5.3A of the Act. However, he noted that "[e]ven if it be correct to characterise the claims of warranty creditors as 'mere expectancies', s 447A empowers the Court to make an order …” His choice of language here suggests that he does not favour the "mere expectancies" approach taken in Lam Soong and that he would be more disposed toward a broad definition of creditor (such as that in Part 5.6 of the Act) which includes "warranty creditors". This may provide some indication of the direction that the Courts will take on this issue in the future.  **4.11 No fiduciary relationship between unit holders in a unit trust**  (Rohan Kumar, Blake Dawson Waldron)  Price v Powers [2005] WASC 154, Supreme Court of Western Australia, Le Miere J, 8 July 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/july/2005wasc154.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/july/2005wasc154.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html" \t "_new)  **(a) Summary**  In this case, the Supreme Court of Western Australia held that a fiduciary relationship did not exist between unit holders of a unit trust. The plaintiff had not provided sufficient evidence of a beneficial interest with respect to certain units. Fiduciary duties may co-exist with contractual duties. However, the plaintiff was seeking to impose fiduciary duties which were wider or different to those the parties had contractually imposed on themselves.  A party seeking to have a register of unit holders rectified retrospectively needs to establish a right or equity to support that rectification, under section 175(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). Such a right or equity was not established in this case.  **(b) Facts**  The Denmark Unit Trust (Trust) was established with Imagination Enterprises Pty Ltd (Company) as trustee. Mr Hayes and the plaintiff, Mr Price, held 10 units each in the Trust. Mr Hayes and the plaintiff were both shareholders and directors of the Company.  Mr and Mrs Powers (the first and second defendants respectively), together with Peter Ryan, contributed funds to enable the Trust to purchase certain land (Scotsdale Road Land) adjoining unimproved land already owned by the Trust.  Pursuant to these events, an agreement was formed in May 1990 (May 1990 Agreement) in which it was decided that:   * the plaintiff, Mr and Mrs Powers jointly, Mr Hayes and Mr Ryan would each hold 10 units in the Trust and would each hold one ordinary share in the Company; and * the plaintiff, Mr Powers, Mr Hayes and Mr Ryan would be the directors of the Company.   In December 1990, an agreement was made in anticipation of the possible bankruptcy of the plaintiff. The directors and unit holders agreed that the Trust would repurchase Mr Price's ordinary units and issue him with 13,125 special one dollar units. Once the plaintiff's financial troubles were over, his position as director and holder of 10 ordinary units would be restored. Documents effecting the agreement were signed in March or April 1991, although they were dated August 1990, when discussions regarding the conversion began. In July 1991, the plaintiff was made bankrupt. He was discharged from bankruptcy in July 1994.  Mr Bazeley, the third defendant, lived and worked on the farm land owned by the Trust from 1992. In April 1996, Mr and Mrs Powers and the plaintiff executed a Deed of Declaration of Trust (April 1996 Deed). Recital G to the Deed stated "that on or about 9 August 1990 the plaintiff exchanged his 10 ordinary units in the Trust for 13,125 special par units in the Trust in consideration of a promise by the Company, Mr and Mrs Powers, Mr Hayes and Mr Ryan that the special par units would be converted back to 10 ordinary units if he should personally request them to do so." Mr Bazeley had witnessed the April 1996 Deed and was taken to know its terms.  In August 1998, the plaintiff wrote to Mr and Mrs Powers requesting that his special units be converted to ordinary units. Mr and Mrs Powers refused, on the basis that the plaintiff would not agree to 10 ordinary units in the Trust being issued to Mr Bazeley.  In July 1999, Mr and Mrs Powers made an agreement with Mr Hayes regarding his interest in the Trust and the Company. Pursuant to this agreement, Mr Hayes transferred his 10 ordinary units in the Trust and his share in the Company to Mr Bazeley. A resolution affecting this transfer, among others, was completed on 9 June 2000.  During the period described, there were other disputes involving the plaintiff and the first and second defendants, particularly in 1995 and 1998 which resulted in Court action. The details of those disputes fall outside the scope of this note.  **(c) Decision**  **(i) The alleged fiduciary duties**  There were two limbs to the plaintiff's argument concerning the existence of a fiduciary duty. First, that the declaration by Mr Hayes in August 1990 created equal beneficial interests in his units in the Trust for the plaintiff, Mr and Mrs Powers and Mr Ryan. Second, Mr and Mrs Powers acknowledged in the April 1996 Deed that the plaintiff's beneficial interest in Mr Hayes' units existed at the time of the execution of that deed. The plaintiff submitted that these circumstances gave rise to the fiduciary duties owed by the defendants "not to take any steps or do anything inconsistent with or which would or might defeat the plaintiff's beneficial interest in the Hayes units."  The Court noted that the relationship between the plaintiff and Mr and Mrs Powers did not fall within an "accepted" or "established" category of fiduciary relationship. Generally, unit holders in a Trust do not owe fiduciary duties to each other. The content of fiduciary duties, if any, would be informed by the specific circumstances of the case. Le Miere J concluded that the plaintiff had not provided sufficient evidence that he had any beneficial interest in Mr Hayes' units in the Trust. The recital in the April 1996 Deed was not, of itself, evidence that Mr and Mrs Powers, Mr Hayes and Mr Ryan held the ordinary units in the Trust for one another and for the plaintiff as tenants in common in equal shares. The plaintiff had not given sufficient evidence to support the veracity of the recital. Similarly, any acknowledgement by Mr and Mrs Powers that the plaintiff had a beneficial interest at the time the April 1996 Deed was executed was not sufficient to create a beneficial interest. Nor could a beneficial interest arise out of the April 1996 Deed itself, as Mr Hayes was not a party to that deed.  Further to the issue of the existence of any fiduciary duties, the Court discussed the relationship between fiduciary duties and contractual duties. Where a contractual relationship provides a basis for fiduciary obligations, the terms of that contract will be crucial in determining the scope of any fiduciary obligations. The fiduciary relationship must accommodate itself to the terms of the contract and not alter the operation of the contract as intended by the parties. On the present facts, fiduciary obligations under the April 1996 Deed arose with respect to units owned by Mr and Mrs Powers, not Mr Hayes' units. In Le Miere J's view, however, the plaintiff was seeking to impose fiduciary obligations on Mr and Mrs Powers that were broader than those imposed in the April 1996 Deed.  **(ii) The alleged breaches of fiduciary duty**  The plaintiff alleged two breaches of fiduciary duty. First, by procuring Mr Hayes to transfer his units to the third defendant, Mr Bazeley, Mr and Mrs Powers acted in a way which might have prevented them from ensuring that 10 ordinary units would be issued to the plaintiff. The Court rejected the plaintiff's submission. The Court found that Mr and Mrs Powers had certain power to affect the plaintiff's position with respect to the reconversion of the plaintiff's special units to ordinary units. That power emanated from their position as unit holders of the Trust, and shareholders and directors of the Company. Any fiduciary duty owed by the defendants, however, needed to fall within conduct relating to the exercise of their powers in those capacities. It followed that the procurement of Mr Hayes to transfer his units was not conduct relating the defendants' unit holding in the Trust, or shareholding or directorship in the Company.  The second breach of duty submitted by the plaintiff was that in passing the resolution dated 9 June 2000, Mr and Mrs Powers defeated the plaintiff's beneficial interest in the Hayes' units. The Court rejected this submission. As stated above, the plaintiff had not established any beneficial interest in Mr Hayes' units and the relevant clause in the April 1996 Deed did not create fiduciary obligations for Mr and Mrs Powers in relation to Mr Hayes' units.  **(iii) Retrospective rectification of the register**  The Court went on to consider the plaintiff's claims for relief, among which was a claim for the retrospective rectification of the register of unit holders. The Court noted that section 175 of the Corporations Act does not expressly confer jurisdiction on Courts to correct the company's register. After reviewing the authorities, the Court concluded that it had jurisdiction to rectify the register. However, the plaintiff had not established the requisite right or equity to support the register being rectified retrospectively. Thus, the Court ordered that the plaintiff's special units be converted to ordinary units in the Trust and the register be corrected prospectively. The plaintiff's claim and the counterclaim were otherwise dismissed.  **4.12 The duty of a non-executive director to stay informed**  (By Andrew Carter, Mallesons Stephen Jaques)  Gold Ribbon (Accountants) Pty Ltd v Sheers [2005] QSC 198, Supreme Court of Queensland, Muir J, 29 June 2005  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qsc198.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2005/june/2005qsc198.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html" \t "_new)  **(a) Summary**  This decision by Muir J reiterates the importance of non-executive directors keeping themselves informed of the activities of companies of which they are directors. In particular, non-executive directors must ensure that they play an active role in decisions of the Board of a company with respect to areas in which they have a particular expertise that may not be common to other directors of that company.  **(b) Facts**  In 1999, Gold Ribbon (Accountants) Pty Limited ("Gold Ribbon") commenced a scheme whereby it would lend practising accountants up to $1,000,000. Each loan was not to exceed 80% of the unpaid, but rendered, fees generated by the relevant accountant's practice. In order to fund the scheme, the promoters obtained a bill facility from Colonial State Bank ("Bank") with a limit of $25,000,000 ("Facility").  Gold Ribbon appointed Austide Holdings Pty Ltd ("Administrator") to implement the scheme, process funding applications and conduct limited due diligence enquiries into prospective borrowers. Generally speaking, the Administrator carried out the administrative steps required under the scheme documentation (note that this does not mean those steps were necessarily adequate).  Gold Ribbon's security for the loans given under the scheme was primarily based on the stability of the class of borrowers and an insurance policy from HIH Winterthur Casualty and General Insurance Ltd ("HIH"). The HIH policy indemnified Gold Ribbon and the Bank against any loss as a result of default by the borrower.  In late 2000, HIH's credit rating was downgraded and the Bank (as it was entitled to do under the Facility) gave a notice of termination of the Facility to Gold Ribbon. Gold Ribbon (pursuant to its agreements with the borrowers) gave notice of termination of the loan agreements and liquidators were appointed to Gold Ribbon. Five borrowers defaulted under their respective loan agreements. These proceedings were commenced by Gold Ribbon seeking recovery from its directors of the loan monies for the five defaulting loans.  The first defendant directors are all bankrupts except for one (Howes), against whom default judgment was entered. The action against the Administrator was discontinued. Thus, the subject of this decision was the second defendant, Mr Dunn, who was a non-executive director of Gold Ribbon.  Critical to this decision was the fact that Mr Dunn had spent the whole of his working life in finance and debt collection. Whilst the other directors of Gold Ribbon were competent, successful businessmen, they did not have extensive knowledge in commercial lending practices.  Gold Ribbon argued that Mr Dunn breached his statutory and common law duties as a director by:   * failing to ensure the scheme was set up so as to comply with "accepted lending practice"; and * failing to ensure that the scheme was administered by a person with the capacity to administer it properly.   **(c) Decision**  Muir J held that Mr Dunn had failed to ensure that the scheme (as devised) complied with "accepted lending practice". In addition, after the scheme was operating, Mr Dunn did not apply himself to identifying deficiencies in the administration of the scheme and failed to ensure that "accepted lending practice" was followed in the operation of the scheme.  The drafting of the administrative procedures for the scheme were largely left to one director of Gold Ribbon, Mr Taylor, and a director of the Administrator, Ms Schweitzer. Muir J held that had Mr Dunn involved himself in devising the administrative procedures for the scheme, he would have detected Mr Taylor's and Ms Schweitzer’s inability to establish sound lending practices. Considering Muir J found that proper loan administration procedures were not in place, the remaining key issue was whether Mr Dunn should bear responsibility for the inadequacy or whether he was entitled to rely on others.  Muir J discussed generally the need for directors to take reasonable steps to place themselves in a position to be able to guide and monitor the management of the company. However, as a non-executive director, Muir J noted that Mr Dunn had no duty to give continuous attention to the affairs of the company. His duties were to be performed periodically at Board and committee meetings.  Muir J concluded that Mr Dunn was entitled to rely on directors appointed to perform specific functions, including the day to day running of the company. However, a director’s ability to rely on others is subject to qualification. Any delegation by a director of one of his functions would not fulfil his/her duty if he/she did not believe on reasonable grounds that the persons to whom the duty was delegated had appropriate expertise.  As Mr Dunn was the only member of the Board with appreciable experience in commercial lending, he had a duty to give the company the benefit of that experience and expertise when the company was establishing, implementing and administering the scheme. Furthermore, the other directors were entitled to place reliance on Mr Dunn’s experience and expertise in commercial lending.  Muir J concluded that Mr Dunn had breached a number of his duties as a director. A number of specific failures on the part of Mr Dunn were identified, including:   * failing to take steps to ensure that appropriate procedures (such as proof of receivables, the review of financial statements and obtaining security) were put in place to cause the scheme to be properly administered; and * failing to involve himself to any significant degree in setting up the scheme or to apply himself in identifying the deficiencies of the scheme; and * the fact that he had no reason to suppose that any of the other directors of Gold Ribbon had the relevant financial expertise to establish the scheme; and * failing to obtain copies or peruse the agreements with the Administrator; and * failing to obtain copies or peruse scheme documentation; and * failing to read the Facility agreement or the HIH policy; and * failing to ensure that scheme documentation and agreements had been settled and approved by lawyers with appropriate commercial expertise.   Furthermore, the breaches of duty by Mr Dunn were in respect of fundamental aspects of Gold Ribbon's business and increased the risk, and materially contributed to, the loss suffered by Gold Ribbon. Accordingly, Mr Dunn's breaches of his duty as a director caused Gold Ribbon's loss. As a result, Muir J ordered that Mr Dunn pay Gold Ribbon the sum of $3,629,000 plus costs. |
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