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| **EDITOR'S NOTE**This is the final issue of the Bulletin for 2006. The next issue will be published in early 2007. I would like to take this opportunity to thank the supporters of the Bulletin - in particular, our sponsoring law firms listed above.I wish all of our readers an enjoyable holiday season.Professor Ian RamsayEditor**[1. 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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 The social responsibility of corporations** There is widespread interest in the way in which companies conduct themselves, including in the environmental and social impact of their activities. The Corporations and Markets Advisory Committee's (CAMAC) report on 'The Social Responsibility of Corporations was released on 7 December 2006. The report aims to provide a pathway through the mass of material and opinions on this subject, as well as respond to questions raised in the terms of reference from the Government. While largely focused on the conduct of business corporations, the report notes that issues of social responsibility also arise for other entities, including public sector, non-profit and unincorporated bodies. Companies operate in a shifting marketplace of legal requirements, consumer preferences, employee views, investor sentiments, community attitudes and other pressures. Where social and environmental issues arise in relation to a company's business, they need to be managed, as do other issues that may impinge on business success or failure. The report suggests that a company will be socially responsible if it operates in an open and accountable manner, uses its resources for productive ends, complies with relevant regulatory requirements and acknowledges and takes responsibility for the consequences of its actions. The report recognises the importance of companies being run with a proper regard to the social and environmental consequences of their conduct. It concludes that existing legal requirements are sufficiently flexible to enable corporate decision-makers to take into account the environmental and other social aspects of their decisions. Any amendment of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) expressly to require or permit directors to have regard to enumerated special interests would not be likely to improve the quality of corporate decision-making and could in fact be counterproductive by clouding the accountability of directors. The report makes the point that transparency is a cornerstone of responsibility. It notes that corporate practice on the reporting of social and environmental aspects is evolving within a framework of legislative, stock exchange and market requirements and guidelines. It concludes that s 299A of the Corporations Act is an appropriate platform for the further development of such reporting. It recommends that this reporting obligation be extended beyond listed public companies to all listed entities. Beyond that, the Committee does not see a need at this stage for legislative elaboration of reporting requirements. On the question of encouraging responsible corporate conduct, the report notes the key roles played by government in laying down boundaries for corporate behaviour through legislation in various areas, in providing a framework for corporate governance and accountability and in the pursuit of corporate compliance. Beyond those areas, the Committee points to possible steps in the areas of policy, leadership, promotion of engagement and encouragement of participation in industry and other initiatives. The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal%2BReports%2B2006/%24file/CSR_Report.pdf%22%20%5Ct%20%22_new) website.**1.2 SEC proposes major rule changes relating to internet availability of proxy material, interpretive guidance for management to improve SOX section 404 implementation, and foreign private issuer deregistration** On 13 December 2006, the United States Securities and Exchange Commission (Commission) voted to adopt major amendments to several of its rules relating to internet availability of proxy material, interpretive guidance for management to improve SOX section 404 implementation, and foreign private issuer deregistration.**(a) Internet availability of proxy material**The Commission voted to adopt amendments to its proxy rules that would allow companies to furnish proxy materials to shareholders through a "notice and access" model using the Internet. The Commission also voted to propose rule changes that would require companies and soliciting persons to follow the notice and access model for all solicitations not related to a business combination transaction in the future.Pursuant to the amendments to the Commission's proxy rules, a company may, but is not required to, furnish proxy materials to shareholders through a "notice and access" model. A company choosing to follow the model must post its proxy materials on an Internet Web site and send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days before the meeting date. A proxy card may not accompany the Notice. However, a company may send a paper proxy card accompanied by another copy of the Notice 10 days or more after sending the initial Notice.The new alternative model for furnishing proxy materials seeks to substantially decrease the expense incurred by issuers to comply with the proxy rules and provide persons other than the company with a more cost-effective means to undertake their own proxy solicitations. **(b) Interpretive guidance for management to improve SOX section 404 implementation**The Commission voted to propose for public comment interpretive guidance for managements regarding their evaluations of internal control over financial reporting. The Commission also proposed amendments to Rules 13a-15 and 15d-15 that would make it clear that a company choosing to perform an evaluation of internal control in accordance with the interpretive guidance would satisfy the annual evaluation required by those rules. Finally, the Commission proposed amendments to Regulation S-X to clarify the auditor's reporting requirement pursuant to section 404(b) of the Sarbanes-Oxley Act."We are proposing this interpretative guidance to help management make their evaluation process more efficient and cost-effective," said SEC Chairman Christopher Cox. "In the absence of guidance, management has looked to the PCAOB's auditing standard to conduct their evaluations, which is not what was intended. With this guidance, management will be able to scale and tailor their evaluation procedures to fit their facts and circumstances, and investors will benefit from reduced compliance costs. While the guidance is intended to help public companies of all sizes, smaller companies should particularly benefit from its scalability and flexibility. We believe that today's proposed guidance, along with the Public Company Accounting Oversight Board's new auditing standard to be proposed next week, will result in significant improvements in the implementation of Sox 404."**(i) Background**Section 404(a) of the Sarbanes-Oxley Act directed the Commission to adopt rules requiring each annual report of a company, other than a registered investment company, to contain (1) a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) management's assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal controls structure and procedures for financial reporting.On 5 June 2003, the Commission adopted such rules implementing section 404(a) with regard to management's obligations to report on its internal control over financial reporting. The final rules did not prescribe any specific method or set of procedures for management to follow in performing its evaluation.The proposal would amend the Commission's rules adopted in 2003 to state that an evaluation conducted in accordance with the interpretive guidance would satisfy the Commission's rules. However, in order to retain the flexibility that was desired by the 2003 rules, the proposed amendments would afford management the latitude to either follow the interpretive guidance or to develop and use other methods that achieve the objectives of the Commission's 2003 rules.**(ii) Proposed interpretive guidance for evaluating effectiveness of internal control over financial reporting**The proposed guidance is principles-based guidance that is organized around two important principles: * First, management should evaluate the design of the controls that it has implemented to determine whether there is a reasonable possibility that a material misstatement in the financial statements would not be prevented or detected in a timely manner. This principle promotes efficiency by allowing management to focus on those controls that are needed to prevent or detect material misstatement in the financial statements.
* Second, management should gather and analyze evidence about the operation of the controls being evaluated based on its assessment of the risk associated with those control. The principle allows management to align the nature and extent of its evaluation procedures with those areas of financial reporting that pose the greatest risks to reliable financial reporting.

By following these two principles, the Commission states it believes that companies of all sizes and complexities will be able to implement the SEC's rules more effectively and efficiently. As smaller public companies often have less complex internal control systems than larger public companies, this proposed approach would enable smaller public companies in particular to scale and tailor their evaluation methods and procedures to fit their own facts and circumstances.The proposed guidance describes a risk-based approach and addresses many of the concerns that have been raised to the Commission including: excessive testing of controls generally; excessive documentation of processes, controls, and testing; and the ability to scale the evaluation to smaller companies. The guidance addresses four specific areas including:* identification of risks to reliable financial reporting and the related controls that management has implemented to address those risks;
* evaluation of the operating effectiveness of controls;
* reporting the overall results of management's evaluation; and
* documentation.

**(c) Easier rules to allow foreign private issuers to deregister**The Commission voted to repropose amendments to the rules that govern when a foreign private issuer may terminate the registration of a class of equity securities under section 12(g) of the Securities Exchange Act of 1934 and the corresponding duty to file reports required under section 13(a) of the Exchange Act, and when it may cease its reporting obligations regarding a class of equity or debt securities under section 15(d) of the Exchange Act. Under the current rules, a foreign private issuer may exit the Exchange Act registration and reporting regime if the class of the issuer's securities has less than 300 record holders who are U.S. residents. Because of the increased globalization of the U.S. securities markets that has occurred since the adoption of these rules, a foreign private issuer may find it difficult to terminate its Exchange Act registration and reporting obligations despite the fact that there is relatively little interest in the issuer's securities among United States investors. Moreover, currently a foreign private issuer can only suspend, and cannot terminate, a duty to report arising under section 15(d) of the Exchange Act.Reproposed Exchange Act Rule 12h-6 would permit the termination of Exchange Act reporting regarding a class of equity securities under either section 12(g) or section 15(d) of the Exchange Act by a foreign private issuer that meets a quantitative benchmark designed to measure relative U.S. market interest for that class of securities, which does not depend on a head count of the issuer's U.S. security holders. The reproposed benchmark would require the comparison of the average daily trading volume of an issuer's securities in the United States with that in its primary trading market. Further information about these proposed changes to SEC rules is available on the [SEC](http://www.sec.gov/%22%20%5Ct%20%22_new) website.**1.3 Industry views sought on streamlining prudential regulation** On 4 December 2006, the Minister for Revenue and Assistant Treasurer, Mr Peter Dutton, released the discussion paper "Streamlining Prudential Regulation: Response to 'Rethinking Regulation'" for public comment. The discussion paper contains a number of proposals to further streamline prudential regulation legislation for authorised deposit-taking institutions, general and life insurers and superannuation entities. The proposals contained in the paper are in response to recommendations regarding prudential regulation contained in the Rethinking Regulation report of the Taskforce on Reducing Regulatory Burdens on Business released earlier in the year, as well as outstanding recommendations of the HIH Royal Commission and issues raised directly by industry. The proposals are aimed at addressing many of the financial services sector's concerns by removing regulatory overlaps, providing greater flexibility for APRA to tailor prudential requirements, removing unnecessary or out of date legislation and improving APRA's independence and accountability for its decisions.The Government invites interested parties to provide comments on the proposals by 15 February 2007. Submissions can be made to the Streamlining Prudential Regulation Project at: SPRsubmissions@treasury.gov.au or the following address:Streamlining Prudential Regulation ProjectFinancial System DivisionThe TreasuryLangton CrescentPARKES ACT 2600 The discussion paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1199" \t "_new) website.**1.4 Financial Reporting Review Panel publishes preliminary report on implementation of IFRS** On 4 December 2006, the UK Financial Reporting Review Panel (IFRS) published a report on its preliminary findings in respect of IFRS implementation by UK listed companies in their annual accounts. The Panel's review of companies' annual accounts prepared under IFRS is continuing but it has identified a number of recurring issues which are highlighted in the report in order to draw them to the attention of companies planning the preparation of their next IFRS annual accounts. IFRS accounts are often said to be too long and too complicated. The Panel has found that there is a tendency to use "boiler-plate" descriptions for disclosure of accounting policies whether or not the matters described actually apply to the company concerned. The Panel states that more focused and thoughtful treatment would reduce length and increase understanding of the complexities which are inevitable in sophisticated commercial operations. Further information is available on the [FRC](http://www.frc.org.uk/frrp/press/pub1206.html%22%20%5Ct%20%22_new) website.**1.5 IPO activity**A December boom in Australian IPO activity is expected to lift the number of public company floats from 172 in 2005 to a record 192 in calendar 2006, according to the latest Deloitte IPO Report published on 4 December 2006. However, the amount of funds raised by IPOs will almost halve from $15.2 billion in 2005 to $8.5 billion (excluding T3).IPOs in 2006 produced an average share price gain of 43%, substantially higher than previous years, although the average was boosted by exceptionally high returns from resource IPOs. Resource floats accounted for eight of the 10 best performing IPOs during the past year.The highest return was 395% for Perth-based Red Hill Iron, while the minimum return among the 10 best performers was 200%.At the other end of the performance spectrum, resource IPOs also accounted for seven of the 10 worst performing IPOs, highlighting the high risks as well as the high rewards of investing in Australia's resources boom.**(a) 10 best performing IPOs**The top performing IPO for 2006 was Red Hill Iron, which is exploring for iron ore in the West Pilbara region. The company is also prospecting for base metals and gold.The 10 top performing IPOs for the year produced an average gain of 263%, and investors in any of the top 10 experienced share price growth of at least 200%.Eight of the top 10 IPOs were in the resources sector, highlighting the effect of high commodity prices and speculative investment on the boom in IPO activity in 2006. Three of the top 10 IPOs were involved in uranium exploration - A-Cap Resources (up 332%), Fairstar Resources (up 250%) and U3O8 (up 230%).**(b) IPO activity by industry**The resource-dominated materials sector generated the greatest IPO activity by industry in 2006 in terms of number of floats and value of funds raised. The sector is set to produce 77 IPOs by the end of the year, with total capital raised of $1.7 billion. The next largest industry sector by value was real estate ($1,239 million), followed by diversified financials ($1,407 million) and capital goods ($1,195 million).**(c) Share price performance by industry**Among sectors with larger numbers of IPOs, the best returns were in software and services, which produced 4 IPOs with share price gains ranging from 32% for APA Financial Services to 110% for Bravura Solutions. The next best return by industry sector was in capital goods, which is host to a number of engineering and mining services firms that are riding high on the resources boom.**(d) IPOs by state**New South Wales generated the greatest value of IPO activity for the second consecutive year, with 49 IPOs that raised a total of more than $4.3 billion. However, this was less than half the value of IPOs in NSW in 2005.In Victoria, IPO activity reduced significantly in 2006, in sharp contrast to the 2003 and 2004 years, when it was the state with the largest number of IPOs by value. Victoria is set to produce only 17 IPOs this year, with total capital raised of $343 million, compared to $4.7 billion in 2005.Western Australia overtook Victoria to become the second largest state by value. The number of WA-based IPOs jumped from 54 to 99, while the value of funds raised more than doubled from $1.1 billion to $2.3 billion.IPO activity also increased sharply by value in Queensland and South Australia. The total amount raised by Queensland-based IPOs increased from $487 million to $1.2 billion, reflecting the $724 million IPO of Rivercity Motorway.South Australian-based IPOs increased from $133 million to $309 million largely because of a $200 million float by Adelaide Managed Funds Asset Backed Yield Trust and a buoyant resources sector.Further information is available on the [Deloitte](http://www.deloitte.com/dtt/cda/doc/content/December_boom_lifts_IPO_number_to_annual_record_011206.pdf%22%20%5Ct%20%22_new) website.**1.6 Survey of performance of business professionals** Chief executive officers (CEOs) and company directors have lost some creditability with the Australian public, but financial planners' credibility is on the increase, according to the findings of CPA Australia's fifth annual confidence in corporate reporting survey released on 30 November 2006. CPA Australia's survey asked Australians how they felt about the performance and the integrity of eight categories of business professionals: company directors, CEOs, management in general, company auditors, public accountants, financial planners, and company regulators. The common response across most categories was 'no change' except for the public's view of company directors' and CEOs' performance. Nearly half (45 per cent) of the Australian public perceives directors' performance to be worse than two to three years ago, and 43 per cent indicated that they perceive CEOs' performance to be worse. The survey also asked the public whether their confidence in major Australian corporations, Australian and overseas share markets, their own superannuation, and their own investments had changed over the past year. While most said their confidence remained the same across all categories, a greater proportion had lost confidence in Australian companies (33 per cent) and Australian share market (17 per cent), and a greater proportion had increased confidence in their own investments (31 per cent) and superannuation (29 per cent). Further information is available on the [CPA](http://www.cpaaustralia.com.au/cps/rde/xchg/SID-3F57FEDF-6370BF6C/cpa/hs.xsl/1019_20807_ENA_HTML.htm%22%20%5Ct%20%22_new) website.**1.7 Promoting audit quality: discussion paper** On 30 November 2006, the UK Financial Reporting Council (FRC) published a Discussion Paper 'Promoting Audit Quality'. This is the first of a number of Discussion Papers to be published by the FRC discussing the way it addresses its objectives, and inviting stakeholders and commentators to comment on the FRC's approach. This Discussion Paper addresses the FRC's objective of promoting and maintaining confidence in the audit process and the resulting audit report. This is a key component of the corporate reporting and governance regime that leads to the effective operation of capital markets. The Discussion Paper seeks opinions as to whether, within the existing legal and regulatory framework, all appropriate steps are being taken to maintain and enhance the quality of audits and, if not, seeks views as to what more could or should be done. The Discussion Paper identifies those drivers that the FRC believes are central to achieving a high quality audit of listed companies and then considers whether there are 'threats' which weaken the effective operation of those drivers. The Discussion Paper has been prepared in the context of the financial reporting framework in the UK and the Republic of Ireland. However, because of the increasingly international context in which standard setting takes place, the FRC is keen to receive the views of all those interested in promoting high quality audits wherever they may be located. Comments on the Discussion Paper are invited by 31 March 2007. The Discussion Paper is available on the [FRC](http://www.frc.org.uk/publications/pubs.cfm%22%20%5Ct%20%22_NEW) website.**1.8 US committee on capital markets regulation recommends enhancing shareholder rights and curbing excessive regulation and litigation** On 30 November 2006, the Committee on Capital Markets Regulation, an independent group comprised of 22 US leaders from the investor community, business, finance, law, accounting and academia, issued its interim report with recommendations for changes in capital markets regulation based on the twin goals of enhancing shareholders rights while reducing excessive and overly burdensome regulation and litigation. The Committee outlined 32 specific recommendations in four key areas - shareholder rights, the regulatory process, public and private enforcement and Section 404 of the Sarbanes-Oxley Act of 2002 to improve the regulatory system and give US capital markets a competitive boost to respond to the increasing efforts of other countries to attract equity capital markets.**(a) Findings on US capital markets competitiveness**According to the Committee, while some erosion of the historically immense U.S. market-share of global equity listings, trading and total equity financing is natural, it cannot fully explain why:* 5% of the value of global initial public offerings was raised in the US last year, compared to 50% in 2000.
* The U.S. share of total equity capital raised in the world's 10 top countries has declined to 27.9% so far this year from 41% in 1995.
* The decrease in U.S. listing premiums erodes the traditional edge maintained by the U.S. on cheaper cost of capital.
* Private equity firms, almost non-existent in 1980, sponsored more than $200 billion of capital commitments last year alone.
* Since 2003, private equity fundraising in the U.S. has even exceeded net cash flows into mutual funds and going private transactions have accounted for more than a quarter of publicly announced takeovers. The increased use of private markets disadvantages the average investor, who typically cannot participate in such markets.
* The dramatic increase in the use of private US markets is evidence that regulation and litigation are keeping them out of the public market.

**(b) Key recommendations**Following are highlights of the Committee's recommendations from each of the four areas of the report: **(i) Shareholder rights*** Classified boards should be required to obtain shareholder authorization to adopt a poison pill, and if this is not done within three months, the pill should automatically be redeemed.
* The Committee endorsed majority - rather than plurality - voting, which is a cornerstone of shareholder rights, and the Committee will study how it may best operate.
* Shareholders should be given the choice to decide how disputes with their companies should be resolved - through arbitration (with or without class actions) or non-jury trials.
* The SEC should resolve issues on ballot access caused by a recent court decision.

**(ii) Regulatory process*** The SEC and self-regulatory organizations should move to a more risk-based regulatory process, emphasizing the costs and benefits of new rules. In weighing the costs and benefits of new rules, regulators should rely on empirical evidence to the extent possible. Also to the extent possible, regulations should rely on principles-based rules and guidance.
* The SEC should periodically test existing rules to ensure they still meet reasonable cost/benefit standards.
* Public enforcement bodies like the SEC, Justice Department and state securities commissioners and attorneys general need to coordinate their activities, providing for federal precedence where enforcement implications are national in scope. There should be more effective communication and cooperation among federal regulators. The President's Working Group on Financial Markets is one natural venue for ensuring such cooperation.

**(iii) Public and private enforcement*** Greater clarity for private litigation under SEC Rule 10b-5, and from the SEC on materiality, scienter (knowledge of wrongdoing) and reliance is needed. Criminal enforcement against companies should be a last resort, reserved for companies that have become criminal enterprises from top to bottom. Outside directors should not be held responsible for corporate malfeasance that they cannot possibly detect.
* Public enforcement authorities should not be allowed to threaten corporate defendants with denial of their employees' right to due process.
* The SEC should protect outside board members against liability from relying in good faith on the validity of audited financial statements - otherwise, it will be difficult to attract independent directors to boards.
* Congress should explore protecting audit firms against catastrophic loss through the provision of caps or safe harbors, as do some European countries and as the European Union is actively considering. Any use of such protection must be balanced against stiff action against those responsible for misconduct.

**(iv) Sarbanes-Oxley*** The SEC should adopt a more reasonable materiality standard both for internal controls and financial statements.
* The SEC and the PCAOB should adopt enhanced guidance on auditors' roles and duties in testing for compliance with section 404.
* If a revised section 404 is too burdensome for small companies (US$75 million market cap and less), even after the general reforms outline above are implemented, the SEC should recommend to Congress that small companies be exempt from auditor attestation and be subject to a more reasonable standard for management certification.

The interim report is available on the [Committee on Capital Markets Regulation](http://www.capmktsreg.org/press.html%22%20%5Ct%20%22_new) website.On 30 November 2006, the US Council of Institutional Investors (a not-for-profit association of 140 public, union and corporate pension funds with assets exceeding US$3 trillion) announced that it disagreed strongly with the Committee on Capital Markets Regulation's assertion that overzealous regulation is stifling US competitiveness. The Council stated that it encourages the Committee to:* Urge all corporate boards, not just those with classified voting structures, to obtain shareowner approval before adopting "poison pill" anti-takeover measures;
* Encourage all states to change their corporation laws to require majority voting for directors; and
* Call on the SEC to ensure that shareowners have some ability to nominate their own board candidates to be included on management proxy ballots.

The Council also stated:"While the committee raises legitimate questions about the level of regulation and litigation, we think it views these issues through far too narrow a prism, by focusing primarily on the market for initial public offerings. IPOs, while a key source of revenue for Wall Street investment bankers, are not the sole, nor the best, basis on which to judge the health of the US economy or the appropriateness of US rules and laws. And the committee's contention that fear of lawsuits and excessive regulation, particularly costs associated with section 404, have driven the decline in IPO listings is off-base. The US share of the IPO market peaked a decade ago, long before Sarbanes-Oxley and other post-Enron reforms. Several factors have contributed to the erosion of U.S. dominance of the global IPO market, including:* Privatization of state-owned enterprises in emerging markets (Not surprisingly, governments selling off such businesses often prefer a listing on their home exchanges);
* High US investment banking fees relative to underwriting fees on European exchanges; and
* Growing globalization, which has increased the sophistication of emerging markets.

US markets enjoy the lowest cost of capital. The amount of money raised by foreign companies in US IPOs has grown since Sarbanes-Oxley was enacted in the wake of a shocking series of corporate scandals. In the first eight months of 2006, it hit $5.8 billion, the highest level since 2000. Rigorous US investor protections are a boon, not a bust, for our capital markets."**1.9 Review of legal professional privilege** On 30 November 2006, it was announced that the Australian Law Reform Commission (ALRC) will review legal professional privilege. The ALRC inquiry will concentrate on the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies-such as the Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Taxation Office and federal royal commissions. Legal professional privilege was raised as an issue in the recent report of the Cole inquiry into the Australian Wheat Board and, before that, in the report of the HIH Royal Commission. Commissioner Cole noted that a conflict sometimes arises between the public interest in discovery of the truth which is the prime function of a royal commission and the right of persons to communicate with their lawyers and obtain legal advice under conditions of confidentiality. The ALRC would begin work on an Issues Paper, outlining the scope of the Inquiry, and seeking feedback on a range of questions. The ALRC is due to report by December 2007. Further information on the work of the Commission can be found at [www.alrc.gov.au](http://www.alrc.gov.au/%22%20%5Ct%20%22_new). **1.10 Oversight of auditors: survey** On 30 November 2006, the Committee of European Securities Regulators (CESR) published a survey of the role of its members in the oversight of auditors.The survey is available on the [CESR](http://www.cesr-eu.org/data/document/06_260.pdf%22%20%5Ct%20%22_new) website. **1.11 Narrative reporting by companies** On 29 November 2006, the Association of British Insurers called on companies to provide more forward-looking analysis in the enhanced narrative reports they are required to produce under UK and European company law. It set out its views in a position paper designed to help companies maximise the value to investors of the new Business Review, which is required under the European Accounts Modernisation Directive.Besides more forward-looking statements, the paper says investors would welcome greater use of key performance indicators and more information on how boards oversee the management of material social, environmental and ethical (SEE) risks. The ABI position paper on narrative reporting is available on the [Association of British Insurers](http://www.abi.org.uk/Members/circulars/viewAttachment.asp?EID=15245&DID=13838" \t "_new) website. **1.12 Benchmarking regulatory burdens on business** On 28 November 2006, a discussion draft was released by the Productivity Commission titled 'Performance Benchmarking of Australian Business Regulation'. The paper provides a preliminary assessment of the feasibility of benchmarking regulatory burdens on business across all jurisdictions in Australia.The Commission identifies a number of ways of comparing the cost to business of complying with regulations imposed by all levels of government in Australia. The results of the benchmarking will be used to identify where paperwork and related costs could be reduced.The Commission observes that governments and business would have to play a central role in any future benchmarking. Selecting indicators and how to measure them would not be straight forward, and further consultation with businesses and government would be required.The Commission suggests a modest program at first, starting with regulatory 'hot spots' already identified by the Council of Australian Governments (COAG).Following public consultation on this draft, a final report will be prepared by February 2007. Subject to COAG's agreement, the Productivity Commission would proceed with the second stage of collecting data on the performance indicators.The discussion draft is available on the [Australian Government Productivity Commission](http://www.pc.gov.au/study/regulationbenchmarking/draftreport/index.html%22%20%5Ct%20%22_new) website. **1.13 Governance in fund management: survey** Ninety five percent of respondents to a global survey conducted by CREATE and KPMG International, on good practice in business governance in investment management believe that the adoption of sound governance practices in their own businesses is important or very important in regaining investors' trust. The mutual fund scandals in the U.S. involving market timing and late trading gave rise to the perception that many fund managers did not have sound practices in their own businesses at a time when they were getting ever more involved in the governance of companies in which they invest. Quite independently, market evolution forced a re-evaluation of business practices as businesses have become more global, products more complex and the value chain more fragmented. It has become increasingly difficult and expensive for fund managers to ensure compliance with the growing mountain of detailed regulation applicable across the globe. The study, published on 27 November 2006, shows that although processes and controls (so-called 'tick-box compliance') remain important, fund managers are also turning to cultural (92 per cent) and behavioural (92 per cent) initiatives to reinforce good business governance on a global basis. This was particularly marked in North America and Asia Pacific where relatively high levels of effectiveness were recorded. The study also reveals that some of the key benefits of these initiatives on business performance have been: improvements in fund managers' relationships with regulators (61 per cent), client service (50 per cent), brand image (46 per cent) and investment performance (44 per cent). But other unintended consequences have also occurred, including product development becoming more robust but at the expense of speed-to-market. According to the study, the process of improvement in business governance at fund managers is hampered by frequent introductions of new rules and the re-interpretation of the old ones. These tend to compound the inconsistencies in regulation at the global level and tilt the focus towards systems and controls, thereby undermining the notions of personal judgment and individual accountability that lie at the heart of good governance. Accordingly, the study makes two recommendations to regulators. First, they should consider reducing the complexity and inconsistency in rules and harmonise them around the principles that fund managers around the world regard as vital to good governance. Second, they should develop audit tools that go beyond the familiar systems and controls, and check the cultural climate in fund houses. Fifty CEOs, CIOs and Compliance Directors participated in interviews and research participants came from 192 investment managers based in 25 different countries managing US$21 trillion of assets. The study can serve as a benchmark against current compliance strategies. It also includes a checklist to help draw out the core competencies of a good governance model.Further information is available on the [KPMG](http://www.kpmg.co.uk/news/detail.cfm?pr=2717" \t "_new) website.**1.14 Personal property securities discussion paper** On 24 November 2006, the Australian Attorney-General released a discussion paper on the reform of Australia's personal property securities laws.More than 70 pieces of legislation currently regulate the industry across Australia. The discussion paper focuses on a proposed national register of personal property security interests.Comments are welcome on the discussion paper until 9 February 2007.The discussion paper is available from the [Attorney General's](http://www.ag.gov.au/pps%22%20%5Ct%20%22_new) website.**1.15 FTSE 100 executive remuneration** The strong performance of many FTSE 100 companies is feeding through to significant increases in the total direct compensation for UK CEOs and other board directors, mostly in the form of bonuses and other elements of 'at risk' pay.The total direct compensation of FTSE 100 company CEOs has increased by 30 per cent over the past year, taking the median to just under £3 million before adding in the value of pensions, according to Watson Wyatt's 2006 Executive Reward Survey published on 23 November 2006. The Watson Wyatt survey shows that in FTSE100 companies, typical bonus plans now pay CEOs 85 per cent of salary for reaching target and 150 per cent of salary at maximum. It also shows that for executives in FTSE 100 companies who are two full reporting levels below the main board, bonuses of 30 per cent of salary are available for on-target results and 50 per cent for top performance. The basic salaries of executives of FTSE 100 companies have continued to pull away from the salaries of those in smaller companies. The median salary increases in 2006 were 7.1 per cent for chief executive officers (CEOs) of FTSE 100 companies, 6.5 per cent in FTSE 250 companies and only 4.7 per cent in small cap companies. It was not CEOs who saw the biggest percentage salary increases this year. The median increase for finance directors of FTSE 100 companies was 9.4 per cent in 2006. The median increase for other board directors of FTSE 100 companies was not far behind, at 8.4 per cent. Further information is available on the [Watson Wyatt](http://www.watsonwyatt.com/%22%20%5Ct%20%22_new) website.**1.16 Are Australian companies delisting because of corporate law reforms?** A research report published on 21 November 2006 by the University of Melbourne's Centre for Corporate Law and Securities Regulation documents the significant extent of delistings from the Australian Stock Exchange (ASX) and the reasons why companies delist. The study examines 30 years of delisting data - from 1975 to 2004. The authors of the study are Nicholas Lew and Ian Ramsay.**(a) Background to the study**There is significant concern in the Unites States that the costly corporate law reforms introduced by the Sarbanes-Oxley Act of 2002 (SOX) are causing companies to delist and "go dark" ie, no longer be required to file information with stock exchanges and the US Securities and Exchange Commission (SEC). The principal cause of increased compliance costs has been section 404 of SOX. This section requires annual reports to contain an internal control report setting out management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting. The effectiveness of the internal control structure must be assessed by management and attested to by external auditors. In a survey of 147 US public companies by Foley & Lardner, 70% of the companies felt overall company administrative costs increased a 'great deal' as a result of SOX and other corporate governance reforms and 82% felt the reforms had been too strict. According to a survey of 217 public companies by Financial Executives International, nearly all companies (94%) thought the costs of section 404 compliance exceeded its benefits. A 2005 survey by the US Business Roundtable of the CEO's of 160 leading US companies found that 47% estimated costs of more than US$10 million to implement SOX and new listing requirements. Another 29% estimated costs of between US$6 million and US$10 million. It is against this backdrop that a growing number of public companies in the US have sought to delist. Thirty nine per cent of the companies that went private in 2004 (44 of 114) cited SOX compliance costs as a reason for doing so. Twenty per cent of public companies surveyed in 2005 by Foley & Lardner were considering going private - compared to 21 per cent in 2004 and 13 per cent in 2003. Most of the companies within the 20 per cent were small in size and all said that the disclosure reforms were too strict. Australia has introduced corporate law reforms in recent years - including the CLERP reforms. However, these reforms have not been as extensive as SOX and Australia has not introduced an equivalent to section 404 of SOX. Australian corporate law reforms would therefore seem not as expensive to comply with as SOX and companies listed on ASX may not have the same incentive to delist as some US companies.**(b) The study**Researchers at the Centre for Corporate Law and Securities Regulation examined all delistings from the ASX for the 30 year period 1975 to 2004. There were 5,952 delistings during this period.**(c) Key results** **(i) Reason for delisting**The main reasons for delisting are: name changes (40% of all delistings); being acquired (19%); capitalisation changes (19%); and failure to pay listing fees (8% - typically because of the company being in financial difficulty). There was no evidence that companies are delisting because of corporate law reforms or excessive reporting requirements. There was a small number of delistings (23) where the company delisting stated that the cost of being listed exceeded the benefits.**(ii) Extent of delisting**The extent of delisting (the number of delistings expressed as a percentage of the size of the ASX board) has been increasing each decade for the past three decades and is the equivalent of more than one whole board being turned over each decade. On average, 150% of the ASX board delists each decade. The extent of delisting decreases significantly if capitalisation changes and name changes are excluded from the analysis (60% each decade).In order to determine the extent of delistings for the largest companies, the Top 150 ASX companies were examined for the period 1990-2005 in a separate analysis. Eighty per cent of the Top 150 companies in 1990 had delisted by 2005. Excluding delistings attributed to capitalisation changes and name changes, 62% of the Top 150 companies in 1990 had delisted by 2005.**(iii) Length of time companies are listed on the ASX before delisting**The study examined the length of time companies are listed on the ASX before delisting. The mean is eight years and the median is four years. Fifty six per cent of companies which delisted did so within their first four years of trading and another 22% delisted within the next five years. This means a total of 78% of companies that delisted did so within nine years of listing.When delistings attributed to capitalisation and name changes are excluded from the sample, the mean is 10 years and the median is five years. Forty four per cent of companies which delisted did so within their first four years of trading and another 28% delisted within the next five years (ie, a total of 73% within nine years of listing). **(iv) Industry of delisted companies**The industries which account for the greatest number of delistings are: banks, investment and financial (15% when delistings attributed to capitalisation and name changes are included and 18% when delistings attributed to these two reasons are excluded); miscellaneous industrials (21% and 23%); and resources (25% and 16%). Collectively these industries account for 61% of delistings when capitalisation and name changes are included and 56% of delistings when capitalisation and name changes are excluded. The remaining industries each account for five per cent or less of delistings. **(d) Summary** The results of the study indicate that:* companies are not delisting because of corporate law reforms - they delist for other reasons;
* the extent of delisting is high - for both large and small companies; and
* companies that delist tend not to be listed for extended periods of time (the mean is eight years and the median is four years). 78% of companies that delisted did so within nine years of listing.

**(e) Media commentary on the research report**1. "Companies not delisting because of corporate law reforms", Across the Board, 28 November 2006, page 12. "Set and forget' and regret", The Australian, 25 November 2006, page 443. "Study shows big turnover of listed companies", The Australian Financial Review, 24 November 2006, page 834. "More delist and enlist private cash", The Age, Business section, 22 November 2006, page 35. "Stricter regulations not cause of delisting, experts say", The Australian, 22 November 2006, page 486. "Local companies not prone to delisting", The Australian Financial Review, 22 November 2006, page 16The research report is available on the [Centre for Corporate Law](http://cclsr.law.unimelb.edu.au/go/news/index.cfm%22%20%5Ct%20%22_new) website. **1.17 2007 ISS policy updates** On 17 November 2007, proxy adviser Institutional Shareholder Services (ISS) announced updates to its US and international proxy voting policies for 2007. ISS analysts will begin applying the new policies for all companies with shareholder meeting dates on or after 1 February 2007. ISS is fine tuning a number of policies in 2007, including those addressing a majority vote standard for board elections and independent director definitions. Key modifications to remuneration-related policies include those dealing with options backdating and shareholder proposals on disclosing measures for performance-based pay.A full listing of changes for 2007 is available on the [ISS](http://www.issproxy.com/pdf/2007%20US%20Policy%20Update.pdf%22%20%5Ct%20%22_new) website. **1.18 Managing risk: stakeholder perspectives** A new report by Ernst & Young "Managing Risk: Stakeholder Perspectives", compares the findings of a series of global research surveys among three key stakeholder groups in relation to risk management: investors, senior executives and independent board members. This review looks at the implications for the people responsible for leading and managing risk in companies, its senior executives and the responsibilities on risk that senior executives have towards both internal and external stakeholders. The key findings are:* Risk mitigation and compliance are the top risk management priorities across the stakeholder groups. A significant number also view risk management as an important source of competitive advantage.
* Stakeholders are consistent in their view that clear ownership of risk and effective communications are key factors for successful risk management. While board members are largely satisfied with the information they receive, investors want more focused information than they currently receive.
* Just over a third of companies surveyed reported that they are successfully managing risk. The report identifies practices most associated with successful risk management.

Further information is available on the [Ernst & Young](http://www.ey.com/GLOBAL/content.nsf/International/Global_Risk_-_Risk_Research_-_Stakeholder%22%20%5Ct%20%22_new) website.**1.19 Corporate sustainability: survey**A report published in November 2006 ranks the world's major companies in corporate sustainability reporting, transparency and disclosure. The leading companies are:

|  |  |  |
| --- | --- | --- |
| **2006 Rank** | **Company** | **Country** |
| 1. | BT | UK  |
| 2. | Co-operative Financial Services  | UK |
| 3. | BP | UK |
| 4. | Anglo Platinum | South Africa |
| 4.  | Rabobank | Netherlands  |
| 6. | Unilever | UK / Netherlands |
| 7. | MTR  | Hong Kong |
| 7. | Vodafone | UK |
| 9. | Shell Group | UK / Netherlands |
| 10.  | Nike | US |
| 10. | Novo Nordisk | Denmark  |

The full ranking and analysis is available in the report.Highlights of the report include:**Financial markets begin to influence sustainability disclosure:** Cutting-edge sustainability reports are framed as part of a portfolio of information available to both SRI and, increasingly, mainstream investors. A panel of financial experts, convened to advise on the Report, agreed that their sector's appraisal of stock volatility and long-term value was benefiting from heightened corporate transparency. Although around 70% of companies report some interaction with investors on sustainability matters, many still lack the hard targets and forward-looking information needed to become essential reading for mainstream analysts. **Sustainability integrates into core business processes:** Most so-called sustainability reports are only steps in that direction, but there has been an increase in the proportion of companies reporting the integration of sustainable development factors into core decision-making. A central concept in this area has been 'materiality', helping companies sort the critical risks and opportunities from the background noise. This year at least 80% of companies were rated as integrated on at least one aspect of their reporting. **Public policy initiatives and disclosure remain weak:** The report concludes that under half of corporate reporters still fail to sufficiently discuss and link their sustainability initiatives and commitments to the lobbying activities they undertake and to the wider influence they exercise, either directly or through lobbying and trade organisations. Only 28% of the leading 50 reporters covered this area meaningfully. The report is available from the [Sustainability](http://www.sustainability.com/insight/research-article.asp?id=865" \t "_new) website. **1.20 IOSCO report on board independence of listed companies** In November 2006, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report titled "Board Independence of Listed Companies".According to Principle VI.E of the OECD Principles of Corporate Governance (OECD Principles), boards "should be able to exercise objective independent judgment on corporate affairs". To achieve this objective, OECD Principle VI.E.1 recommends that boards should consider "assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest".The annotation to OECD Principle VI.E states, among other things, that the variety of board structures, ownership patterns and practices in different countries will require different approaches to the issue of board objectivity. In many instances objectivity will require that a sufficient number of board members not be employed by the company or its affiliates and not be closely related to the company or its management through significant economic, family or other ties. This would not prevent shareholders from being appointed as board members. In other instances independence from controlling shareholders (sometimes called "block holders") or another controlling body will need to be emphasised, in particular if the ex ante rights of minority shareholders are weak and opportunities to obtain redress are limited.The OECD Principles are drafted at a high level of generality and emphasise outcomes, which makes it possible to apply them in jurisdictions with varying legal and regulatory frameworks. Accordingly, additional work on how they are implemented in practice may be useful. To this end, in 2005 the IOSCO Technical Committee, given its expertise on standards for listed companies (e.g. disclosure standards, principles for board audit oversight committees), set up a Task Force on Corporate Governance to study how OECD Principle VI.E has been reflected in the legal and regulatory frameworks applicable to listed companies in major securities markets.Given the diversity of board structures among IOSCO members and the OECD Principles' recognition that there are potentially many different, functionally equivalent ways to achieve particular outcomes, the study was designed to cover:* non-executive board members of companies with unitary boards;
* members of supervisory (i.e. non-executive) boards of companies with dual board structures; and
* members of the board of auditors elected by shareholders (which exist, for example, in Brazil, Italy, Japan and Portugal).

This diversity of governance structures means the term "board" is used in a broad sense - i.e. encompassing relevant corporate bodies with either management, monitoring or supervisory functions.In keeping with the Task Force's mandate, the Report describes, on a purely factual basis, how each jurisdiction addresses OECD Principle VI.E, with a particular focus upon how the applicable standards are designed to promote and facilitate the board's exercise of objective, independent judgment. It should be emphasised that OECD Principle VI.E recommends a particular outcome, i.e. that company boards are able to exercise objective, independent judgment, rather than specifically recommending that board members maintain an independent status according to defined criteria.One mechanism for facilitating the achievement of the outcome specified in Principle VI.E, however, is for a jurisdiction to adopt standards providing for the board, a specified proportion of board members and/or board members performing particular functions to satisfy certain criteria relating to independence. This is the reason why the Report focuses on various jurisdictions' standards in this regard, including: (a) the jurisdictions' criteria for independence; (b) standards relating to the proportion of people who should meet these criteria; (c) determination and disclosure of which board members meet independence criteria; and (d) specific roles and powers of independent board members.Of equal importance, however, are various other standards that underpin, encourage and facilitate the exercise of objective, independent judgment, such as standards relating to board members' appointment and removal, liability, compensation, dedication, training and evaluation. The OECD Principles include numerous recommendations in this regard and the annotations to these OECD Principles provide additional guidance about why and how these standards could be implemented. It was determined, however, that a detailed discussion of how these standards are implemented in various markets was beyond the scope of the Report.The full report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD228.pdf%22%20%5Ct%20%22_new) website.**1.21 IOSCO report on stock exchanges** In November 2006, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Regulatory issues arising from exchange evolution".The report notes that in recent years, the rationale and support for continuing mutual ownership of stock exchanges has tended to weaken and most major exchanges have now converted into for-profit companies with broader shareholder bases. For securities regulatory authorities these changes in exchange ownership and business objectives have been raising significant issues.Those issues can be grouped under two main headings:* issues concerning the regulatory role of exchanges; and
* issues relating more broadly to the regulation of exchanges.

IOSCO Principle 26 articulates the importance of jurisdictions having appropriate supervisory arrangements to ensure that exchanges are properly run. That principle states that:"there should be ongoing regulatory supervision of exchanges and trading systems which should aim to ensure that the integrity of trading is maintained through fair and equitable rules that strike an appropriate balance between the demands of different market participants".The IOSCO Technical Committee first responded to the growing interest among exchanges in moving away from mutual ownership in the "Issues Paper on Exchange Demutualization" (2001 paper), published in June 2001. That report reviewed the regulatory issues that could arise following the demutualization of exchanges and their conversion into for-profit entities and concluded that:* the challenges facing exchange regulators may be heightened when an exchange, operating in a competitive marketplace, decides to restructure its operations as a for profit entity;
* in practice, regulatory responses to such restructuring vary according to circumstances, and there is no universal right regulatory path to follow; and
* given the importance of an exchange in the financial and economic system of a country, the issues arising on conversion to for-profit status would continue to demand regulatory attention.

Since publication of the 2001 paper, the trend for exchanges to demutualize and, in many cases, obtain stock exchange listings has continued. By October 2006, 19 exchanges or holding companies for an exchange group operating in jurisdictions represented in the Technical Committee Standing Committee on the Regulation of Secondary Markets had obtained public listings, including most recently NYSE Group Inc. Demutualized exchanges have become the dominant providers of securities markets globally. The trend among derivative exchanges is similar.The report deals with the following matters:* Section B describes the regulatory role of exchanges and the issues raised for that role by demutualization and the conversion to for-profit business models in combination with the competitive environment existing around them.
* Section C describes the various ways in which securities regulatory authorities have addressed these issues.
* Section D discusses broader issues arising from exchanges' new business models.
* Section E sets out the report's conclusions and recommendations.

The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD225.pdf%22%20%5Ct%20%22_new) website.**1.22 Hedge funds data** Axiss Australia has updated its publication "The Hedge Funds Industry in Australia: Data File Series 2006/07".Key points from the 2006-07 publication highlight that:* Australia's A$62.7 billion (US$46.6bn) hedge funds industry has grown rapidly in recent years to become the largest in Asia.
* Assets under management in the industry have almost tripled in the past two years.
* There are 66 hedge fund managers and 130 hedge fund products in Australia.
* There are 17 fund of hedge fund managers in Australia and 58 fund of hedge fund products in Australia.

The publication is available from the [Axiss Australia](http://www.axiss.gov.au/assets/documents/axissinternet/HEDGE%20FUNDS%20DATA%20FILE_06_FINAL%20PDF20061102135813.pdf%22%20%5Ct%20%22_new) website.  |
| **2. Recent ASIC Developments** |
| **2.1 ASIC releases updated policy on real estate companies** On 7 December 2006, the Australian Securities and Investments Commission (ASIC) released an updated policy statement about the sale of shares in real estate companies following recent legislative amendments to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The updated policy is contained in ASIC's Policy Statement 67 Real Estate companies [PS 67]. This policy statement sets out ASIC's policy on relief from certain provisions of the Act as it applies to real estate companies. While the underlying policy regarding real estate companies remains unchanged, the statement has been updated to reflect legislative amendments to the Act arising from the [Corporate Law Economic Review Program Act 1999](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "_default) (CLERP Act) and the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "_default). The updated PS 67 also now reflects more recently issued relief that ASIC provides to: * real estate agents from the disclosure and licensing provisions (Class Order [CO 00/213] Real estate companies as amended by Class Order [CO 02/266] Real estate companies - amendment), and
* individuals who provide valuations of shares in real estate companies from the licensing provisions (Class Order [CO 05/1243] Licensing relief for valuers providing valuations of shares in real estate companies).

**Background**Real estate companies are companies formed for the purpose of owning and managing land and buildings. An example of a real estate company is a company title property. Shares in the real estate company are held by individuals who wish to have a right of occupation and use of a particular area within the land or building owned by the real estate company. Interests in these real estate companies are regulated under the Corporations Act because they are shares in a company. As a result, an offer to sell shares in a real estate company may trigger the disclosure provisions of the Act. In addition, individuals who deal or who provide advice (such as valuations) about the shares in a real estate company may be required to obtain an Australian financial services licence (AFSL). For some years now, ASIC has granted relief from the financial services disclosure and licensing provisions of the Act because it considers that interests in a real estate company are better regarded as real estate interests and regulated as such. ASIC is also of the view that there would be insufficient regulatory benefit to require State or Territory regulated real estate agents or individuals who provide valuations of shares in the company to meet the costs of obtaining and holding an AFSL. A copy of the updated policy statement on real estate companies is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps67_pdf" \t "_new) website. |
| **3. Recent ASX Developments** |
| **3.1 ASX and FINSIA** ASX Limited (ASX) and the Financial Services Institute of Australasia (Finsia) have signed a heads of Agreement to commence a two year pilot scheme to increase research coverage of medium sized ASX listed companies.**3.2 Australian Stock Exchange branded Australian Securities Exchange** On 5 December 2006, Australian Stock Exchange Limited officially changed its name to ASX Limited. The group was created by the merger of the Australian Stock Exchange and SFE Corporation Limited in July 2006 and will operate under the brand "Australian Securities Exchange".**3.3 Changes to ASX group fees and rebates** ASX Limited has announced a number of changes to its fees, charges and rebate mechanisms across the ASX and SFE markets, and Austraclear. The changes to the ASX Group fees will for the most part become effective from the start of next financial year (i.e. 1 July 2007). Details of the fee changes are available on the on the [ASX](https://www.asxonline.com/%22%20%5Ct%20%22_new) website and the [SFE](http://www.sfe.com.au/%22%20%5Ct%20%22_new) website.**3.4 ASX Corporate Governance Council revised principles** The ASX Corporate Governance Council was formed in August 2002. In 2003 the Corporate Governance Council released 'Principles of Good Corporate Governance and Best Practice Recommendations'. A revision of this was released in November 2006. The deadline for submission on the revised document is 9 February 2007. The revised principles are designed to reduce areas of overlap; promote understanding by merging Principles and Recommendations that cover common areas and take into account feedback from Council review groups and users of corporate governance information. The proposed effective date for the revised Principles is the first financial year commencing after 1 July 2007.Further information was provided in the [November issue](http://research.lawlex.com.au/news.asp?id=4355&sp=1" \l "031" \t "_new) of the Corporate Law Bulletin and is also available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.  |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Takeovers Panel publishes guidance note on takeover documents** On 15 December 2006, the Takeovers Panel advised that it has published its Guidance Note 18 on Takeover Documents. The Guidance Note addresses the issues of "Wrap Information" and "Broker Valuations" in takeovers documents. The Panel published a draft of the Guidance Note for consultation late last year.A copy of the Guidance Note is available on the Guidance page of the [Panel's](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.**4.2 Rinker Group Limited - Panel decision** On 7 December 2006, the Takeovers Panel (Panel) advised that it has considered the application (Application) from Rinker Group Limited (Rinker) in relation to an off-market takeover bid by CEMEX, S.A.B. de C.V. (CEMEX) for Rinker.CEMEX agreed to provide a supplementary bidder's statement to address a number of concerns which the Panel had concerning disclosure of the terms of the offer relating to the facility offered by CEMEX to convert its US dollar consideration into Australian dollars and the risks associated with converting the US dollar consideration into Australian dollars. CEMEX also provided the Panel with an undertaking that it would not purchase Rinker shares outside its offer for Australian dollars which addressed a concern raised by Rinker. The Panel had advised CEMEX that, in the absence of additional disclosure, it was minded to make a declaration of unacceptable circumstances. However the Panel considers that CEMEX's proposed supplementary disclosure and undertaking will address its concerns and accordingly, declined to make a declaration of unacceptable circumstances.CEMEX's offer is structured as a United States dollar offer with a conversion mechanism to allow Rinker shareholders to elect to have the United States dollar consideration converted into Australian dollars. Rinker submitted that the actual effect of CEMEX's offer is that shareholders who elect to receive Australian dollars may receive different amounts depending upon the date on which CEMEX pays funds to its share registry (which would then pay the relevant shareholder).The Application sought review of certain relief granted by the Australian Securities and Investments Commission (ASIC) which was designed to facilitate CEMEX's offer structure, and an order that the ASIC relief be set aside. The Application also sought a declaration of unacceptable circumstances and final orders that CEMEX must amend its offer to ensure that all Rinker shareholders who elect to receive bid consideration in Australian dollars, receive the same Australian dollar amount.Further information is available on the [Takeovers Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.  |
| **5. Recent Corporate Law Decisions** |
| **5.1 Circumstances where a court may give judicial advice to a trustee involved in litigation** (By Tony Downes, Blake Dawson Waldron)Australian Pipeline Limited [2006] NSWSC 1316, New South Wales Supreme Court, Barrett J, 4 December 2006The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/december/2006nswsc1316.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/december/2006nswsc1316.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**If a trustee is minded to seek judicial advice on a question related to the bringing or defending of legal proceedings, the trustee may do so only if the legal proceedings are concerned with the management or administration of the trust property. A court will not provide judicial advice to a trustee on a question relating to the potential liability of the trustee personally because of past acts and a contemplated course of conduct of the trustee.**(b) Facts**Australian Pipeline Limited (APL) is the trustee and responsible entity of the Australian Pipeline Trust (the Trust), a managed investment scheme registered under Chapter 5C of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (Corporations Act). APL applied to the New South Wales Supreme Court under section 63 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "_default) (Trustee Act) for an opinion, advice or direction on the following question:"Whether APL is justified in defending proceedings numbered NSD 2265 of 2006 commenced by Alinta LGA Limited in the Federal Court of Australia insofar as they raise allegations of breach of trust against APL."The proceedings commenced by Alinta LGA Limited (Alinta LGA) related to action taken by APL to satisfy the conditions of its Australian financial services licence, following a merger between Alinta Limited and The Australian Gas Light Company (AGL). Prior to the merger, the condition that APL must hold at least $5 million net tangible assets was satisfied by obtaining a financial undertaking from AGL, a company admitted to the official list of ASX. Following the merger, AGL was de-listed, and APL was required to satisfy the condition through other means.After consideration of a number of options, the board of APL determined that it would satisfy the condition by causing the company's own issued share capital to be increased from its pre-existing level of $24 to $5,000,024, by the allotment and issue of 5 million shares to APT Pipelines Limited (APTPL), in return for subscription moneys of $5 million. APL is itself the registered holder of all the shares constituting the issued share capital of APTPL, although those shares are held by APL non-beneficially as an asset of the Trust.Following the issue of shares, Alinta LGA alleged, among other things, that:* the assets of the Trust, to the extent of $5 million, were applied in acquiring 5 million shares in APL for the benefit of APL and its directors rather than for the benefit of the unitholders of the Trust;
* APL, as trustee of the Trust, had breached the duties that it owed to the unitholders of the trust under common law and the Corporations Act; and
* by causing APTPL to subscribe for the 5 million shares in APL, APL gave to itself out of the property of the Trust a financial benefit within the meaning of section 208 of the Corporations Act, as modified by section 601LC.

In response to the commencement of proceedings based on these allegations, APL applied to the court for judicial advice under section 63 of the Trustee Act as to whether it was justified in defending the proceedings commenced by Alinta LGA.**(c) Decision**Barrett J found that the purpose of section 63 of the Trustee Act was to entitle a trustee, who is in genuine doubt about the propriety of any contemplated course of action in the exercise of their fiduciary duties and discretions, to seek proper judicial advice on the legality of such action and, if so advised by a court of law, to protect their position by following the guidance of the court.Barrett J noted that typical cases where the section is applicable include where a trustee is faced with litigation, either as plaintiff or defendant, and desires advice whether to sue or defend the action.However, he noted that in all cases involving potential litigation where judicial advice was given, the trustee's participation in the legal proceedings related to protection, recovery or management of the trust estate. After reviewing a number of authorities, he concluded that if a trustee is minded to seek judicial advice under section 63 on a question related to the bringing or defending of legal proceedings, the trustee may do so only if the legal proceedings are concerned with the management or administration of the trust property or the pre-emptive interpretation of the trust instrument.Barrett J found that the present case was not such a situation. He found that the trustee's concern, upon the present application, was with the question of the potential liability of the trustee personally, because of past acts and a contemplated course of conduct of the trustee. He considered that the determination of the question of whether the Federal Court proceedings should or should not be defended by APL would not contribute to any particular outcome related to the management or administration of the assets of the Trust. He therefore found that the trust property of which APL had stewardship would in no way be protected or enhanced by defence of the claim.Barrett J therefore refused to provide judicial advice to APL in relation to the question posed in the application, namely, whether APL should defend the proceedings in the Federal Court.**5.2 Ex parte orders for extensions of time in voidable transaction proceedings** (By Polat Siva, Clayton Utz, Melbourne)Kimberley Stuart Wallman as Liquidator of Graffitti Holdings Pty Ltd (in Liquidation) v Milestone Enterprises Pty Ltd [2006] WASC 260, Supreme Court of Western Australia, Master Newnes, 24 November 2006.The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/november/2006wasc0260.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/november/2006wasc0260.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This is another in a recent line of cases considering the operation of section 588FF(3)(b) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"), pursuant to which liquidators of companies may seek extensions of time to commence proceedings in relation to voidable transactions.**(b) Facts**On 4 August 2006, the liquidator of Graffitti Holdings Pty Ltd (GH) made an application pursuant to section 588FF(3) of the Act seeking an order extending for a period of 12 months the time within which he could make an application under section 588FF(1) of the Act against the defendant seeking orders in respect of allegedly uncommercial transactions.The application was made ex parte on a Friday afternoon and Counsel for the liquidator sought to have the application heard and determined on that day on the basis that the limitation period under section 588 FF(3) would expire on 6 August 2006. Although Master Newnes expressed doubt that the application had to be determined on that day in order to preserve the liquidator's rights, the extension order was made on 4 August 2006. Leave was expressly reserved to the defendant to apply to vary or set aside the extension order. The liquidator was ordered to serve the relevant materials on the defendant and the application was adjourned for further hearing. The court made it clear to the liquidator on 4 August 2006 that if any application was made by the defendant to set aside the extension order, the onus would be on the liquidator to establish that he was entitled to the order, rather than on the defendant to show why the order should be varied or set aside (ie. a hearing de novo). The defendant applied to set aside the extension order and argued that it was entitled to have it set aside as of right by reason of the fact that it had been obtained ex parte. Further, the defendant argued that the liquidator's application in relation to the alleged uncommercial transactions was without substantive merit. **(c) Decision** The court held that the extension order should stand. However, the court varied the terms of the extension order which had initially been made in unrestricted terms (ie. it could relate to any transactions between GH and the defendant) so as to limit it to the only transaction which the liquidator had put forward as forming the possible basis of a proceeding under section 588FF(1). Several aspects of the decision merit further consideration. **(i) Was the liquidator entitled to an ex parte order?**The court considered the authorities which recognise that ex parte orders are appropriate in circumstances of "necessity or other strong reason", one of which is urgency. The court stated that it was not apparent from the liquidator's affidavit in support of the application why the application had been left so late. The court inferred that the perceived urgency was wholly of the liquidator's making (as well as a misunderstanding of the need to have the application heard and determined before the expiry of the limitation period). Accordingly, the court held that the hearing of the application ex parte could not be justified on the basis of urgency. **(ii) Should the order be set aside?**Although the court found that the hearing should not have proceeded ex parte, that did not necessarily mean that the extension order should be set aside. Rather, that issue was "to be determined on the basis of considerations of practical justice; it is not a question of punishing the plaintiff for making the application on an ex parte basis when adequate grounds for doing so did not exist".The court held that the extension order should not be set aside on the ground that it was made ex parte, because the extension order not only reserved to the defendant the right to apply to set it aside, but had been made on the basis that the hearing in respect of an application to set aside the extension order would be conducted as a hearing de novo of the liquidator's application for an extension order. In light of this, the court held that the defendant was in the same position that it would have been had it been present to make submissions at the initial ex parte hearing. **(iii) Is an application spent once an extension order is set aside?**The court considered whether, if the extension order did need to be set aside (contrary to the court's finding), the liquidator's application for an extension order would be spent, so that a fresh application would be necessary to proceed against the defendant. This was an important question: if the application was spent, the liquidator would not be able to proceed against the defendant because any application for an extension of time under section 588FF(3) must be made (but not necessarily heard and determined) prior to the expiry of the three year limitation period, which had expired at the time of the inter partes hearing. The court considered the conflicting authorities in relation to this issue and found that they could not be reconciled. The court preferred the dissenting view of Justice Fryberg in Greig v Stramit Corporation Pty Ltd [2004] 2 Q D R 17, which the court held was, in effect, endorsed by the New South Wales Court of Appeal in BP Australia Ltd v Brown [2003] NSW CA 216. This required the court to consider whether the making of the ex parte order was intended to finally dispose of the application for an extension of time. Having regard to the fact that the order in this case was expressly made subject to the defendant's right to apply to set it aside, the court held that the ex parte order did not, and was not intended to, finally dispose of the application for an extension of time. Accordingly, if the order needed to be set aside, the liquidator's application for an extension of time remained on foot and could be re-heard. **(iv) Assessment of the merits**The court assessed the evidence in relation to the merits of the liquidator's case against the defendant and, whilst it stated that the evidence was "incomplete" and "in some ways unsatisfactory", it found there were "matters which warrant further investigation" and, accordingly, it was not unfair to expose the defendant to the continuing prospect of a suit by granting the extension. **(v) Can the liquidator wait for funding before commencing proceedings?**In relation to delay, the liquidator stated that he did not have funding to commence proceedings earlier. The defendant submitted that this was unsatisfactory and that the liquidator should have commenced proceedings and not pursued them until funding was available. The court rejected the defendant's submissions and held that it was not unreasonable for the liquidator to hold off commencing proceedings until funding was available. **(vi) Restricted scope of the order**When originally made, the ex parte order had been in unrestricted terms and could therefore apply to any transactions entered into by GH with the defendant. However, the court found that the case for an order in such wide terms had not been made out, and restricted the extension order to the transaction that the liquidator referred to as forming the possible basis for a proceeding under section 588FF(1). **(d) Comments**This case is a further illustration that the issue of extension orders in relation to voidable transactions is continuing to cause difficulties for parties and the courts. Whilst liquidators can perhaps take some comfort in the finding that it was not unreasonable to await funding prior to commencing proceedings, the willingness of the court to restrict the terms of the original extension order is a warning to liquidators to be careful about delaying commencing investigations and/or proceedings. Whilst it would not have had any application in this case, it is worth noting that the recently announced insolvency law reforms propose to amend section 588FF(3)(a) of the Act so as to make the limitation period for commencing voidable transaction proceedings the later of three years after the relation-back day or 12 months after the first appointment of a liquidator to the company. Section 588FF(3)(b) of the Act will also be similarly amended to allow liquidators to make an application for an extension of time within the same period. Accordingly, under the proposed amendments, liquidators who are appointed to a company after the termination of a deed of company arrangement will be able, within 12 months of their appointment, to commence voidable transaction proceedings or make an application for an extension of time to do so, irrespective of whether more than three years has elapsed since the relation-back day. **5.3 Claim for damages on the grounds of misrepresentation and negligence resulting from involvement in syndicated credit facilities** (By Peter Mordue, DLA Phillips Fox)IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), England and Wales High Court (Commercial Court), Toulson J, 21 November 2006The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWHC/Comm/2006/2887.html](http://www.bailii.org/ew/cases/EWHC/Comm/2006/2887.html%22%20%5Ct%20%22_new)**(a) Summary**This decision of the English High Court of Justice concerned IFE Fund SA's (IFE) claim for damages against Goldman Sachs International (Goldman Sachs) for its loss on a transaction on the grounds of misrepresentation, pursuant to section 2(1) of the Misrepresentation Act 1967 (Eng), and negligence. The essence of IFE's complaint was that it was induced to enter into a transaction by information provided by Goldman Sachs, which presented a picture that was misleading, and not corrected or qualified after Goldman Sachs had cause to doubt the information.It was found by Toulson J that IFE's claim failed because Goldman Sachs did not make the implied representations or owe IFE the alleged duty of care and IFE was barred by clause 16.4 of the Bondholders' Agreement between the parties and others (Agreement) from bringing legal action against Goldman Sachs.**(b) Facts**IFE bought from Goldman Sachs bonds and warrants issued by French company Autodis SA (Autodis) for €20 million for the purpose of enabling Autodis to takeover an English company, Finelist Group PLC (Finelist), upon being supplied with a Syndicate Information Memorandum (SIM).The structure was such that IFE was a member of a syndicated credit facility (mezzanine credit facility) arranged and underwritten by Goldman Sachs with other credit facilities on top of the mezzanine credit facility.It transpired that Finelist was in a terrible financial position and had deceived its auditors by transferring money between different members of the group, which eventually resulted in administrative receivers being appointed.After the collapse of Finelist, an operation was mounted to rescue Autodis. This involved investors injecting more funds under the Agreement. Clause 16.4 of the agreement stated:"The Parties, both on their own behalf and for and on behalf of their Affiliates, for which they shall be answerable, undertake (i) to cooperate and provide every assistance with the preparation and conduct of Proceedings, (ii) not to conduct proceedings relating to the Proceedings and, more generally, to any facts and circumstances which may be the subject of the Proceedings other than in the context of and in accordance with the provisions of the Participating Capital Loan and (iii) not to bring any proceedings of any kind whatsoever against (x) Autodis or its subsidiaries, (y) any of the members of the Supervising Board or Managing Board of Autodis or Autodistribution, or (z) any of the Parties, or their Affiliates, with regard to the Finelist Group plc, its acquisition and all events, actions or omissions linked to this acquisition which have preceded or followed this (including with regard to corporate offices within the Finelist Group plc)."**(c) Decision**IFE claimed damages for its loss on the transaction against Goldman Sachs on the grounds of misrepresentation, pursuant to section 2(1) of the Misrepresentation Act 1967, and negligence. The claim in negligence was put two ways, either negligent misstatement, or breach of a duty of care to inform. IFE's complaint was that it was induced to enter into the transaction by information provided by Goldman Sachs, which presented a picture that was in fact misleading and which was not corrected or qualified after Goldman Sachs had cause to doubt its reliability as a result of receiving two further reports from the investigative accountants.Goldman Sachs's grounds of defence to the claim under the Misrepresentation Act were:1. it did not make the pleaded representations;2. if it did, such representations were confined to Goldman Sachs's state of knowledge at the time when they were made and did not give rise to any duty to disclose information subsequently acquired by it;3. it was reasonable for Goldman Sachs not to consider that the position was materially changed by any further information obtained by Goldman Sachs before IFE became contractually bound;4. IFE did not rely on the alleged representations;5. IFE's claim to recover its loss was excluded by the terms of Goldman Sachs' SIM, which had contractual effect; and6. IFE's claim was barred by the terms of a subsequent Bondholders' Agreement (Agreement) entered into between IFE, Goldman Sachs and others.The allegations by IFE of misrepresentation and negligence involved essentially the same allegations and as such were not discussed separately by Toulson J.IFE relied on a reservation which it entered at the time of signing the Agreement. Mr Mitjavile who signed the Agreement for IFE was concerned that clause 16.4 (as set out above) might prevent IFE from taking legal action against a party whose acts or omissions had led IFE to invest in Autodis. He sought to have the clause amended, but Mr Sauvage (the bondholders' representative) insisted that the Agreement should be signed as it stood without delay. Mr Mitjavile signed the Agreement, after writing a side letter. He wrote to Mr Sauvage referring to clause 16.4:"It goes without saying that our company's fiduciary duty towards IFE Fund's subscribers prevents us, both on behalf of our company and IFE fund, from waiving the right to potentially try to find any persons involved liable, whose action or omission would have provoked or encouraged our investment decision.Therefore, we would like to point out that based on our understanding of the above-mentioned clause, the purpose and effect of this clause is not to prevent us from taking such action in the future, if this proves to be necessary and appropriate.We would like to specify that we accept to sign the above-mentioned legal documents as currently drafted based on this understanding and at your express request."**(d) Conclusion**Toulson J concluded that IFE's claim failed because:1. Goldman Sachs did not make the implied representations or owe it the duty of care alleged; and2. IFE's claim was barred by clause 16.4 of the Agreement.These conclusions were based on the fact that:1. Goldman Sachs did not act as an advisor to IFE or purport to carry out any professional service for IFE, as the terms in the SIM made clear. They were acting as sponsors and not on behalf of the recipient of the SIM. There was therefore no positive duty of disclosure; and2. Mr Mitijavile knew there was more negative information which had not been disclosed to IFE at the time he entered into the Agreement for and on behalf of IFE and therefore knew all that was essential for clause 16.4 to constitute a valid waiver.**5.4 The Consumer Credit (Victoria) Code - credit contracts and disclosure requirements** (By Tim Downing, Mallesons Stephen Jaques)Australia Finance Direct Ltd v Director of Consumer Affairs Victoria [2006] VSCA 245, Supreme Court of Victoria (Court of Appeal), Maxwell, P, Ashley and Neave, JJA, 20 November 2006)The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsca245.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsca245.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Essentially, the Consumer Credit (Victoria) Code is a device aimed at protecting consumers when entering into credit contracts, to ensure they fully understand what they are getting into. Part of that regime concerns what credit providers must disclose to borrowers. This case, while considering disclosure of a certain arrangement, has broader implications in demonstrating that credit providers should ensure they fully disclose all details of the provision of credit to a borrower. This is particularly so in cases where there is a multi-partite arrangement under which:(i) a third party provides goods or services to the borrower;(ii) to fund the purchase of those goods or services, the credit provider lends funds to the borrower; and(iii) there is an arrangement between the credit provider and supplier related to the provision of credit to the borrower, under which the credit provider receives or retains funds from the supplier.**(b) Facts** Australian Finance Direct Ltd ("AFD") entered into credit contracts with customers ("C"), under which C borrowed the necessary funds to enrol in an investment seminar. A standard form credit contract was used.Once the loan to C was approved, the funds covering the seminar fee were transferred to the seminar providers NII/Capital, less an amount held back by AFD under an arrangement it had with NII/Capital. This holdback existed for the purpose of enabling AFD to lend the amount of the fee to applicants on more favourable terms, that is, a reduced interest rate. C was unaware of the holdback and it was not disclosed in the credit contract. AFD's standard interest rate was usually 24%. In the cases where AFD loaned money to persons in respect of the seminar courses offered by NII/Capital, the amount of the interest actually charged combined with the amount of the holdback often amounted to 24%. For every customer, the amount of the loan in their credit contract was for the full cost of the seminar and the amount of the loan was always said to be payable to NII/Capital.It was argued that the failure to disclose the holdback breached section 15B of the Consumer Credit (Victoria) Code ("Code"), which requires a credit contract to specify the amount of credit to be provided and the persons to whom it is to be paid and the amounts payable to each of them.The Victorian Civil and Administrative Tribunal (VCAT) held that the holdback arrangement did not create a debt payable by NII/Capital to AFD, which was then capable of being offset against the amount AFD was required to pay to NII/Capital under the contract with C. So, section 15B was breached as the holdback should have been disclosed to C. This position was upheld on appeal to the Supreme Court.VCAT also held that the holdback constituted interest and, as such, sections 15C, 15D and 15E of the Code were breached as they require credit contracts to state the annual percentage of interest, its method of calculation and the total interest charges payable.On appeal, the Supreme Court upheld VCAT's findings in respect of section 15B, but overturned its findings in respect of sections 15C, 15D and 15E.AFD appealed against the court's findings in respect of section 15B and the Director of Consumer Affairs cross-appealed against the court's findings in respect of sections 15C, 15D and 15E.**(c) Decision** **(i) Challenging VCAT's factual findings - was the finding of fact an error of law?**Under section 148(1) of the [Victorian Civil and Administrative Tribunal Act 1998](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5443" \t "_default), a party is permitted to appeal from VCAT to the Supreme Court on questions of law alone. Hence, if VCAT's findings about the nature of the arrangement between AFD and NII/Capital were simply findings of fact, then VCAT can only have erred in law if those findings were not supported by any evidence, or were otherwise peverse.The Court of Appeal agreed with the findings of the Supreme Court judge that on the facts it was open to VCAT to make the factual findings that it did, being that the evidence adduced to VCAT did not establish an agreement between AFD and NII/Capital whereby the holdbacks constituted a debt owed or to be owing by NII/Capital to AFD. Hence, there was no error of law by VCAT as its decision was open to it on the basis of the evidence put forward. On this basis alone, the appeal could be dismissed.**(ii) What if VCAT's characterisation of the arrangement was a question of law? Was there a legally enforceable contract?**Even if the question of the characterisation of the facts is a question of law, the Court of Appeal found that VCAT did not err in finding there was no legally enforceable agreement for the payment of holdbacks. Neave and Ashley JJ.A agreed that none of the correspondence or arrangements over the years between AFD and NII/Capital made the holdbacks debts payable to AFD. The holdback was simply retained by AFD. It was never contemplated that it should be paid to NII/Capital, or that it was to be held by AFD to be paid at the direction of NII/Capital, to AFD or anyone else.Neave and Ashley JJ.A stated that it was wrong to regard the holdback arrangement as a payment by AFD to itself at the direction of NII/Capital. But, even if the holdback was a payment to AFD at the direction of NII/Capital, AFD was required to disclose it to C under section 15B(a)(ii).Their Honours went further to say that, even if there was an enforceable contract, in the circumstances of the actual agreement it must have been intended that the holdback was an amount to be retained from the amount of credit payable to NII/Capital by AFD, rather than an amount to be paid by NII/Capital to AFD. This means that, in substance, the amount of credit was split between AFD and NII/Capital. Hence, in this situation it was not an amount required to be paid by NII/Capital, so there was still an obligation to disclose it to C.**(iii) Does section 15B require disclosure of amounts not required to be paid under the credit contract?**This is clearly a question of law. AFD argued that section 15B(a)(ii) only requires disclosure of an amount which is payable out of the amount of credit to a person (including the credit provider) under the contract between the credit provider and the borrower. In other words, amounts paid to a person under a separate arrangement (not the credit contract) do not need to be disclosed to C.Neave and Ashley JJ.A rejected this submission on the basis that:* the legislative history and policy goals of the Code,
* the text of the provision itself, and
* the legislative context in which it appears,

support an interpretation which requires disclosure of the amount of the holdback to C.The focus of legislative history and policy has been on "truth in lending" to protect consumers and ensure they receive accurate information. Further, the purpose is to give consumers a basis for comparison between credit providers. The purpose of the Code is expressed to be to regulate the provision of credit for "personal, domestic or household purposes". The Code also states that, in interpreting a provision of the Code, the interpretation which will best achieve the purpose of the Code is to be preferred. Hence, in multi-partite transaction cases such as this, where the consumer has entered into a contract with the supplier of the goods or services and another contract with the credit provider for credit, even though there may be no contract between the supplier and the credit provider, there is some form of arrangement between the two. It is this characteristic, and the commonality of such multi-partite transactions in society, which support the disclosure requirements of the section being broad enough to require disclosure of the holdback to C.In respect of the legislative context, the Code contains provisions which recognise the multi-partite relationships which may exist between suppliers of goods and services and credit providers, including:* Part 7, which concerns the inter-relationship between contracts for the provision of goods and contracts for the provision of credit and cross-liability;
* section 15M, which deals with disclosure of a commission paid by or to the credit provider; and
* section 15N, which requires the disclosure of the details of any credit-related insurance contract.

All these provisions require disclosure of matters which do not form part of the borrower's contract with the lender, but which should be known to the borrower. That supports a broad interpretation of section 15B(a)(ii), being that the holdback is something which C should know about and have been informed of.A further point of discussion concerned the words of the section. The Court of Appeal felt that AFD's argument that the words "under the contract" had been left out of section 15B(a)(ii) merely to avoid repetition was not accurate, and was an attempt to read down the provision. Neave and Ashley JJ.A said that the absence of the words "under the contract", which appear in many of the other disclosure provisions in section 15, indicated that section 15B(a)(ii) is intended to require that the credit contract specify the persons to whom the amount of credit is to be paid, regardless of whether the source of that obligation is the contract document or a different agreement. In further support of this, the words "under the contract" appeared in the preceding legislation and were not incorporated into the Code, so this indicates that they were deliberately excluded. Its omission was not merely to avoid repetition.In any event, the words clearly cover the amounts retained by AFD through the use of the words "including the credit provider" which is sufficient to cover retention of the holdback fee. It is wide enough to capture amounts paid to third parties or the credit provider under an arrangement separate to the credit contract.**(iv) The cross-appeal - did the holdback constitute interest?**The Court of Appeal unanimously rejected the cross-appeal for the following reasons:* the holdback was not an amount of interest, but was an additional amount retained by AFD;
* the credit contract did specify the rate of interest to be paid;
* the existence of the words "under the contract" in the relevant sections made it clear that as the holdback was not payable under the contract, but under a separate arrangement, so it could not be characterised as interest.

**(v) Dissent (in respect of the appeal by AFD)**Maxwell P dissented and held that section 15B(a)(ii) had not been breached by AFD. His Honour said that:* the holdback was equivalent to a payment to AFD by NII/Capital, or a payment by AFD to itself at NII/Capital's direction - simple offset occurred;
* a critical factor was that the full amount of the seminar fee was payable to NII/Capital;
* it did not matter whether the source of the holdback was contractual, or merely, voluntary;
* the holdback arrangement was necessarily bipartite between AFD and NII;
* the Code is only concerned with the content of the agreement between a lender and borrower - so section 15B did not require the amount of the holdback to be disclosed because it was not a part of the credit contract;
* the holdback was linked to the credit contract, but that nexus was not sufficient to regard the holdback as part of the credit contract;
* other provisions in section 15 prescribe situations where amounts payable outside the credit contract must be disclosed, so the absence of a provision requiring a holdback amount to be disclosed shows it is not required to be disclosed; and
* the payment obligations of the credit provider under the credit contract supplies the particulars required by section 15B.

**5.5 Equitable principles for the recovery of ultra vires payments** (By Warwick Taylor, DLA Phillips Fox)Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council; Hillig v Darkinjung Pty Ltd [2006] NSWSC 1217, New South Wales Supreme Court, Barrett J, 16 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1008.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/october/2006nswsc1008.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case deals with the equitable issues which arise where:* a statutory body corporate makes ultra vires payments to a trust; and
* the trustee subsequently loans those moneys in breach of its fiduciary duty to return them, and where the recipients of the loans have notice that the original payment may have been ultra vires.

The equitable concepts of tracing and following; Barnes v Addy constructive trusts; equitable compensation; and a trustee's right to satisfy a deed of indemnity from trust property where it was not authorised to enter into that deed are all discussed by Barrett J in this case. The case also deals with an unusual application of the oppression remedy, in an instance where the party claiming the benefit of ss232 and 233 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) is the sole member of the relevant company.**(b) Facts**The Darkinjung Local Aboriginal Land Council ("Council") is a body corporate constituted by s50 of the [Aboriginal Land Rights Act 1983 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6630" \t "_default) ("ALR Act"). In 2002, the Council sold land at North Entrance for $42 million. Subsequently, it made a number of payments in the sum of $25,757,095 to Darkinjung Pty Ltd ("DPL"), of which it was the sole member. DPL was the trustee of the Darkinjung Local Aboriginal Land Council Trust ("the Trust"). In an earlier hearing, Barrett J held that these payments were ultra vires, as they did not "[entail] performance by DLALC of a function of promoting the protection of Aboriginal culture and the heritage of Aboriginal persons in DLALC's area", as required by the ALR Act.DPL then applied these funds through loans to a number of companies, including three companies referred to as the "Enterprise Companies" which were wholly-owned subsidiaries of the Council, as well as a related company referred to as "CattleCo". DPL and the Enterprise Companies were all companies registered under the Corporations Act 2001 (Cth) ("Corporations Act"). At the time these loans were made, concerns had been raised that the Council's payments to DPL may have been ultra vires, and the recipients were aware of these concerns.In May 2006, the directors of each of the Enterprise Companies appointed administrators under Part 5.3A of the Corporations Act, in what Barrett J deemed in an earlier hearing to be "a deliberate contrivance intended to create what can only be described as a false pretext for their appointment", that is to ensure the repayment of the loan amounts. These appointments were successfully overturned in that hearing.The present hearing concerned the following matters:* whether the Enterprise Companies and CattleCo held the loan funds (and certain assets) on trust for the Council, either by tracing or following the loans to those companies, or under the first limb of the rule in Barnes v Addy;
* whether DPL should pay equitable compensation to the Council, as a result of its breach of a fiduciary duty in respect of its receipt of the Council's ultra vires payments;
* whether DPL could use Trust property to satisfy a deed of indemnity in favour of the administrators appointed to the Enterprise Companies; and
* whether the Council, as DPL's sole member, could modify the constitution of DPL to ensure that it could recover the funds owed to it using the oppression provisions of the Corporations Act.

Barrett J's findings and reasoning in respect of these matters are set out below.**(c) Decision** **(i) Following and tracing**The first issue dealt with by Barrett J was whether the Council had a right in equity to trace or follow the loan funds and their proceeds to the Enterprise Companies and CattleCo such that those companies held the funds on trust for the Council. If a claimant has an equitable right to trace or follow property against a third party arising, for example, as a result of a party which owes it fiduciary obligations transferring those assets in breach of those obligations, it can recover that property. This was the case here, as it was common ground that upon receipt of the ultra vires payments from the Council, DPL had a fiduciary duty to the Council in respect of those payments. Barrett J discussed the subtle distinction between tracing and following in some detail. For present purposes, "following" can be understood as following the same asset as it moves between parties, whereas "tracing" identifies substitute assets.Barrett J rejected the Council's claim on the basis that the tracing chain ceased in the hands of DPL. DPL exchanged the Council's ultra vires payments (an asset) for the loans it issued to the Enterprise Companies and CattleCo (effectively, also an asset). DPL therefore held the debts owed to it on trust for the Council. The loan funds in the hands of the recipients did not represent a "substitute" asset, such as to allow that asset to be traced, but an entirely new asset. As Barrett J pointed out, to allow the Council's claim would effectively sanction double recovery.**(ii) Knowing receipts**The Council also contended that the Enterprise Companies and CattleCo received the loan funds knowing that the payments from the Council to DLP were ultra vires. The Council argued that, therefore, a constructive trust arose in respect of the loan funds, following the first limb of the rule in Barnes v Addy (known as "knowing receipt"). The basis of this contention was that, at the times the payments from the Council to DLP were made, there were allegations that the payments were ultra vires. Specifically, three counsel had given an opinion on the issue. Two counsel were of the opinion that the payments were ultra vires. The third counsel's opinion, given after and in knowledge of the other two, supported the validity of the payments. Barrett J rejected this claim, holding that a "conscientious layman" would not have concluded that dishonesty or other moral wrong was involved. Indeed, Barrett J appeared to be of the view that nothing short of a judicial opinion ruling that the payments were ultra vires would change this outcome.**(iii) Equitable compensation**Barrett J dealt briefly with the issue of whether DPL should pay equitable compensation to the Council in respect of such part of the $25,757,095 received from the Council which it had neither retained nor repaid to the Council. Barrett J held that, as DPL was at all times a fiduciary in respect of those moneys, the application of the moneys in any way other than to restore them to the Council was a breach of fiduciary duty. Therefore, Barrett J made an order that DPL pay equitable compensation in respect of these amounts, to take into account "the interest which [the Council] may be presumed to have earned if the moneys had remained with it".**(iv) Whether DPL could satisfy an indemnity using trust property**On 19 May 2006, DPL executed a deed of indemnity in favour of the purported administrators of the Enterprise Companies, indemnifying them in respect of their actions as administrators. The deed was executed in DPL's personal capacity and in its capacity as trustee of the Trust. However, the Trust is a trust for charitable purpose and, as Barrett J noted, DPL was not authorised to execute the deed as trustee, since doing so did not fall within the Trust's charitable objects.Barrett J therefore ordered that DPL could not satisfy the deed of indemnity using Trust property.**(v) Oppression in relation to a sole member**The final substantive issue dealt with in this case was whether the Council could obtain relief under ss232 and 233 of the Corporations Act. Those sections allow the court to make various orders where the conduct of a company's affairs is contrary to the interests of the members as a whole; oppressive; or unfairly prejudicial to or unfairly discriminatory against a member or members. The particular order sought by the Council was that certain provisions of DPL's constitution be omitted. This application is slightly unusual in that the Council is the sole member of DPL, and almost invariably a sole member has complete control over a company's affairs. In this instance, however, DPL's constitution contained a provision which required that before certain actions could be undertaken, an authorising or confirmatory resolution must be passed at a meeting of the members of the Council itself, with at least 66% of those members present and voting at the meeting casting votes in favour of the resolution. While Barrett J did not come to any conclusion on the issue of whether a sole member could obtain relief under the oppression provisions of the Corporations Act, his Honour declined to make an order removing the relevant provision from DPL's constitution. Barrett J considered that the purpose of the oppression provisions is to "allow mitigation of strict legal obligations and qualification of strict legal rights in a way that ensures a just and equitable outcome consistent with legitimate expectations within the company." It was the concept of "legitimate expectations within the company" which Barrett J ultimately relied upon in his reasoning. Crucial to his decision was the fact that DPL was founded and established on the principle that the Council's overriding control would be qualified by DPL's constitution. Barrett J was therefore not prepared to remove a provision which "the corporator itself deliberately chose to adopt".**5.6 Member's privileges** (By Michael Watts and Yvonne Vukosav, Blake Dawson Waldron)Goldsmith v Moore Park Golf Club Ltd [2006] NSWSC 1221, New South Wales Supreme Court, Barrett J, 16 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/november/2006nswsc1221.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/november/2006nswsc1221.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**Barrett J, finding for the defendants, held that the suspension of the plaintiff's "privileges" of membership under article 49(a) of the defendant's constitution, meant that his right, privilege and eligibility to be considered for election onto the defendant's Board of Directors was not available. **(b) Facts** Moore Park Golf Club Ltd (Defendant) is a company registered under the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Bruce Goldsmith (Plaintiff) is a member of the defendant. On 8 November 2006 the plaintiff was nominated, with his consent, for election onto the defendant's Board of Directors. Later he was informed that he was no longer eligible for nomination and his nomination was removed.On 23 August 2006, the club's board found the plaintiff guilty of a charge of conduct unbecoming of a member, contrary to article 49(a) of the club's constitution. The board determined that the plaintiff "be suspended from all privileges of membership for a period of six months". Consequently, the plaintiff's privileges of membership were suspended at the time of his nomination for election.**(c) Decision(i) Issue to be determined** The issue was whether the suspension of all "privileges" of membership led to the plaintiff being ineligible and unqualified for nomination and election onto the Board. The plaintiff sought a declaration and order that the plaintiff was eligible for nomination for election to the Board and an order that the plaintiff's name be included on the list of nominations.**(ii) Rights v privileges of membership**Debate before the court revolved around the meaning of "privileges" in article 49(a). The plaintiff contended that a member's "privileges" were separate and distinct from the member's "rights", with the consequence that a suspension of "privileges" leaves the "rights" intact. The plaintiff characterised "privileges" as matters such as the ability to use the club's facilities, while a member's "rights" concern matters going to the relationship between "corporation and corporator". Under this approach, a suspension of the plaintiff's privileges would still entitle the plaintiff to be nominated and elected to the Board. The defendant on the other hand submitted that the constitution drew no distinction between the term "privileges" and "rights". A suspension of a member's "privileges" has the result that the member continues to hold such privileges, however such a member is disabled for the period of suspension from exercising them. Barrett J held the defendant's submission as to the meaning of "privileges" was consistent with its dictionary definition. Furthermore several provisions of the defendant's constitution made no attempt to distinguish the term from "right". In this case "privileges" of membership necessarily referred to the rights and entitlements of membership. In addition, Barrett J cited a number of cases for the proposition that "privileges" of membership necessarily entail "the right to stand for elected office in the organisation".**(iii) Eligibility to be elected to the board** Article 53 of the constitution outlines various classes of membership (one of which the plaintiff is a member) that are eligible to be nominated for, elected to and hold office on the Board. The plaintiff submitted that article 53 contains an exhaustive list of those persons eligible for election. The defendant submitted that the section does not confer eligibility, but clearly makes it clear that members within those categories are eligible to be nominated and elected to hold office. Barrett J held that Article 53 is a source of a particular benefit, that is, the eligibility to be elected onto the Board, as it outlines the category of person who is eligible to hold office. Eligibility is part of the "privileges" of membership. Article 54 describes circumstances in which a member becomes ineligible for nomination. Barrett J held that the article is one of many provisions which detract from Article 53. There is nothing in the provisions to suggest that the denial of privileges through other provisions, such as article 49(a) in this particular case, cannot effect the privileges granted under article 53. Barrett J concluded:* There is no distinction in the defendant's constitution between "rights" and "privileges".
* The eligibility to be nominated and elected to the Board, conferred under article 53, is a "privilege" of membership.
* Article 54 is not the only provision that can limit or affect the privilege conferred by article 53. A suspension of "privileges" under article 49(a) will suffice.
* The plaintiff's privileges of membership were validly suspended under article 49(a) of the defendant's constitution for a period of six months.
* During the period of suspension, the plaintiff was not entitled to enjoy the privileges of membership. Consequently, the plaintiff was ineligible to be considered for election to the Board.

**5.7 Courts have limited power to overrule discretionary decisions of private receivers and managers** (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)Australian Securities and Investments Commission v Forestview Nominees Pty Ltd (Receivers and Managers Appointed) [2006] FCA 1530, Federal Court of Australia, French J, 15 November 2006 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1530.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1530.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The Australian Securities and Investments Commission (ASIC) commenced winding up proceedings against Forestview Nominees Pty Ltd (Forestview). Mr Carey, a director of Forestview, sought to defend these proceedings. The receivers and managers appointed to Forestview refused a request by Mr Carey to provide funding for the defence. Mr Carey brought an application under sections 423 and 1321 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) for a review of the receivers and managers' decision not to provide funding. French J considered that the scope for court intervention is limited in an appeal brought under section 1321 against a discretionary or evaluative decision or a qualitative judgment by receivers and managers. He found that the receivers and managers' decision was made in good faith and dismissed the application.**(b) Facts**On 8 December 1998, Forestview granted a fixed and floating charge to Sandhurst Trustees Ltd, which was later assigned to Perpetual Nominees as custodian of the ING Mortgage l (Charge). The mortgaged property subject of the Charge was defined broadly as were the powers of the mortgagee under the Charge, which included powers to enter, seize and take possession of the property.On 7 March 2006, ING served Forestview with a notice of breach for granting an equitable mortgage over the property to a third party without obtaining the consent of ING, as required under the Charge. Receivers and managers were appointed to Forestview for the purpose of enforcing the Charge. On 26 June 2006, ASIC filed an application in the Federal Court for the winding up of Forestview on the grounds of insolvency (ASIC application).Mr Carey, who was granted leave by the court to resist the ASIC application in the name of Forestview, asked the receivers and managers for $20,000 to defend the ASIC application. His request was refused. Mr Carey brought an application under sections 423 and 1321 of the Act for a review of the receivers and managers' decision not to provide funding.**(c) Decision**French J considered the application pursuant to section 1321 only. His Honour stated that section 423 should be limited to applications where the conduct of liquidators and others is "liable to attract sanctions or control for … disciplinary reasons" (adopting comments by Mclelland J in Northbourne Developments Pty Ltd v Reily Chambers Pty Ltd (1989) 19 NSWLR 434 and Belvista Pty Ltd v Murphy (1993) 11 ACSR 628). French J found that Mr Carey, as a person whose "interest …rises above that of an ordinary member of the public", had standing under section 1321 as a "person aggrieved". French J held that as Mr Carey was entitled to defend the proceedings in Forestview's name, he would have sufficient grounds to make an application under section 1321.Conflicting affidavit evidence was put on by Mr Carey, on the one hand, and the receivers and managers on the other, about Forestview's financial position. French J accepted a report by the receivers and managers and provided to ASIC on 30 May 2006 which stated that Forestview may have unsecured creditors with claims in excess of $9 million. French J also found that there was no evidence that the refusal to provide money to fund a defence in the ASIC proceedings was made other than in good faith and having regard to the obligations under the Charge.In circumstances where an appeal is brought under section 1321 against a discretionary or evaluative decision or a qualitative judgment by receivers and managers, French J considered that the scope for court intervention is limited. His Honour held that this limitation should apply with greater force to receivers and managers privately appointed with extensive powers under a company charge. His Honour stated that "a person bringing an appeal under section 1321 … must demonstrate that the decision is informed by some error of law or significant factual error or is otherwise so unreasonable, in the circumstances, that it should not be allowed to stand." French J found that, given the good faith on which the decision to refuse the funding was made, there was no basis in the current decision to warrant interference and he dismissed the appeal.**5.8 Court denies approval for scheme of arrangement on basis of misleading omission and unfairness** (By Narelle Thomas, Clayton Utz, Melbourne)Zenyth Therapeutics Ltd v Dr Peter Smith [2006] VSC 436, Supreme Court of Victoria, Dodds-Streeton J, 15 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsc436.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/november/2006vsc436.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**Zenyth Therapeutics Ltd ("Zenyth"), a biotechnology company, sought the approval of the court for two proposed schemes of arrangement pursuant to section 411(4) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act") to effect a merger with CSL Limited. The proposed schemes were:* a scheme of arrangement between Zenyth and its shareholders ("Share Scheme"); and
* a scheme of arrangement between Zenyth and its option holders ("Option Scheme").

Approval of the Share Scheme was unopposed. Approval of the Option Scheme was opposed by option holder Dr Peter Smith, a former CEO of Zenyth who was joined as a defendant to the action.**(b) Facts**There were 14 series of options subject to the Option Scheme, issued by Zenyth at various dates between 14 November 2001 and 24 February 2006. Under the Option Scheme Zenyth proposed a cash payment to option holders in return for the cancellation of each of their options ("Cancellation Payment"). The Cancellation Payment was calculated by the company using the Black-Scholes option valuation method and varied between $0.01 to $0.5196 for each option depending on the date of issue, exercise price and expiry date. In the Explanatory Booklet the Zenyth directors, who unanimously recommended that, in the absence of a more favourable proposal, the Zenyth option holders vote in favour of the Option Scheme, took the position that the scheme was fair.An independent expert also valued the 14 series of options using the Black-Scholes method but applied different inputs, producing different valuations to those Zenyth had produced for most of the series of options. For six series in particular, the independent expert produced higher values than the company's valuations and thus the consideration payable under the Option Scheme in relation to those series of options was less than the independent expert's valuations. In these instances, a number of option holders stood to receive significantly less than the value of their options by accepting the Cancellation Payment compared with the independent expert's valuation. For example, the independent expert valued Dr Smith's options at $134,000 while the Cancellation Payment under the Option Scheme only provided $65,400. On this basis, the independent expert concluded that the Option Scheme was not fair but was reasonable and, on balance, in the best interests of the option holders in the circumstances. This was noted in the Explanatory Booklet.A resolution to approve the Option Scheme was put at the Option Scheme Meeting, held on 23 October 2006, and was passed with the necessary statutory majorities. ASIC did not oppose the Option Scheme. Dr Smith's principal objection to the Option Scheme was that there was "insufficient disclosure in the Explanatory Booklet about the rights of option holders in the event that the Share Scheme proceeded but the Option Scheme did not, and their options (or the shares obtained by exercise of those options) were compulsorily acquired". That is, the Explanatory Booklet was misleading by omission, giving the impression that, if the Share Scheme went ahead, but the Option Scheme was rejected, the option holders would not have an opportunity to gain any more value than was being offered under the Option Scheme and that the options would, in any event, be compulsorily acquired.It was argued that, by failing to disclose that a compulsory acquisition under Chapter 6A would be subject to the approval of the Court and that such approval would only be granted if fair value was offered, the Explanatory Booklet misleadingly omitted information that was material for the purposes of section 411(3) of the Act. As such, the overwhelming vote received in favour of the Option Scheme should be vitiated as it was based on misleading information or inadequate disclosure. It was also argued that the independent expert's explanation of why the Option Scheme was not fair, but nevertheless reasonable, had a tendency to mislead or confuse and failed to accord with the required level of disclosure.Counsel for Zenyth submitted that the Explanatory Booklet contained accurate and adequate disclosure, arguing that the application of Chapter 6A did not guarantee any better outcome in future for the option holders than was available under the Option Scheme. Given the variables inherent in Chapter 6A, it was impossible to convey in the Explanatory Booklet a meaningful statement of what the future might hold for option holders. Zenyth also argued that, while it disagreed with the independent expert's valuation, the independent expert's report was, overall, straightforward. **(c) Decision**The court declined approval for the Option Scheme in its current form. In coming to her decision, Justice Dodds-Streeton made the following findings.**(i) The court's jurisdiction in relation to schemes of arrangement**Her Honour found that, although the court has a discretion not to approve schemes such as the Share Scheme, the role is supervisory. Where there is no oppression, the scheme is capable of being accepted by shareholders, there is no opposition from either members or ASIC and there is nothing to suggest that there has been inadequate disclosure, the Court "proceeds on the basis that the members are the best judges of their commercial interests".**(ii) Misleading statements in explanatory booklet**In relation to whether or not Zenyth misled option holders by omitting information from its Explanatory Booklet, her Honour found that:* the extent of any disclosure in any given case is a question of fact dependent on both the nature of the scheme and the total context in which the information is presented or omitted;
* in the circumstances of this case, it was material for the option holders to know that the compulsory acquisition of their options under Chapter 6A would only be approved by the court where they were offered "fair value" within the terms of section 667C of the Act, in the opinion of an independent expert nominated by ASIC. It was also important for the option holders to know that CSL would bear the legal costs of a proper and reasonable objection. This information could affect the option holders' assessment of whether or not a better deal than the one offered under the Option Scheme might be available;
* although the procedure under Chapter 6A did not ensure any better outcome than that available under the Option Scheme, it gave option holders a chance of obtaining a better deal than the one being offered under the Option Scheme. The fact that there was no certainty of a better result under Chapter 6A did not mean that option holders should not be "alerted to the prospect" of an alternative avenue of recoupment so as to enable them to fully assess their available options. The information in the Explanatory Booklet in this case tended to suggest that opposing the Option Scheme would not produce a different outcome;
* it was not sufficient for Zenyth to simply advert to the application of compulsory acquisition without referring to the principal safeguards of that process. It was not appropriate to leave it to the option holders to get their own advice about compulsory acquisition, particularly when there was no suggestion there might be any advantage to this avenue of recoupment;
* overall, the option holders were not provided with the full information necessary to enable them to make a sensible commercial judgment in their own interests as to whether or not to vote in favour of the Option Scheme. As a general rule, proponents of schemes should be liberal when determining the degree of disclosure necessary to fulfil their obligations; and
* as Zenyth's disclosure was inadequate, the overwhelmingly large number of votes received in favour of the Option Scheme was vitiated.

**(iii) Independent expert's conclusion the Option Scheme was not fair but was reasonable**On the question of the independent expert's conclusion that the Option Scheme was not fair, but was reasonable in the absence of a better offer, her Honour noted the following:* courts should approach the approval of any scheme which the independent expert considers "not fair" cautiously, particularly when it may involve expropriation at less than full value.
* a scheme involving an offer at undervalue, which is not fair, should "generally not be considered reasonable unless it is accompanied by some positive compensatory feature". The fact that the option holders are "unable to exact fair, or better, consideration through any alternative avenue should not render an unfair scheme reasonable in the relevant sense".
* the court's legitimate role is limited to an assessment of the independent expert's explanation for its conclusion. In this case, the court found that the expert's conclusion that the scheme was reasonable and in the option holders' best interests was not "clear or logically compelling". The long term option holders would be "out of the money" (that is, the exercise price of the options exceeded the market value) and it was not clear whether there were any benefits in a sale at an undervalue.
* the deficiencies in the independent expert's explanations fortified her Honour's position that the court should not, in its discretion, approve the Option Scheme in its present form.

**(iv) Single class and use of the Black Scholes model**Neither the classification of the holders of the 14 series of options as creditors within a single class nor the appropriateness of the Black Scholes method of valuation of options were disputed.**5.9 Consequences of being found to be a shadow director or deemed officer in the context of insolvency** (by Hayley Webb, Mallesons Stephen Jaques)Ho v Akai Pty Ltd (in liquidation) [2006] FCAFC 159, Federal Court of Australia, Full Court, Finn, Weinberg and Rares JJ, 13 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fcafc159.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fcafc159.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This decision sheds light on when individuals and companies may be considered shadow directors and officers of corporations in the context of liquidation; and provides a reminder that holding companies can lose the asset protection provided through corporate structures if they are acting as shadow directors or deemed officers of a subsidiary.The decision illustrates that the duties of directors:* to exercise their powers and duties with care and diligence, in good faith in the best interests of the corporation, and for proper purpose; and
* to not improperly gain advantage for themselves or someone else, or cause detriment to the corporation,

may also be imposed on persons as shadow directors and deemed officers, by reason of their relationship with the corporation. Moreover, it provides an example of where shadow directors, officers and holding companies can be found to have engaged in insolvent trading.**(b) Facts** **(i) Background** Akai was part of a group of companies (the "Akai Group"), the holding company of which was Akai Holdings Ltd ("Akai Holdings"). Prior to its winding up, Akai was the sole distributor of Akai electronic goods in Australia and New Zealand. The Akai group of companies experienced financial difficulties in late 1999. An arrangement was reached whereby the Grande Group was given authority to manage the business of the Akai group. This was formalised in a "Management Agreement" ("the Agreement") between Akai Holdings and Grande Group Limited.The President and Group Chief Executive of Grande Holdings, Mr Christopher Ho ("Ho"), signed the Agreement on behalf of Grande Group Limited. Ho indirectly controlled 74.9% of the issued share capital, however he was not a director of that company.Mr Binney ("Binney") was the principal Grande Group official concerned with the effectuation of the Agreement with Akai.A few months after execution of the Agreement, Akai was placed in liquidation and the liquidator proceeded to take action against Ho, Grande Group Limited and Grande Holdings (the parent company). Under the operation of the Agreement, Akai entered into transactions which it claimed occurred after it had become insolvent. The transactions caused it loss for which Akai and the liquidators sought compensation.**(ii) The claims** This decision dealt with claims that:* Ho, Grande Group Limited and Grande Holdings, as deemed officers or shadow directors of Akai, contravened the insolvent trading provisions (section 588G) and the directors' and officers' duties provisions (sections 180, 181 and 182) of the Corporations Law and/or [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Accordingly, orders under sections 588J and 1317H were sought requiring each of them to compensate Akai for loss and damage incurred as a result of the contraventions; and
* Grande Group Limited and Grande Holdings, as holding companies of Akai, were liable for insolvent trading by a subsidiary under section 588V of the Corporations Law and/or Corporations Act. Orders were also sought pursuant to section 588W requiring these entities to compensate Akai for their loss.

**(iii) Shadow directors and deemed officers** The term "director" includes a person who, though not validly appointed as a director, is nonetheless a person in accordance with whose instructions or wishes the directors of the company are accustomed to act. Such persons are referred to as shadow directors. A deemed officer is a person:* who makes, or participates in making, decisions that affect the whole, or a substantial part of the business of the corporation;
* who has the capacity to significantly affect the corporation's financial standing; or
* in accordance with whose instructions or wishes the directors are accustomed to act.

**(c) Decision of the Full Federal Court****(i) The shadow director and deemed officer claims against Ho and Grande Holdings**Based on evidence that:* Ho's involvement in the affairs of Akai was strategic in relation to both the company's business and the participation in the rescue package;
* Ho was effectively in charge of negotiations concerning the refinancing and restructuring of the whole Akai group;
* Binney acted upon the instructions of, and reported to Ho in relation to Akai;
* the decision-making of the board of Akai was under the instructions of Grande Holdings; and
* Akai's managing director considered that he was responsible to an officer of Grande Holdings and that Grande Holdings was Akai's "new strategic management partner",

the Full Federal Court found that there was a prima facie case that both Ho and Grande Holdings were shadow directors and officers of Akai.The court also found that the transactions entered into after execution of the Agreement provided sufficient evidence to establish a prima facie case in relation to contraventions of the directors' duties and insolvent trading provisions. **(ii) The holding company claims against Grande Group Limited and Grande Holdings**The claims that each of Grande Group Limited and Grande Holdings were holding companies of Akai and each was therefore liable to pay compensation to Akai's liquidator for insolvent trading under sections 588V and 588W were rejected by the Full Federal Court. The court said that the fact that the Agreement was described as a "Management Agreement" was "revealing" and illustrative of it being concerned only with managing the companies. The Agreement was described by the court as an "essentially interim and holding measure". The court agreed with Gyles J's original finding that: "the Agreement is not capable of any reasonable construction which would give Grande Group any power of control of the composition of the Board or any power to cast or control the casting of votes at a general meeting of Akai." The Agreement did not cover issues of ownership, internal constitutional arrangements or possible sale or liquidation of the companies and was restricted to managing the business. **(d) Conclusion**This decision demonstrates the care that must be taken when entering into "rescue package" type arrangements with companies in financial difficulty. Here the rescuer corporate group and its representatives found themselves in contravention of the directors' duties and insolvent trading provisions of the Corporations Act as a result of an agreement to manage the failing corporate group. This decision also illustrates that if a holding company is found to be a shadow director or deemed officer, the asset protection benefit of the corporate structure may be eroded. It is therefore important from a risk minimisation point of view, that the directors of a holding company ensure that the directors of its subsidiaries exercise autonomous control over decision-making. **5.10 'Professional standards' determine whether registered liquidator has 'adequately and properly' performed duties**(By Miffy Wood, Freehills) Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board [2006] FCA 1438, Federal Court of Australia, Tamberlin J, 8 November 2006 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1438.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/november/2006fca1438.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The case was an appeal from the Companies Auditors and Liquidators Disciplinary Board's ('the Board') decision to suspend Mr Ronald Dean-Willcocks' registration as a liquidator under section 1292(2)(d)(ii) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act'). Tamberlin J of the Federal Court upheld the Board's decision. The appeal decision confirms that courts may look beyond legislation and have regard to professional standards when determining whether the office of a registered liquidator has been 'adequately and properly' carried out or performed under section 1292(2)(d)(ii) of the Act. The twelve month suspension is a warning to liquidators that significant consequences flow from a failure to maintain independence or avoid conflicts of interest in the administration of companies over which they are appointed. **(b) Facts** In May 2006 the Australian Securities and Investments Commission (ASIC) applied to the Board to have the registration of Mr Dean-Willcocks as a liquidator cancelled under section 1292(2)(d)(ii) of the Act. The Board suspended Mr Dean-Willcocks' registration for 12 months. The Board relied on breaches of the Institute of Chartered Accountants in Australia ('ICAA') Code of Professional Conduct and the Insolvency Practitioners Association of Australia ('IPAA') Code of Professional Conduct in making its decision. The Board held Mr Dean-Willcocks' conduct concerning the creation of commercial relations with several companies was not 'proper' nor 'adequate' conduct of a liquidator within section 1292(2)(d)(ii) of the Act. Relevant conduct that gave rise to the breach included: * Mr Dean-Willcocks' acceptance of appointment as administrator of a company where there existed a prior continuing professional relationship of a related practice with the appointment company during the two years prior to his appointment. This conduct lacked professional independence within paragraph 4 of the IPAA Code of Professional Conduct and paragraph 22 of the ICAA Code of Professional Conduct, 'Professional Independence'; and
* Mr Dean-Willcocks' failure to adequately disclose to creditors the extent of his firm's relationship with related accounting practices with respect to those appointments; the creation of a conflict of interest in accepting appointments where there was an existing relationship with a creditor of the appointee company; and his failure to adequately disclose to creditors the extent of his and his firm's professional relationship with the shareholders of a company. This conduct breached paragraph 3 of the IPAA Code of Professional Conduct and paragraph 21 of the ICAA Code of Professional Conduct.

Mr Dean Willcocks appealed the decision of the Board claiming that the Board:* wrongfully construed section 1292(2(d)(ii) of the Act by having regard to professional standards; and
* applied the wrong test in determining whether there was a conflict of interest and in determining whether sufficient disclosure of previous involvement with shareholders and secured lenders had been made.

**(c) The law**Section 1292(2)(d)(ii) of the Act provides:"(2) The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:… (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly: (i) the duties of a liquidator; or (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;or is otherwise not a fit and proper person to remain registered as a liquidator;by order, cancel, or suspend for a specified period, the registration of the person as a liquidator." **(d) Decision** **(i) Interpretation of section 1292(2)(d)(ii) of the Act**Tamberlin J followed the judgments of Re Wylie and CALDB (1998) 54 ALD 523, Re Vouris (2003) 47 ACSR 155 and Goodman v Australian Securities and Investments Commission [2004] FCA 1000, in concluding that recourse to professional standards is permitted under section 1292(2)(d)(ii) of the Act. Although these cases considered administrators duties because the section applies to administrators as well as liquidators, Tamberlin J agreed with Campbell J in Re Vouris (2003) 47 ACSR 155 that duties of a liquidator under section 1292(2)(d)(ii) remain the same as those of an administrator. His Honour reasoned that there should be a uniform and consistent interpretation of the provision in line with those cases. The contention that 'duties' be confined to matters required by legislated 'Australian law' was rejected. Tamberlin J reasoned that such confinement was artificial and not practical. There exists a large number of matters governing proper professional practice not dealt with by specific statutory prescriptions. A natural meaning was given to the words 'adequate' and 'proper.' The question of whether an applicant fails to carry out or perform adequately and properly their duty or function is not a pure question of law. The words 'adequately' and 'properly' incorporate notions of judgment that include professional standards. 'Professional standards' encompass relevant material published by professional bodies. It also includes evidence such as expert evidence to determine the terms, nature and content of the relevant duties. Despite recourse to professional standards, where codes of professional conduct conflict with law, the law will prevail. **(ii) Test for disclosure and conflict** Tamberlin J rejected a contention that the Board applied the wrong tests in determining whether there was a conflict of interest or a duty to disclose under section 1292(2)(d)(ii) the Act. Since it is permissible to take professional standards into account as guidelines, it is open to the Board to give such weight as it thinks appropriate to those guidelines. Tamberlin J emphasised that the Board is a specialist body that brings to bear professional experience when taking account of and interpreting professional standards.Paragraph 21 of the ICAA Code entitled 'Conflicts' requires that full and frank explanation and disclosure of actual or apparent conflict is made to a client. It is a matter for the Board to determine whether the time, nature and extent of the disclosure is adequate and proper under section 1292(2)(d)(ii) the Act. The appellant's submission that disclosure obligations are not required under the Act was rejected. The applicant contended that because the Harmer Report (recommending that any association between company and administrator, or the firm of the administrator, should be declared and published at the time of appointment as administrator) was not taken up by Parliament, disclosure is not a relevant factor under section 1292(2)(d)(ii) the Act. Tamberlin J considered that the disclosure obligations were relevant for consideration. **(iii) Penalty**Tamberlin J did not consider the 12 month suspension of registration too harsh. His Honour believed the penalty important in publicly demonstrating that there is a regulatory regime applicable to liquidators that is effective.**5.11 Oppression of minority shareholder in quasi-partnership** (By Lisa Hirsowitz, Freehills)Saykan v Elhan [2006] VSCA 230, Supreme Court of Victoria Court of Appeal, Nettle, Ashley JJA and Smith AJA, 26 October 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/october/2006vsca230.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/october/2006vsca230.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned appeals from judgments in two proceedings which were heard together. In the first proceeding ("the contract proceeding"), the court found that the first share sale agreement had been rescinded by another subsequent agreement as the appellants did not accept the respondents' repudiation of the first agreement, but instead replaced their previous rights and obligations by entering into a subsequent new agreement. In the second proceeding ("the oppression proceeding"), the court held that the appellants had conducted the affairs of the company in a manner that was unfair to the respondents and oppressive to the second respondent as a shareholder of the company under section 232 of the [Corporations Act (2001) (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The court ordered that the appellants purchase the second respondent's shares in the company at a fair price to be determined. **(b) Facts** A family business was conducted by way of a company called Unique Doors Pty Ltd ("Unique Doors"). It was the parties' intention that the business would be conducted on an equal basis and that it was to operate as a form of partnership between the appellants and respondents. A bitter dispute arose between the family members who conducted and had shareholdings in this business. It was not possible to point with precision to a particular time when the personal relationship broke down. On one side of the dispute was Adnan Elhan ("Anthony") and Elbek Investments Pty Ltd ("Elbek"), which was Anthony's company ("the respondents"). On the other side was Anthony's sister Nebahat Saykan, her husband Selahattin Saykan, Selfet Cokelek and Selfet's company, SFK Cokelek Pty Ltd ("SFK Cokelek") ("the appellants"). The appellants had procured the appointment of an administrator as a means of forcing the respondents out of the company, but upon realising that this would destroy their shareholding, entered into an agreement with the respondents on 2 August 2002 that Elbek sell its shares in Unique Doors to the appellants for $220, 000. The first respondent then had second thoughts about selling. After mediation, an agreement was entered into on the 30 September 2002 for the respondents to buy out the appellants for $660,000, with payment to be made as soon as reasonably practicable. The first respondent was to raise the finance for the purchase. The issues to be decided were, firstly, whether the appellants accepted the respondents' repudiation of the agreement for the sale of shares and secondly, whether the appellants' conduct as a whole was unfair to the respondents and oppressive to Elbek as a shareholder of the company. **(c) Decision** **(i) The contract proceeding**The Court of Appeal found that although the respondents had repudiated the 2 August 2002 agreement, the appellants did not accept the repudiation but instead kept the agreement alive until 30 September 2002. By entering into the 30 September 2002 agreement, the appellants agreed to replace their previous rights and obligations. There was no indication that the appellants impliedly reserved the right to hold the respondents liable for repudiation. As such, it was held that there was no breach of contract. **(ii) The oppression proceeding** Nettle JA (Ashley JA and Smith AJA agreeing) considered the cumulative effect of the appellants' conduct. Firstly, the appellants' initial decision to close the business was commercially illogical as no reasonable director would have done so without seeking commercial alternatives. Similarly, the appointment of an administrator was pursued for the purpose of squeezing the respondents out of the company. The fact that, notwithstanding the 30 September 2002 agreement, obstacles were placed in Anthony's path in order to make it difficult for him to complete the purchase of the appellants' shares was oppressive. Similarly, the fact that the appellants advised the landlord that Unique Doors would not be renewing or entering into a new lease of the premises (when the respondents were not advised of this and it had been their wish to extend the lease) had the effect that the landlord refused to deal with the first respondent when he attempted to negotiate a new arrangement. Additionally, the first appellant back-dated an invoice which did not represent a bona fide claim and where the amounts claimed were not owed, with the knowledge that this would frustrate any attempt by the respondents to raise funds to finance the share purchase. Nettle JA considered that the invoice was not in the nature of a 'joke', and that in fact the respondents may well have believed that it was legitimate and indeed the appellants contended that it was so until the proceedings were instituted. The first appellant had also changed all locks and security codes of the company's premises to prevent the first respondent from entering the premises after hours and during business hours when the first appellant was present. Such exclusion of a director and principal shareholder strongly indicated oppression. The court also looked at other occurrences such as the fact that the appellants had terminated the first respondent's wage in October 2002 and the countermanding of the first respondent's decision to appoint a replacement for Ferdi Cokelek after his resignation was part of a scheme of hostility towards the first respondent. The court rejected the appellants' argument that the conduct did not amount to oppression because, at the time at which it was committed, the appellants were ready and willing to buy out the victim for a fair value. The court distinguished on the facts the line of cases that were relied on by the appellants for this assertion. Re a Company (1986) 2 BCC 99 was distinguished on the basis that it concerned a rights issue where the complainant was free to participate but lacked the funds to do so and O'Neill v Phillips [1999] 1 WLR 1092 dealt with a profit-sharing agreement which was found to be not legally binding. By contrast, the case at hand was held to be of a different kind as it was concerned with a campaign to push the respondents out of the company. Moreover the court considered that an offer by the appellants was made six days after proceedings were instituted and the terms of the offer were such that they allowed little time for completion and thus were in themselves oppressive. The court held that even if the appellants remained ready and willing to purchase the respondents' shareholding, it had not been established that the buy-out was at a fair value. Importantly, the court noted that section 234 of the Corporations Act (2001) is broader than its precursor in that it includes conduct which is unfairly prejudicial to or unfairly discriminatory against a member or members rather than merely oppressive, and includes discrimination against a member other than as a member. Thus, the court agreed with what was said in Aqua-Max Pty Ltd v MT Associates Pty Ltd (2001) 3 VR 473 that the section encompasses any conduct of the company which is unjustly detrimental to any member of the company, whether it adversely affects all members or discriminates against some only. The court emphasised the dicta of Young J in McWilliam v LJR Estates Pty Ltd (1990) 20 NSWLR 703 where his Honour stated that the whole matter is a question of fact. Thus the various incidents should be viewed cumulatively, and not in isolation. Cumulatively weighing the incidents and looking at the series of conduct by the appellants, the court held that the appellants' conduct of the affairs of Unique Doors was, on any objective analysis, plainly unfair and discriminatory against the second respondent as a member of the company. The court agreed with the order of Hansen J that the fair value be determined as at 30 June 2002. Both appeals were dismissed. **5.12 When a charge will be declared void under section 267** (By Justin Fox and Phillipa McCormack, Corrs Chambers Westgarth)Highland v Exception Holdings Pty Ltd (in liquidation) [2006] NSWCA 318, Supreme Court of New South Wales, Court of Appeal, Giles JA, Hodgson JA, and Santow JA, 17 November 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/november/2006nswca318.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/november/2006nswca318.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This was an appeal from a decision of Young CJ who found that a charge was rendered invalid by the operation of section 267(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The charge in question was given by Exception Holdings Pty Limited (Exception), in favour of two of its directors, Mr Labraga and Mr Pomfret. Relevantly, the directors purported to be acting in their capacity as executors of a deceased estate in entering into the charge. The directors subsequently appointed a receiver under the charge within 6 months after the charge was created without seeking leave of the court to do so.Section 267(1) was held to apply and to render the charge void in these circumstances. The fact that the directors were acting as executors of a deceased estate, and not in their own capacity, did not prevent the section from applying.**(b) Facts**Highland, Labraga and Pomfret were co-directors of Exception, each with a one-third interest. Mr Highland died on 27 March 2003. Labraga and Pomfret were co-executors of the Estate of Mr Highland ('the Estate'). They agreed, after consultation with Mrs Highland, to advance $800,000 from the Estate to Exception. This payment was to be secured with a fixed and floating charge over Exception's assets in favour of the Estate. Labraga and Pomfret subsequently entered into the charge with Exception as agreed.Clause 18.1 of the charge provided that in the event of a default, the chargee could appoint a receiver and manager of the charged property. On 30 May 2005, Mr Albarran was appointed as receiver and manager. Labraga and Pomfret had not obtained leave of the court prior to the appointment of the receiver.Young CJ found at first instance that in those circumstances, section 267(1) of the Corporations Act operated to render the charge void. Section 267(1) provides:"Where:(a) a company creates a charge on property of the company in favour of a person who is, or in favour of persons at least one of whom is, a relevant person in relation to the charge; and(b) within 6 months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the Court having, under subsection (3), given leave for the charge to be enforced;the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge, are, and are taken always to have been, void."A "relevant person" is defined in section 267(7)(a) to include a person who is an officer of the company at the time the charge is created.**(c) Decision**The court agreed with Young CJ that section 267(1) rendered the charge void. The fact that the directors were acting as administrators of the Estate did not alter their conclusion.The applicant had argued that section 267 did not apply as Labraga and Pomfet were not acting in their personal capacity in entering into the charge.Giles JA considered whether in these circumstances the charge could be said to have been created 'in favour' of a 'relevant person' for the purposes of section 267. His Honour noted that the section spoke of the person named as 'chargee' so it did not matter that that person was named in a representative capacity (both Hodgson and Santow JA agreed).Santow JA noted that the mischief sought to be addressed by section 267 is the opportunity for an "insider" to have a friendly receiver appointed in such a way as, for example, to impede a liquidator seeking to obtain the company books. The fact that Labraga and Pomfret attempted to enforce the charge in their capacity as executors of the estate was not relevant, as the enforcement allowed for the same potential mischief, in that it gave them the advantage of control over the security with its attendant rights over Exception, to the disadvantage of other creditors. The test for applying section 267, Santow JA noted, was not whether the charge favours the company's directors but whether it is in their favour. If it is necessary for a charge to be in favour of a person in his or her capacity as a director of the company granting the charge, then it would follow that the section would be readily avoided if, for example, the director concerned took the benefit of the charge for the benefit of a discretionary trust.Santow JA noted that section 267 does not prohibit the creation of a change in favour of a relevant person and that the directors could have avoided the operation of this section by refraining from enforcing the security within six months, or by seeking the court's leave to do so. The court did note that the fact that the directors were acting in a representative capacity would likely be a factor which the court would take into account in deciding whether to grant leave for the charge to be enforced under section 267(3). |
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