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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Report on corporate responsibility**  On 21 June 2006, the Parliamentary Joint Committee on Corporations and Financial Services published its report titled "Corporate Responsibility: Managing Risk and Creating Value". Following is an extract from the executive summary of the report.  **(a) Introduction**  Corporate responsibility is usually described in terms of a company or organisation considering, managing and balancing the economic, social and environmental impacts of its activities. During the course of the inquiry the committee received a great deal of evidence of the way many Australian companies are employing responsible corporate approaches to manage risk and to create corporate value, in areas beyond a company’s traditional core business. Some Australian companies are leading the push towards greater sustainability, and have been key contributors to global developments in the establishment of sound mechanisms to report on sustainability.  Of particular interest to the committee was evidence that many companies are integrating the consideration of broader community interests into their core business strategies, rather than treating these issues as an add-on or a side show.  The committee heard that such an approach was key to the success of their corporate responsibility endeavours. Also crucial was the need to balance a long term view of company viability and profitability with a focus on short term returns. The committee noted the view that the diverse range of companies and organisations of different sizes and from different sectors meant that it was inappropriate to apply a 'one-size-fits-all' approach to corporate responsibility.  Despite evidence that Australian companies have shown a greater engagement with the corporate responsibility agenda over the past decade, the committee also heard that by international standards, Australia lags in implementing and reporting on corporate responsibility. A number of points of view were put to the committee as to whether it was necessary to adopt a regulatory approach in order to increase responsible corporate behaviour, or whether there were other ways to provide encouragement to Australian companies.  **(b) Duties of directors**  The committee heard a number of arguments in relation to whether or not existing requirements in the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) allow company directors to consider broader community interests, and whether any change is required to legislation to either permit, or require, responsible corporate behaviour.  A number of interpretations of the current legislative framework regarding the duties of directors were provided to the committee. At one end of the scale was the view, made prominent in the case concerning James Hardie Industries that a director would be failing in his or her duties if consideration was given to any factors other than maximising profit. At the other end of the scale, 'the enlightened self-interest' interpretation of directors' duties argues that directors may consider and act upon the legitimate interests of stakeholders other than shareholders, to the extent that these interests are relevant to the corporation.  This 'enlightened self-interest' interpretation is favoured by the committee. Evidence received suggests that those companies already undertaking responsible corporate behaviour are being driven by factors that are clearly in the interests of the company. Maintaining and improving company reputation was cited as an important factor by companies, many of whom recognise that when corporate reputation suffers there can be significant business costs. Evidence also strongly suggested that an 'enlightened self-interest approach' assists companies in their efforts to recruit and retain high quality staff, particularly in the current tight labour market.  Also reflecting an enlightened self-interest approach and driving corporate responsibility was the desire of companies to avoid regulation. Many companies recognise that by taking voluntary action to improve responsible corporate performance, corporations may forestall regulatory measures to control their conduct. It was also evident that for many companies, acting in a responsible corporate manner was in the interests of the company because such behaviour attracted investment from ethical investment funds, a sector of increasing importance in Australia. Mainstream institutional investors, such as superannuation funds, are also becoming a strong driver towards corporate responsibility, as they increasingly recognise the importance of how companies manage their non-financial risks to overall financial performance.  The committee looked at a number of options for legislative change, including suggestions that the Corporations Act should direct companies, and in particular directors, to take into account the interests of stakeholders other than shareholders. Also considered was the use of a permissive provision which would clarify that directors are entitled to make decisions which reflect the interests of stakeholders other than shareholders.  It was put strongly to the committee, however, that there was no need to change the existing legal framework, because it is currently sufficiently open to allow companies to pursue a strategy of enlightened self interest. Indeed, many were already doing so.  The committee is of the view that the Corporations Act permits directors to have regard for the interests of stakeholders other than shareholders, and that amendment to the Corporations Act is not required.  **(c) Other matters**  **(i) Institutional investors**  The committee considered evidence on whether legislation governing superannuation funds, and in particular the 'sole purpose test' in the [Superannuation Industry Supervision Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default), limited 'responsible investment'.  The committee concluded that it did not, but agrees with suggestions that detailed guidelines on the sole purpose test should be issued to clarify for superannuation trustees their position in relation to allocating investments to ethical investment fund managers.  The committee noted the April 2006 release of the United Nations Principles for Responsible Investment, to which three Australian investment funds have become signatories. The committee supports the further adoption of these UN Principles by Australian institutional investors and fund managers, and in particular recommends that the recently established Future Fund should become a signatory.  **(ii) Sustainability reporting**  Sustainability reporting refers to the practice of corporations and other organisations measuring and publicly reporting on their economic, social, and environmental performance, and future prospects. Sustainability reporting emerged as a significant issue in the inquiry.  The committee heard arguments as to whether reporting should be voluntary or mandatory. Overall, the committee concluded that reporting should remain voluntary. In particular, the committee took note of evidence suggesting that mandatory reporting would lead to a 'tick-the-box' culture of compliance. This is an undesirable outcome and one that defeats the purpose behind the concept of corporate responsibility.  The committee is of the view that it is important for companies to be strongly encouraged to engage voluntarily in sustainability reporting rather than being forced to do so.  The committee notes the benefits of independent assurance and verification of sustainability reports, but also notes that there are significant costs associated with such verification. Accordingly, the committee supports the continuation of voluntary assurance and verification of sustainability reports. Other principles that should apply to sustainability reporting were explored. The committee supports reporting that is cost-effective and flexible, and comparable.  The committee also recognises the potential of the relatively new Operating and Financial Review (OFR) provisions of the Corporations Act, and recommends that each company auditor monitor and review disclosures made under these provisions, and make recommendations to the company Board regarding the adequacy of the disclosures.  **(iii) Encouraging corporate responsibility**  The committee takes the view that although it is not appropriate to mandate the consideration of stakeholder interests into directors' duties, or to mandate sustainability reporting, there is a need to seriously consider options to encourage greater uptake and disclosure of corporate responsibility activities. A number of initiatives by business and industry to encourage corporate responsibility were brought to the attention of the committee. The mining and finance sectors provided encouraging examples, and the committee is strongly supportive of such sector wide, industry-led projects.  Of particular interest is an example from overseas: the United Kingdom industry-led organisation Business in the Community, a network which works with business to develop practical and sustainable solutions to manage and embed responsible business practice. The committee supports the establishment of such a network in Australia, and recommends that the Australian Government provide seed-funding for the network. Another overseas example of a business-led initiative which is recommended for use in Australia is the London Stock Exchange's Corporate Responsibility Exchange, an online tool which reduces reporting costs and streamlines the dissemination of policies and practices in the area of corporate responsibility.  The committee acknowledges that government could do more to encourage and facilitate corporate responsibility. One way is by providing leadership in best practice, primarily through its own agencies and activities. The committee commends those government agencies that undertake sustainability reporting, and would like to see the rate of reporting continue to rise in the future. The committee recommends that, in order to show greater leadership, and to encourage more reporting by government agencies, the Australian Government establishes voluntary sustainability reporting targets for government agencies.  The committee recommends that the Australian Government establishes voluntary targets for government agency procurement in areas such as water, waste, energy, vehicles and equipment. In the interests of transparency, the voluntary targets set for government agencies in terms of sustainability reporting and green procurement should be disclosed in annual reports, along with a report on progress against these targets. In other areas where government policies exist in relation to environmental performance by government agencies, the committee expects agencies to comply with their obligations.  The committee also sees a role for government in promoting international initiatives in the area of corporate responsibility. In recognition of concerns that the benefits of sustainability reporting were difficult to assess and quantify, the committee has recommended that the Australian Government, in consultation with the business community, undertake research in this area.  Another role suggested for government was in the area of providing financial incentives to encourage corporate responsibility, or in removing barriers that work against corporate responsibility. The committee supports consideration by Government of options for providing regulatory relief to corporations which voluntarily undertake specified corporate responsibility activities. In recognition of the high start-up costs faced by companies establishing a reporting regime, the committee recommends that the Australian Government should examine the feasibility of introducing inflated write-off arrangements for the year-one costs of initiating sustainability reports, to assist companies commencing sustainability reporting for the first time.  The report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/report.pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.2 Use of schemes of arrangement to acquire companies in New Zealand – reform proposals**  On 19 June 2006, the New Zealand Takeovers Panel announced that it is seeking public comment on the use of schemes of arrangement and amalgamations to merge or acquire code companies. A code company is a listed company or a company with 50 or more shareholders and assets of $20m or more.  "The media and the market have expressed concerns on the use of schemes and amalgamations under the Companies Act to merge or acquire a code company," Chairman John King said. "The Panel shares those concerns."  The current relationship between the Code and the Act can result in a change of control of a code company under a scheme or amalgamation without shareholders having the rights and protections they have under the Code.  "This is undesirable," John King said. "Companies should be able to choose which process they use to merge with or gain control of a code company. But the rights and protections of code company shareholders should follow consistent principles under all processes."  The Panel has published a discussion paper seeking the views of market participants.  It will then recommend changes to the law on the use of schemes and amalgamations.  The paper considers amending the Code and the Companies Act so that:   * schemes and amalgamations are taken out of the Code; and * the principles of the Code are included in the provisions of the Companies Act that deal with schemes and amalgamations.   To achieve this the Panel suggests that:  the Companies Act relating to schemes be amended to require:   * the courts to consider the code principles when approving a scheme, including the level of shareholder approval needed and the information to be given to shareholders; and * the courts to take into account recommendations from the Panel on the court's requirements for approval of a scheme.   the Companies Act relating to amalgamations be amended to require:   * parties to a proposed amalgamation to obtain Panel approval of the amalgamation provisions; and * the Panel to take into account the principles of the Code in determining its requirements for approval.   The discussion paper is available on the [Panel's website](http://www.takeovers.govt.nz/publications/code-companies/index.html" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.3 Corporate duties below board level**  On 13 June 2006, the Corporations and Markets Advisory Committee (CAMAC) published its report on corporate duties below board level. The report responds to a request from the Government for the Committee to consider a number of recommendations in the HIH Royal Commission Report on the Failure of HIH Insurance (April 2003). The Commissioner, Justice Neville Owen, drew attention to uncertainties and gaps in the regulation of corporate behaviour below board level.  The report puts forward recommendations to clarify the coverage of provisions in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that already impose personal duties and liabilities on persons below board level and to ensure that those provisions take better account of the working arrangements found within many companies, including:   * the way in which corporate groups are commonly managed in practice as a single enterprise; * the increasingly common use of independent contractors, consultants and others in carrying out corporate functions; and * the large role that executives and others, as well as directors, play in the running of many companies, especially medium to large enterprises.   The Advisory Committee recommendations include:   * application of the duties in ss 180 (care and diligence) and 181 (good faith and proper purpose) to directors and corporate officers and 'any other person who takes part, or is concerned, in the management of that corporation'. This clarification will overcome what appears to have been an inadvertent narrowing in recent years of the class of persons below board level subject to those provisions; * extension of the prohibitions in ss 182 and 183 (dealing with improper use of corporate position or corporate information) beyond directors, other officers and employees of a corporation to 'any other person who performs functions, or otherwise acts, for or on behalf of that corporation'. This is to ensure that a person who performs functions for a company cannot avoid these prohibitions, designed to protect the interests of a company and its shareholders, because that person is not technically an officer or employee; and * for similar reasons, extension of the prohibitions in ss 1309 (providing false information to various parties, including a director, auditor or shareholder) and 1307 (falsifying or destroying corporate records) beyond officers and employees of a corporation to 'any other person who performs functions, or otherwise acts, for or on behalf of that corporation'.   The report also considers whether there should be a general provision, as recommended in the HIH Royal Commission report, prohibiting individuals from acting dishonestly in connection with the performance of any statutory obligation imposed on a corporation. While seeing some attraction in the proposal, the Advisory Committee was not persuaded of the need for such a broad prohibition, given the effect of its other recommendations.  The report is available on the [CAMAC website](http://www.camac.gov.au/camac/camac.nsf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.4 European accountants call for a specific international standard on sustainability assurance**  On 13 June 2006, the European Federation of Accountants (FEE) published its most recent paper in the Sustainability Assurance series. In publishing this work, FEE has concluded that there is a need for a more specific international standard for assurance on corporate social responsibility reports. FEE has called on the International Federation of Accountants to develop an international standard for sustainability assurance.  The paper is available on the [FEE website](http://www.fee.be/fileupload/upload/PR72.Key%20Issues%20in%20Sustainability%20Assurance%200606131362006511021.pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.5 Call for evidence on transparency in bond markets and other non-equity markets**  On 12 June 2006, the European Commission launched a call for evidence on transparency in the bond markets and other non-equity markets. The call for evidence relates to a report that the Council of Ministers and the European Parliament have asked the Commission to make by the end of October 2007. It will investigate whether and to what extent new requirements on pre- and post-trade transparency should be introduced at EU level to the trading in financial instruments such as bonds and other non-equities.  The call for evidence states that in conducting the review, the Commission intends to prioritise cash bond markets (government, investment grade and high-yield), as well as related derivatives markets and other important markets such as those for asset-backed securities. The call for evidence asks for views on whether the right prioritisation has been proposed for the review. It goes on to ask a series of questions focusing on whether there are demonstrable problems in any of these markets that mandatory transparency might be able to solve; if so, whether EU-level action would be indicated; and what policy options, if any, the Commission should consider in framing any response.  The Commission is required by Article 65(1) of the Markets in Financial Instruments Directive (2004/39/EC), known as 'MiFID', to present a report to the European Parliament and the Council by the end of October 2007 concerning pre- and post-trade transparency obligations to transactions in classes of financial instrument other than shares.  Following this call for evidence and after discussions with all interested parties, including practitioners, the Commission will draw up a draft report. The draft report will be subject to a public consultation and discussed at a hearing in Brussels ahead of the finalisation of the report in the autumn of next year.  More information on MiFID is available on the [Europa website](http://ec.europa.eu/internal_market/securities/isd/index_en.htm" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.6 Final communiqué of the annual conference of the International Organization of Securities Commissions**  On 9 June 2006, the Final Communiqué of the 31st Annual Conference of the International Organization of Securities Commissions (IOSCO) was published.  Some key issues from the meetings in Hong Kong were:  IOSCO memorandum of understanding - 34 members have signed the MoU. New signatories to the MoU are Dubai Financial Services Authority, the Financial Supervisory Authority of Denmark, the Israel Securities Authority and the Securities and Exchange Commission of Nigeria. An additional 9 members have committed to signing. The meeting put greater emphasis on the IOSCO MoU adopted in May 2002. The MoU is IOSCO's most significant contribution to regulatory cooperation and effective cross-border enforcement.  Cross-border cooperation in the freezing of assets - IOSCO adopted a resolution encouraging members to examine and review their legal frameworks to freeze assets derived from cross-border securities and derivatives violations. Those who break the securities laws will not be able to benefit from any gains made as a result of their illegal actions.  Boiler Room Activity - IOSCO continues to monitor "boiler room" activity around the world and has recently established an ad hoc group to carry out additional work on this issue. It aims to provide guidance on issues facing regulators in combating boiler room scams.  Compliance Function for Market Intermediaries - IOSCO has outlined the principles that should be considered by all market intermediaries and their regulators in order to increase effectiveness in the compliance function of market intermediaries.  International Financial Reporting Standards (IFRS) - A database of information providing useful references for regulators on IFRS decisions will be available to members later this year.  The SRO Consultative Committee released a Model Code of Ethics which aims to strengthen a culture of ethical behaviour within the financial services industry. This committee represents self regulating organizations and other securities and derivatives markets around the world.  Public panels - One panel discussed regulations and expectations surrounding the implementation of International Financial Reporting Standards (IFRS). The others discussed increasing risks in hedge funds and transparency in bond markets.  A detailed copy of the communiqué is available from the [IOSCO website](http://www.iosco.org/" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.7 Delaware Supreme Court affirms decision on the termination payments received by former Disney President Michael Ovitz**  In the August 2005 issue of the Corporate Law Bulletin we reported on the 9 August 2005 judgment of the Court of Chancery of Delaware in the case In re the Walt Disney Company Derivative Litigation.  Michael Ovitz was President of Disney for only about 14 months in 1995-96. When he left the company, he received termination payments of US$130 million. Shareholders of Disney sued Ovitz, and the directors, CEO, and general counsel of Disney for breach of duty in relation to the termination payments and made other legal claims.  The Delaware Chancery Court held that none of the defendants had breached their duties and dismissed all the plaintiffs' claims.  On 8 June 2006, the Delaware Supreme Court affirmed the decision of the Chancery Court (In re the Walt Disney Company Derivative Litigation (No CA 15452).  The judgment is available on the website of the [Delaware Supreme Court](http://courts.delaware.gov/opinions/%28qiumkk3gfibkvx45ay2qzn55%29/download.aspx?ID=77400" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.8 Australian analysts take 'wait and see' approach on AIFRS' value for capital markets**  On 7 June 2006, a KPMG report found that in a Catch 22 scenario, increased understanding of Australia's equivalent of International Financial Reporting Standards (AIFRS) has caused mixed reactions amongst Australian financial analysts as to its potential to help investment decision-making.  The report titled 'A work in progress' assesses Australian financial analysts' responses to the first financial results published under AIFRS since its inception in January 2005. It replicates a similar report conducted in late 2004 on the same subject.  While it showed an encouraging uplift in analyst understanding, increased analyst knowledge around AIFRS has also led to debate on its value with 30 per cent saying it facilitated a strengthening of the capital markets, 30 per cent saying it didn’t and 40 per cent still undecided.  Additionally, a 17 per cent increase in the number of analysts who are confident in distinguishing a change resulting from either business performance or accounting changes under AIFRS, coincided with an 11 per cent drop in those saying AIFRS provided more insight into a company's true financial performance.  The report is available on the [KPMG website](http://www.kpmg.com.au/Portals/0/10153AAA_AIFRS_WP_elec.pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.9 Corporations Amendment Regulations – remuneration disclosures and auditing**  On 1 June 2006, the Governor General made regulations dealing with remuneration disclosures, auditing standards and auditor independence. The purpose of the regulations is to update accounting standard references relating to remuneration disclosures; extend transitional provisions to provide the former professional auditing standards with the force of law until 29 June 2007; and address a number of anomalies and unintended consequences in relation to the auditor independence requirements in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  **(a) Remuneration disclosures**  Regulation 2M.3.03 in the [Corporations Regulations 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) refers to accounting standard AASB 1046 Director and Executive Disclosures by Disclosing Entities. Regulation 2M.6.04 in the Corporations Regulations refers to Schedule 5B of the Act, which also makes reference to AASB 1046.  The Australian Accounting Standards Board (AASB) recently decided to withdraw the requirements of AASB 1046 and move its requirements into AASB 124 Related Party Disclosures. This resulted in the regulations becoming inoperative or ineffective. The amendments replaced references to AASB 1046 with references to AASB 124.  The amendments ensure that the regulations concerning remuneration disclosures remain effective for the preparation of financial reports for financial periods ending on or after 30 June 2006. The amendments do not modify the substance of the Corporations Regulations.  **(b) Auditing standards**  Regulation 10.5.01 in the Corporations Regulations lists the auditing standards made by the Australian accounting profession prior to 1 July 2004 that are to be treated as if they had been made by the Auditing and Assurance Standards Board (AUASB) for the purposes of the Act. Regulation 10.5.01 refers to 1 July 2004 because section 1455 of the Act gives auditing standards made by the accounting profession before 1 July 2004 interim legal backing from that date. Section 1455 of the Act limits the life of these standards by providing that they cease to have effect in relation to financial reports for periods ending after 30 June 2006.  The AUASB has announced that the new auditing standards it has made for the purposes of the Act will apply to financial periods ending on or after 30 June 2007. As a result, there will be no auditing standards with the force of law applicable to audits of financial reports for periods ending after 30 June 2006 and before 30 June 2007. The amendment ensures that the former professional auditing standards continue to have effect until the new standards made by the AUASB are in force.  **(c) Auditor independence**  The Regulations relating to auditor independence modify the operation of the auditor independence requirements in the following manner to address three unintended consequences:   * the introduction of an ordinary course of business exemption in relation to the prohibition on an audit firm owing more than $5,000 to an audit client; * clarification that cheques and savings accounts are not intended to be covered by the prohibition on loans by an audit firm to the audit client; and * giving the Australian Securities and Investments Commission (ASIC) the power to extend the period within which an auditor is required to resolve a conflict of interest situation beyond the existing 21 days under subsections 327(2A), 327(2B) and 327(2C) of the Act.   [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.10 APRA finalises prudential approach to IFRS**  On 31 May 2006, the Australian Prudential Regulation Authority (APRA) released revised prudential standards and guidance notes to reflect its prudential approach to the adoption of International Financial Reporting Standards (IFRS) by authorised deposit-taking institutions (ADIs). The changes have been finalised after extensive industry consultation.  The revised standards de-couple the definition of capital instruments eligible for Tier 1 capital from Australian accounting standards and bring APRA's approach to innovative capital instruments into line with international practice. The revised standards also de-couple the assessment of securitised assets for capital adequacy purposes from the accounting treatment of these assets, and address some other adverse prudential outcomes flowing from the adoption of IFRS.  APRA Chairman, Dr John Laker, said that APRA has aligned its prudential and reporting framework with IFRS-based financial reports, except where this would not be consistent with the intent and integrity of the framework.  The revised prudential standards and guidance notes apply to all ADIs from 1 July 2006. Institutions expecting their total capital to be reduced by APRA's IFRS-related changes may seek transition relief until 1 January 2008. New Tier 1 capital limits will come into effect on 1 January 2008. Institutions expecting that their Innovative Tier 1 capital will exceed the proposed limit of 15 per cent of net Tier 1 capital as at that date may apply to APRA for a two-year transition period, until 1 January 2010.  Similar changes to the prudential standards for general insurers will be introduced following the completion of consultation on APRA's general insurance 'Stage 2' reforms dealing with capital, assets in Australia and custodian arrangements. These particular reforms are expected to take effect around the end of 2006.  The revised standards and guidance notes for ADIs are located on the [APRA website](http://www.apra.gov.au/ADI/ADI-Prudential-Standards-for-1-July-2006.cfm" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.11 Internal audit post Sarbanes-Oxley**  The PricewaterhouseCoopers 2005 State of the Internal Audit Profession Study was conducted in the third quarter of 2005 and includes responses from a cross section of the US internal audit community. The study identified six trends that are impacting the internal audit profession in the aftermath of Sarbanes-Oxley:  1. Sarbanes-Oxley requirements continue to significantly impact internal audit priorities  2. Internal audit strengthens relationships with key stakeholders  3. Risk management and corporate governance take centre stage  4. Rising demands strain internal audit resources and processes  5. Chief audit executives are increasingly asked to provide formal opinions on internal controls  6. Continuous auditing and monitoring techniques gain momentum.  Full analysis and details of these six trends, supported by survey results can be found on the [PricewaterhouseCoopers website](http://www.pwcglobal.com/extweb/pwcpublications.nsf/docid/acfafd390978cb2785257147005ef9b6" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.12 How financial system reform could benefit China**  The consulting firm McKinsey has undertaken research on the how financial system reform could benefit China. The research indicates:   * The ongoing development of China's financial system will play a critical role in the country's effort to narrow social disparities and pursue balanced growth. * Reforming the financial system could not only raise GDP by as much as 17 percent, or US$320 billion a year, but also help spread Chinas new wealth more evenly. * If the reforms directed additional funds to private companies China's growth engine the economy would generate significantly higher returns for the same level of investment and GDP would rise. * Such a shift will stimulate mass job creation in the strongest areas of China's economy and increase tax revenues to finance social programs.   The reforms recommended are:  **(a) Improving capital allocation**  1. Improve governance and increase competition in the banking sector  2. Change the collateral requirements for small businesses 3. Improve the information and data available for good lending decisions 4. Deregulate the corporate-bond market  **(b) Creating a balance within the financial system**  1. Deregulate bank interest rates ahead of the current schedule  2. Spur the growth of domestic institutional investors through deregulation  3. Create a more strategic relationship between the Hong Kong Stock Exchange and mainland equity markets  4. Change equity IPO procedures to let private companies and small and midsize enterprises compete for funds  **(c) Making the overall system more efficient**  1. Accelerate improvements in the payments system  2. Further liberalise the capital account  This article is available on the [McKinsey website](https://www.mckinseyquarterly.com/register.aspx?ArtID=1785" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **1.13 Recent trends in US shareholder class action litigation**  NERA Economic Consulting has published a report on recent trends in US shareholder class action litigation.  In 2005 and the first two months of 2006, the list of the 10 largest shareholder class action settlements changed dramatically, according to this newly released edition of NERA's semi-annual study. The study reveals that seven slots on the list are now filled by 2005 and 2006 settlements, with two of those involving non-US companies - which may be chilling news to non-US issuers already wary of being embroiled in US litigation.  However, the authors note that while mega-settlements continue to make headlines, for the greater mass of shareholder class action defendants the situation appears to be stabilising. The study is based on more than 10 years of research on case filings and settlements in shareholder class actions.  The study's key findings also include:   * Average settlement values hit a new peak in 2005. Excluding WorldCom and Enron, the mean settlement value reached US$24.3 million, exceeding the prior high of US $23.7 million in 2002. Including WorldCom would bring the average to nearly US$71 million. * Dismissal rates have doubled since the passage of the Private Securities Litigation Reform Act. While dismissals accounted for only 19.4 percent of dispositions for cases filed between 1991 and 1995, dismissals accounted for 40.3 percent of dispositions in the 1998-2003 period. * Median settlement values in 2005 hit US$7 million, exceeding the past record by more than 15 percent and the 2004 level by one-third. * Based on the 2003-2005 filing rate, over a five-year period the average public corporation has nearly a 10-percent probability that it will face at least one shareholder class action lawsuit.   The authors also note that, because many of the largest suits in this recent period have class periods ending during the collapse of the stock market bubble in 2000-2002, average settlements are not likely to rise further over the next two or three years and may even fall. Their analysis indicates that the high value of settlements in 2002-2005 is due to higher investor losses, not due to changes in the litigation environment.  The study is available on the [NERA website](http://www.nera.com/publication.asp?p_ID=2777" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%231)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top) |
| **2. Recent ASIC Developments** |
| **2.1 Interim relief extended for superannuation investment strategy product disclosure**  On 23 June 2006, the Australian Securities and Investments Commission (ASIC) announced that it has extended current interim relief for superannuation trustees that delays the commencement of the product disclosure requirements in s1012IA of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) from 30 June 2006 to 30 June 2007.  Under s1012IA of the Act, a trustee of a superannuation fund has to provide a Product Disclosure Statement (PDS) to members and prospective members about particular financial products which may be acquired through an investment strategy selected by a member or prospective member.  This PDS needs to be prepared by the issuer of the particular financial product accessible through an investment strategy and is in addition to the PDS that the trustee must provide members and prospective members about the superannuation fund itself. An example of a superannuation fund that may be subject to s1012IA for some of its strategies would be a superannuation master trust.  The requirements under s1012IA relate to investment strategy choice not to choice of superannuation fund.  In November 2004, ASIC issued a policy proposal paper 'Superannuation: Delivery of product disclosure and investment choice' and received several submissions. A final policy position is expected to be announced in July.  A copy of the Class Order is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-330_pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **2.2 Transitional compensation arrangements extended for AFS licensees**  On 23 June 2006, the Australian Securities and Investments Commission (ASIC) announced a new class order [CO 06/495] extending the transitional compensation arrangements under s912B of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) until 31 December 2006.  **(a) Background**  Section 912B of the Corporations Act requires an Australian financial services licensee who provides financial services to retail clients to have in place arrangements to compensate those persons for loss or damage suffered because of breaches of obligations under Chapter 7 of the Corporations Act.  Section 912B was introduced by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "Default) but did not take immediate effect. The Government delayed the operation of s912B until 30 June 2006 so that it could consult on the details of the compensation regime under s912B. ASIC understands that as a result of these consultations the Government is considering what measures are needed to assist with implementation of s912B. Under Class Order [CO 06/495] the expiry date of the transitional arrangements (and reg 7.6.02AA) has been extended to 31 December 2006.  **(b) Current transitional arrangements**  Under a combination of regulations and licence conditions, some licensees are currently subject to transitional compensation arrangements while the operation of s912B is delayed. The transitional arrangements are:   * professional indemnity insurance requirements continue to apply to most responsible entities of managed investment schemes; * dealers and advisers in investment products remain subject to security deposit requirements; * insurance brokers remain subject to the professional indemnity insurance requirements that applied under the superseded [Insurance (Agents and Brokers) Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6415" \t "Default); and * market operators continue to maintain fidelity fund style compensation arrangements (and ASX continues to operate the National Guarantee Fund).   The class order will commence after it has been recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form. The FRLI may be accessed at [http://www.frli.gov.au/](http://www.frli.gov.au/" \t "_new).  A copy of the Class Order is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-495_pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **2.3 Disclosure for deposit products**  On 20 June 2006, the Australian Securities and Investments Commission (ASIC) announced new class order relief which simplifies certain disclosure requirements for issuers of deposit products.  Detailed in Class Order [[CO 06/476]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-476_pdf" \t "_new) Variation of Class Orders [CO 05/681] and [CO 05/683] Dollar disclosure: further transitional relief, the relief grants:   * permanent unconditional relief to issuers of deposit products from the requirement to include termination values in periodic statements; * permanent conditional relief to issuers of deposit products from the requirement to disclose interest rates in Product Disclosure Statements (PDSs); and * extension of transitional relief to issuers of deposit products from the dollar disclosure requirements from 1 July 2006 to 31 March 2007.   **(a) Termination values in periodic statements for deposit products [CO 06/476]**  The law requires that the termination value of a financial product, such as a deposit product, be included in a periodic statement if it is relevant to the financial product and to the extent to which it is reasonably practicable to calculate its value. A termination value is the amount that will be paid to the consumer if they closed their account at that time. A periodic statement is a document provided to the holder of a deposit product detailing information about the status of their deposit. A periodic statement must be provided during each reporting period (typically at least on an annual basis).  ASIC's relief in Class Order [[CO 06/476]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-476_pdf" \t "_new) exempts the issuer of a deposit product from disclosing a termination value in a periodic statement for a deposit product.  The relief is not subject to any conditions, but ASIC expects that issuers of deposit products will provide adequate disclosure in their offer documentation for deposit products (whether or not a PDS is required), including details about termination values for such products. This disclosure should include information about whether there are any restrictions on termination and if any early termination costs may apply.  **(b) Interest rates in PDSs for deposit products [CO 06/476]**  Details of interest rates that may be paid on a deposit product are required to be disclosed in a PDS under s1013D of the Act.  Class Order [CO 06/476] exempts the issuer of a deposit product from disclosing the interest rate of a deposit product in a PDS where:  (a) the PDS clearly and prominently states how any person may find out the interest rate of the relevant deposit product; and (b) the issuer has in place means by which a person may obtain details of the interest rate that are simple, involve little inconvenience to the person and are free of any charge imposed by the issuer or its associates.  ASIC understands that it is current industry practice to provide potential applicants for a deposit product with interest rate information before the making of the deposit. The precise interest rate is not contained in the offer documents as the rate changes frequently.  **(c) General transitional relief for dollar disclosure [CO 06/476]**  In June 2005, ASIC granted transitional relief for issuers of deposit products from the dollar disclosure requirements because the Federal Government was reviewing product disclosure statement (PDS) requirements for basic deposit products and general insurance products as part of the Refinements to Financial Services Regulation Proposals Paper (May 2005). In December 2005, the Government excluded basic deposit products from the PDS regime, leaving non-basic deposit products subject to the dollar disclosure requirements.  In general, "non-basic deposit products" are term deposits that must be held for at least two years and do not offer "at call" termination in less that seven days.  As the Government did not exclude non-basic deposit products from the PDS regime, the current transitional relief from the dollar disclosure regime for non-basic deposit products was due to expire on 30 June 2006. While ASIC expects issuers of non-basic deposit products to comply with the dollar disclosure regime as soon as practicable, it has granted a short extension of the transitional relief (until 31 March 2007) to allow an orderly transition to the new regime. Over the coming weeks, ASIC will confirm any outstanding practical issues regarding the transition with industry stakeholders.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **2.4 ASIC further extends interim relief for actuaries and general insurers**  On 20 June 2006, the Australian Securities and Investments Commission (ASIC) announced that it has extended interim relief for actuaries from the requirement to hold an Australian financial services licence (AFSL) until 31 December 2006 while the Federal Government continues its consultation with industry on the application of the licensing provisions.  Relief has also been extended for issuers of general insurance products from dollar disclosure requirements until March 2007 while the Government considers the application of these requirements to general insurance PDSs.  **(a) Actuaries**  The extension of relief for actuaries is provided under ASIC Class Order [CO 06/469] Further transitional relief for actuaries. This will provide the Government further time to consider the application of the licensing regime to actuaries.  Under s911A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), a person who carries on a financial services business is required to hold an AFSL. Corporations Regulation 7.1.29 provides exemptions from the need to be licensed for certain classes of professional activities that would otherwise constitute a financial services business. Actuaries have previously raised concerns that the categories of exemption from licensing may not apply to all aspects of their ordinary business.  In response, ASIC issued Class Order [CO 03/1096] Actuaries to provide temporary relief until 30 June 2005 to certain types of actuaries from the need to hold an AFSL, while the details of any potential permanent exemption were determined by Government. This relief was then extended under Class Order [CO 05/680] Transitional relief for actuaries.  **(b) General insurance products and dollar disclosure**  In 2005, ASIC granted transitional relief for issuers of general insurance products from the dollar disclosure requirements until 30 June 2006 under Class Order [[CO 05/683]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co05-683_pdf" \t "_new) Dollar disclosure: further transitional relief.  This extension followed the Government's announced review of product disclosure statement (PDS) requirements for basic deposit products and general insurance products as part of the Refinements to Financial Services Regulation Proposals Paper (May 2005).  As a result of this review, the Government excluded basic deposit products from the PDS regime in December 2005, leaving non-basic and general insurance products under the PDS regime. However, the Government applied a modified PDS regime to issuers of general insurance products.  The Government is now reviewing the application of the dollar disclosure regime to general insurance products (see the Corporate and Financial Services Regulation Review, April 2006). Recognising the need for flexibility in compliance with dollar disclosure until a permanent position is developed, ASIC has extended transitional relief until 31 March 2007. The extension of relief is provided under Class Order [[CO 06/476]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-476_pdf" \t "_new) Variation of Class Orders [CO 05/681] and [CO 05/683].  Further background information about the dollar disclosure requirements and issuers of deposit products is available on the [ASIC website](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR+06-20+ASIC+helps+simplify+disclosure+for+deposit+products?openDocument" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **2.5 ASIC reports on SFE group**  On 20 June 2006, the Australian Securities and Investments Commission (ASIC) released the findings of its fourth assessment of the Sydney Futures Exchange Limited (SFE) and SFE Clearing Corporation Limited (SFECC), and its second assessment of Austraclear Limited (Austraclear).  Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), ASIC is required to conduct an annual assessment of how well the SFE is complying with its obligations to supervise its market and how well SFECC and Austraclear are complying with their obligations to supervise their respective clearing and settlement facilities.  ASIC has concluded that the SFE has adequate arrangements for supervising the market, including arrangements for:   * handling conflicts between its commercial interests and the obligation to operate the market in a fair, orderly and transparent way * monitoring the conduct of participants, and * enforcing compliance with its rules.   SFE is already acting on suggested improvements to its supervision, compliance and disciplinary arrangements to ensure it can continue to comply with its obligations in the future.  The report also notes that SFE suffered some outages on its SYCOM trading system in the last year. ASIC is satisfied that SFE has taken swift action to minimise the chances of unexpected outages in the future. ASIC will continue to monitor this issue in conjunction with SFE.  ASIC has also concluded that SFECC and Austraclear have adequate arrangements for supervising their respective clearing and settlement facilities, including arrangements for:   * handling conflicts between their commercial interests and the need to ensure that the clearing and settlement facilities services are provided in a fair and effective way, and * enforcing compliance with their operating rules.   The assessment report for [Sydney Futures Exchange (SFE)](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=SFE_assessment_report_May2006_pdf" \t "_new) and SFE Clearing Corporation and Austraclear is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **2.6 ASIC consults on timeshare schemes**  On 24 May 2006, the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking industry and consumer feedback on a proposal to refine Policy Statement 160 Time-sharing schemes [PS 160] regarding time-share schemes.  The consultation paper raises specific issues for public comment as part of a broader project to update ASIC's timeshare policy to take into account the financial services reform amendments to the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  Having regard to ASIC's recent experience in the regulation of time-share and recent changes to the Act, the paper proposes that:   * certain time-sharing operators with ASIC relief need to be members of an ASIC approved external dispute resolution scheme; * all purchasers of time-sharing interests be given 14 calendar days to exercise cooling-off rights (at the moment the length of the cooling off period can vary); and * licensing exemptions be granted in relation to the resale of time-sharing interests for certain time-sharing schemes with ASIC relief.   ASIC will continue to apply its existing policy in [PS 160] pending finalisation of the consultation. This includes allowing time-sharing operators to rely on membership of the Australian Timeshare and Holiday Ownership Council as a condition of being exempt from the managed investments provisions under various ASIC relief instruments.  The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=review_of_ps160_cp.clean_pdf" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%232)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top) |
| **3. Recent ASX Developments** |
| **3.1 ASX and SFE merger**  On 14 June 2006, the Australian Stock Exchange Limited ("ASX") and SFE Corporation Limited ("SFE") announced that the merger proposal to be considered by shareholders of SFE on 5 July 2006 will be modified to reflect the decision of the ASX Board to appoint Robert Elstone as CEO of the merged group, if the merger is approved.  ASX confirmed that other than the changes announced it has no intention of increasing the financial terms of the merger, in the absence of a higher bid or material development.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%233)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **3.2 ASX to retain two month reporting deadlines**  On 8 June 2006, the Australian Stock Exchange (ASX) confirmed after extensive consultation, that it will retain the two-month deadline for listed entities to report their full-year and interim financial results.  The consultation suggested there is significant market support for retaining the two-month reporting deadline – in line with ASX's initial view that this is both desirable for shareholder protection reasons as well as appropriate given international practice and trends.  This means:   * Listed entities that operate on a 31 December balance date will need to report their half yearly results to 30 June 2006 by 31 August 2006 and full-year results by 28 February 2007. There are approximately 200 listed entities in this category. * The more than 80 percent of listed entities who operate on a 30 June balance date will need to report their half yearly results to 31 December 2006 by 28 February 2007 and their full-year results by 31 August 2007. * Listed entities who operate on a balance date other than 31 December or 30 June will need to report their half-yearly and full-year results by the dates set out in the ASX announcement.   **Background**  In 2003 ASX reduced the deadlines for full-year and interim results from 75 days to two months. In response to concerns raised by some issuers and analysts, ASX conducted a review of this decision during 2005. In addition, transitional arrangements were adopted in June 2005 to accommodate the shift to AIFRS reporting. Under these arrangements, listed entities with a 30 June 2006 balance date that have the benefit of the temporary 15 day extension have until 13 September 2006 to report their full-year results.  ASX's review was conducted in two parts. The review consisted of analysis of reporting patterns from before 2002, (since before the change to a two-month deadline) and focus group and interviews with representatives of approximately 100 listed entities, organisations and professional bodies, brokers, analysts, auditors, and corporate advisers. In 2006 ASX's Regulatory Policy Unit undertook a public consultation on this issue based around a discussion paper.  During its review, ASX examined international benchmarks and trends. Singapore has a 45-day deadline for quarterly reports. US deadlines (on a tiered system) range from 35 to 60 days, while New Zealand has a 60-day deadline. Regional Asian reporting deadlines range from 45 to 75 days.  The ASX review also considered the causes and impact of "clustering" of financial reports towards the closing days of the reporting period. The review recognised that clustering could cause problems particularly when they involved similar businesses. However it found that the two-month deadline had not contributed to this clustering. ASX will continue to consider measures to alleviate this cohort clustering.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%233)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **3.3 Significant improvement in corporate governance reporting**  The latest ASX review of compliance with the ASX Corporate Governance Council's principles and recommendations has revealed listed companies are continuing to improve their corporate governance reporting.  Overall reporting levels – the aggregate of adoption of recommended practices and of 'if not, why not' exception reporting – were higher in 2005 than in the previous year.  Key improvements in corporate governance reporting in 2005 were as follows:  **(a) Overall reporting levels**   * The overall reporting level for all Recommendations (being the aggregate of actual adoption of the Recommendations and the 'if not, why not' exception reporting) increased to 88% from 84% in 2004. * 14 out of 28 Recommendations had reporting levels over 90%. * An additional 9 out of 28 Recommendations had reporting levels over 80%. * This compares with the 2004 review where 8 out of 28 Recommendations had reporting levels over 90% and an additional 9 out of 28 Recommendations had reporting levels over 80%. * The overall reporting level increased at a faster rate among companies outside the Top 500.   **(b) Adoption reporting levels**  The adoption reporting level for all Recommendations increased to 74% from 68% in 2004.  **(c) 'If not, why not' exception reporting levels**  There were continued high levels of 'if not, why not' exception reporting in relation to:   * Recommendation 2.1 (A majority of the board should be independent directors) - 47% 'if not, why not' exception reporting * Recommendation 2.4 (The board should establish a nomination committee) - 57% 'if not, why not' exception reporting * Recommendation 9.2 (The board should establish a remuneration committee) - 38% 'if not, why not' exception reporting.   The findings emerge from ASX's review of annual reports of 1,162 companies that reported with a 30 June 2005 balance date. Listed trusts, not included in this review, will be the subject of a separate review which will also include stapled entities and listed managed investment schemes.  The findings are available on the [ASX website](http://www.asx.com.au/supervision/governance/index.htm" \t "_new).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%233)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top) |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Tower Software Engineering Pty Ltd - decision**  On 15 June 2006, the Takeovers Panel advised that it has considered the application (Application) by Mr Berend Hoff (Mr Hoff) in relation to the affairs of Tower Software Engineering Pty Ltd (Tower) dated 25 May 2006 (TP 06/576).  The Panel considers that circumstances exist that would have justified a declaration of unacceptable circumstances in connection with the early dispatch of Pendant Software Pty Ltd's (Pendant Software) bidder's statement. However, the Panel decided that the undertakings and further disclosure offered by Pendant Software and Pendant Properties Pty Ltd (Pendant Properties) remedied the unacceptable circumstances and accordingly, the Panel declined the Application and has not made a declaration of unacceptable circumstances.  **(a) Background**  The Application concerned a takeover offer by Pendant Software for Tower, made on 18 April 2006 (Offer).  The Offer provided that all Tower shareholders must first comply with the provisions in Tower's constitution granting existing members a pre-emptive right to purchase shares offered for sale (Pre-emptive Rights Regime). Prior to the Offer, the Pre-emptive Rights Regime had already been satisfied by one member, Equity Partners One Pty Ltd (Equity Partners). As no existing Tower shareholder had elected to acquire all of Equity Partners' shares, Equity Partners had a three month window within which to sell its shares to a non-member (such as the bidder).  At a Tower board meeting held on 18 April 2006:  (a) Mr Frost, a director of both Tower and Pendant Software, tabled a bidder's statement in relation to the Offer (Bidder's Statement); and (b) a motion was moved that Tower dispense with the usual 14 day period between giving a bidder's statement to the target and dispatching offers to target shareholders (as provided for under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)). This allowed Pendant Software to send the offers and Bidder's Statement to Tower shareholders immediately.  If the Bidder's Statement had been dispatched in accordance with the normal 14 day timetable, Equity Partners' window within which it could accept the Offer (before having to re-comply with the Pre-emptive Rights Regime) would have expired.  The Panel found that at the time the Tower board agreed to early dispatch it:  (a) had not seen a draft of the Bidder's Statement before that meeting;  (b) had, at the most, time to read the Bidder's Statement at the meeting, but only very limited opportunity to consider its content; (c) had not sought or obtained any advice on the content of the Bidder's Statement; and (d) had not sought or obtained any advice on the issue of consenting to early dispatch.  The Panel considered that, where the Bidder's Statement was not properly reviewed from the perspective of the target by any person, the Tower directors should have considered seeking advice before agreeing to early dispatch.  If it had not been for the Tower board's decision to agree to early dispatch, Equity Partners would not have been able to accept the Offer (as it would have had to re-comply with the Pre-emptive Rights Regime). Accordingly, the Panel found that the circumstances (being the board's decision to consent to early dispatch) had the direct effect of enabling Pendant Software to acquire a relevant interest in Equity Partners' shares in Tower (amounting to the acquisition of a substantial interest in Tower).  **(b) Decision**  The Panel considered that the Tower board's decision to consent to early dispatch in these circumstances would have justified a declaration of unacceptable circumstances (having regard to the effect of that decision on the acquisition by Pendant Software of Equity Partners' shares in Tower, and on the control, or potential control, of Tower). The Panel considers that the decision of the Tower directors to consent to early dispatch, without having either undertaken a thorough review of the bidder's statement or sought appropriate advice, would need to be justified by extremely compelling reasons to be consistent with paragraphs (a) and (b)(iii) of section 602.  The Panel considered that a declaration would have been warranted, in the light of the effect on the efficient, competitive and informed market for voting shares in Tower, regardless of whether any of Pendant Software, Equity Partners or any Tower director knew or intended that allowing early dispatch would result in or enable immediate acceptance of the Offer by Equity Partners.  **(c) Undertaking**  The Panel accepted undertakings offered by Pendant Software and Pendant Properties (a 30% shareholder in Tower and associate of Pendant Software) and accordingly, has declined to make a declaration of unacceptable circumstances.  Mr Hoff submitted that the Undertakings would allow Pendant Software and Equity Partners to benefit from the unacceptable circumstances and to maintain the loss by Tower shareholders of their pre-emptive rights.  The Panel considered that had it not been for the Tower board's decision to consent to early dispatch, Equity Partners would have been unable to accept the Offer without giving a further pre-emption notice. Accordingly, there would have been at least one month in which a potential rival bidder could have made a bid and had a viable prospect of acquiring control. The Undertakings provide an equivalent opportunity for a potential rival bidder to make a takeover bid and acquire the Equity Partners' shares if Pendant Software does not match that rival bid. Accordingly, the Panel considers that the Undertakings are sufficient to address the unacceptable circumstances arising from the decision to consent to early dispatch and to ensure that there is an efficient, competitive and informed market for the control of Tower.  The Panel did not consider it could justifiably require that Tower shareholders be given the opportunity to buy Equity Partners' shares under the Pre-emptive Rights Regime. The takeovers legislation does not require that shareholders be given the opportunity to exercise pre-emptive rights and even if it did, the Panel found that Tower shareholders did have such an opportunity (as a result of Equity Partners early satisfaction of the Pre-emptive Rights Regime prior to the Offer), but did not seek to take advantage of it.  The Panel will publish its reasons for its decision on its website in due course.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%234)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top) |
| **5. Recent Corporate Law Decisions** |
| **5.1 Letters of request in cross border insolvencies**  (By Michael Quinlan, Partner and Angela Martin, Allens Arthur Robinson)  In the matter of HIH Casualty and General Insurance Limited [2006] EWCA Civ 732, English Court of Appeal (Civil Division), 9 June 2006  The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWCA/Civ/2006/732.html](http://www.bailii.org/ew/cases/EWCA/Civ/2006/732.html" \t "_new)  Do letters of request in cross-border insolvencies provide assistance? A recent decision of the English Court of Appeal will have a significant impact on the consideration of letters of request in complex international insolvencies. The decision also has serious implications for the efficacy of section 562A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) where Australian insurers are reinsured in London.  **(a) Introduction**  On 9 June 2006, the English Court of Appeal unanimously dismissed an appeal by the Australian liquidators of HIH Casualty and General Insurance Limited (HIH) against an English High Court decision. A single judge of the English High Court held that in an English liquidation of a foreign company, the English Court had no power to direct the English liquidator to transfer funds to Australia for distribution in the principal liquidation.  The judgment questions the efficacy of the letter of request procedure to procure English court to apply Australian insolvency law, where the principal liquidation is in Australia and the English liquidation is ancillary.  In Australia, the Corporations Act 2001 (Cth) provides for the courts to act in aid of, and be auxiliary to, each other in all external administration matters. Section 581 provides that, where a letter of request from a court of a country other than Australia requesting aid in an external administration matter is filed in an Australian court, the court may exercise such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction.  Reciprocally, the Australian court may request a court of a foreign country that has jurisdiction in external administration matters to act in aid of, and be an auxiliary to it in an external administration matter.  **(b) Background**  In March 2001, an originating process to wind up HIH and three associated companies was presented to the New South Wales Supreme Court (the Supreme Court) and provisional liquidators were appointed in Australia on 27 August 2001. At the same time winding up petitions were presented to the Supreme Court that court requested the High Court in England, pursuant to section 426 of the UK Insolvency Act 1986, to appoint provisional liquidators to HIH, and the English provisional liquidators were duly appointed.  At the time of its collapse, the HIH insurance group in Australia comprised 274 companies through which the group carried on insurance business in many countries, including Australia and England. Following the provisional liquidation of HIH, it subsequently became clear in Australia that, unless the sums collected by the English provisional liquidators from reinsurers of HIH were remitted to Australia for the Australian liquidators to apply in the due course of winding up HIH, or in accordance with the scheme of arrangement, insurance creditors of HIH would lose the benefit of section 562A of the Corporations Act. English law contained no priority for insurance creditors in the winding up of an insurer.  Section 562A of the Corporations Act applies when an insurance company is in liquidation and gives all insurance creditors of such an insurance company a special priority over other creditors to share in any reinsurance recoveries. Like most Australian insurers, much of HIH's reinsurance was written by London-based reinsurers. If those reinsurance proceeds recovered by the English provisional liquidators were not remitted to Australia and English law was applied to their distribution, insurance creditors would lose out.  In June 2005, the Australian liquidators asked the English provisional liquidators to remit the assets under their control to Australia for distribution by them in accordance with the Corporations Act. The English provisional liquidators declined to do so, on the basis that they did not have such power, and instead applied to the High Court in England for directions as to the appropriate distribution of the sums collected in England. Accordingly, the Australian liquidators applied to the Supreme Court for a letter of request to the English court to be issued to this effect.  In the application of the Australian liquidators, Justice Barrett ordered the transmission of a letter of request to the English court on 4 July 2005. The letter did not directly ask that the English court direct the English provisional liquidators to pay over to the Australian liquidators the asset realisations. Instead, the letter requested the English court:  'to assist and to act in aid of and be auxiliary to this court in this proceeding by hearing and determining an application by the Australian liquidators for: (a) 'Directions to the English provision liquidators to pay over to the Australian liquidators all sums collected, or to be collected, by them in their capacity as English provisional liquidators ...'  On the same date that Justice Barrett issued the letter of request in Australia, Justice Hart in the Companies Court in the Chancery Division of the English High Court ordered that the application for directions and the request application be expedited.  **(c) The decision at first instance**  Justice Richards in the High Court in England held that, if the companies in question were ordered to be wound up by the English courts, the English liquidators would be directed not to transfer assets to Australia, as those assets would not be distributed in Australia according to rules for a pari passu distribution in the way that the English rules provided. The court was also concerned with whether, notwithstanding that finding, it should direct the English provisional liquidators to make such a transfer in view of the fact that the directions for transfer were sought under a letter of request from the Supreme Court.  The judge directed the English provisional liquidators not to pay over to the Australian liquidators all or any sums collected, or to be collected, by them and refused to extend their powers to enable them to do so.  The explanation of the reasoning of Justice Richards is set out at paragraph 112 of his judgment:  'In an English liquidation of a foreign company, the court has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for pari passu distribution in that liquidation is not substantially the same as under English law.'  **(d) The English Court of appeal decision**  The Court of Appeal (Sir Andrew Morritt Chancellor, Lord Justices Tuckey and Carnwarth) heard the appeal of the Australian liquidators in May 2006 and delivered one main judgment on 9 June 2006.  Essentially, the question before the court was whether it had jurisdiction to entertain a request under the Insolvency Act for directions to the liquidators in England to transfer the assets collected by them to the liquidators in the principal Australian liquidation. This raises the issue of whether such a transfer would:   * interfere with the statutory scheme imposed on those assets by the Insolvency Act; and * whether or not the court ought to exercise its discretion in favour of such a transfer.   The Chancellor, Sir Andrew Morritt, stated that the question had to be approached in two stages:  '(1) could such a direction be given if the companies were in liquidation in England? If so;  (2) did it make any difference that they are not currently being wound up in England?'  The Court of Appeal considered the jurisdiction to wind up foreign companies in England under section 221 of the Insolvency Act and the relevant case law and found that Justice Richards had gone too far in his view that:  'The substantive rules of distribution under the English statutory scheme are mandatory and the court has no power to make an order which has the effect of disapplying them'.  The Chancellor found that there may be circumstances in which a transfer of assets is for the benefit of the creditors and the transfer should be made, notwithstanding that this would involve the disapplication of English insolvency priorities. The example given by the Chancellor was a savings in costs by avoiding duplication which could offset any reduction in a prospective dividend.  The Court of Appeal also found that if the companies were in liquidation in England, the English court would have jurisdiction to entertain a request under section 426 of the Insolvency Act for directions to the liquidators in England to transfer the assets collected by them to the liquidators in the principal liquidation, even though the result of such a transfer would interfere with the statutory scheme imposed on those assets by the Insolvency Act.  The Court of Appeal stated:  'Thus the court should comply with the request if it may properly do so. That will involve a consideration of all the circumstances including whether the transfer sought will prejudice the creditors or any class of them and whether there would be other advantages sufficient to counteract such prejudice'.  The Court of Appeal went on to say:  'If the interests of creditors would be prejudiced by the transfer sought then the fact that the principal liquidation is in Australia is immaterial'. The court also considered the regard to be paid to the rules of private international law when exercising its discretion under section 426 of the Insolvency Act.  The court found that while the provision for cross-border cooperation might serve a useful purpose where the request relates to a matter in which the rules of private international law might operate, there was no rule of domestic or private international law in this case that entitled the court to disregard the interests of creditors or any class of creditors.  Accordingly, the Court of Appeal held that the starting point was to consider the scope of section 426 of the Insolvency Act. Here, the Supreme Court letter of request did not fall outside the ambit of the concept of 'assistance' and the jurisdiction conferred by section 426 did not preclude the High Court in England from a proper consideration of the request. The court also held that if section 426 could authorise a transfer from the liquidators of an ancillary winding up to the liquidators of the principal winding up, then the only question would be whether the court should exercise its discretion to do so. In exercising its discretion, the court had to consider the prejudice to the interests of some creditors of such a transfer. In this case, the Court of Appeal held that it would not direct a transfer of the English assets by the English provisional liquidators to the Australian liquidators because to do so would prejudice the interests of many of the creditors.  Accordingly, the appeal was dismissed.  **(e) Impact of the findings**  The Australian liquidators have one month from the date of judgment to decide whether to seek permission from the Court of Appeal to appeal to the House of Lords and it is not known whether they will choose to do so.  As the law stands, the implications of the Court of Appeal's decision are as follows:   * the Court of Appeal's decision has led to a conservative view of the letters of request procedure in English insolvency law and continues to reflect a leaning towards a territorial approach in cross-border insolvency matters, although not being quite as restrictive as the approach of the first instance judge; * the Court of Appeal has found that where it is asked by a letter of request to do so it can apply foreign rather than English law, but whether or not it should do so is a matter of discretion; * where the exercise of that discretion would see creditors or a class of creditors disadvantaged, the court will not exercise its discretion in favour of disapplying English law; * the court was not prepared to direct the payment of funds from England to Australia as the effect of section 562A would be to prefer insurance creditors, and it would act to the detriment of other creditors in comparison to the result under English insolvency law; * the effectiveness of section 562A of the Corporations Act has been undermined, at least in the circumstances where an Australian insurer goes into liquidation and an ancillary liquidator is appointed in the United Kingdom; and * notwithstanding the fact that the majority of the reinsurance of Australian insurance risks is, and has historically been, written out of London, reinsurance proceeds recovered in England in these circumstances will not be remitted to Australia for distribution to creditors in accordance with Australian insolvency law.   [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.2 The discretion of directors to refuse to register acceptance of shares and the conflict of the same facts before the court and the Takeovers Panel**  (By Rory Maguire, Freehills)  Tower Software Pty Ltd; Pendant Software Pty Ltd v Harwood [2006] FCA 717, Federal Court of Australia, Goldberg J, 6 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca717.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca717.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Pendant Software Pty Ltd ("Pendant") made a takeover offer for Tower Software Engineering Pty Limited ("Tower") and acquired a stake in Tower from a Tower shareholder. The transfer of these shares to Pendant was not registered by the Tower directors, resulting in two separate interlocutory proceedings. Justice Goldberg dismissed both applications and deemed that the Takeovers Panel ("the Panel") be able to hear the question of unacceptable circumstance.  **(b) Facts**  **(i) Concurrent applications**  The court heard two interlocutory applications set against the backdrop of a takeover offer by Pendant for all the share capital of Tower.  The first of these was on behalf of the plaintiff, Pendant, for an order that the second defendant, Mr Berend Hoff (a director of Tower who owned 30.26% of its issued capital), be restricted from taking any further step in a proceeding/application initiated by him in the Panel.  The second application was on behalf of the first, fourth and fifth defendants and sought to have the proceeding in the Takeovers Panel dismissed generally.  **(ii) Takeover offer**  Tower's constitution restricts shareholders transferring shares without first offering them to existing shareholders. Equity Partners One Pty Limited ("Equity Partners") held 4.5 million shares in Tower and in accordance with the constitution made an offer on 9 January 2006 to all existing shareholders to buy their shares at $1.45 each. No shareholder offered to buy the Equity Partners' shares, therefore they were free to sell them to anyone.  On 18 April 2006, Pendant announced its takeover offer for Tower and on 20 April 2006 accepted Equity Partners' offer and purchased their 4.5 million shares in Tower. By 1 May 2006, Pendant' offer was declared unconditional and notice was served on Tower stating that Pendant now had 44.97% of Tower shares (comprising 14.43% from the acceptance of Equity Partners' shares and 30.54% from Pendant Properties Pty Ltd, an associate of Pendant).  A Tower directors meeting was called to register acceptances received under the offer. Prior to this, Tower received a memorandum of advice from its solicitors stating that the directors could choose to refuse to register the transfer of the Equity Partners' shares to Pendant if they though it may prevent another takeover offer at a higher price. Further advice from counsel questioned this and argued that it would be improper to refuse to register the transfer due to the possibility of another takeover offer being made.  **(iii) Refusal to register share transfer and resulting actions**  At the Tower directors' meeting a friendly offer from Quadrant Private Equity Pty Limited ("Quadrant") for Tower shares at $1.55 was tabled. As such, the transfer of the Equity Partners shares was refused by directors, who then passed a new resolution which (among other things) stated that share transfers would only be approved if no higher offer were made for Tower’s shares during the Offer Period.  In light of this decision, a number of actions were commenced:   * Pendant instituted proceedings against the directors of Tower, seeking to have the registration of the share transfer from Equity Partners approved. The cause of action was based primarily on section 1071F of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). On 11 May 2006, Justice Goldberg heard the application and granted interlocutory relief making a limited order for the purpose of keeping the takeover offer alive, which included that the shares from Equity Partners be registered by midnight. On 24 May 2006, the directions hearing took place with the main issue before the Court, as stated by counsel for Pendant, being the question of whether the refusal to register an acceptance of shares for the reason that it may prevent another offer at a higher price was a proper or improper purpose. * On 25 May 2006, Mr Hoff filed an application with the Panel seeking declarations (pursuant to section 657A of the Act) of unacceptable circumstances in that Pendant's acceptance of the notice of acceptance by Equity Partners of its shares in Tower be declared void. * On 29 May 2006, Pendant filed a submission to the Takeovers Panel that Mr Hoff's application not be heard, as the dispute was already being heard in Court. * On 1 June 2006, Tower held a Board meeting in which the Chairman and the first and fourth defendants stated they had no objection to the registration of the Equity Partners share transfer, and it is for this reason that the second application was filed to dismiss or stay proceedings as the registration had been accepted.   **(iv) Conflict of the same facts before the court and the Takeovers Panel**  Pendant, in relation to the first application, sought an anti-suit injunction against Mr Hoff. Counsel for Pendant, Mr Ehrlich, referred to two authorities in this area: CSR Limited v Cigna Insurance Australia Ltd and National Mutual Holdings Pty Limited v Sentry Corporation. Mr Dixon, appearing for Mr Hoff, argued that a more appropriate approach was to consider the principles involved with potential commissions of contempt of court in relation to an administrative proceeding which might impinge upon a court proceeding, citing Sage v Australian Securities and Investments Commission and Hammond v Commonwealth of Australia.  Justice Goldberg considered what the matter before the Court actually was, concluding that it was not the integrity of the takeover as a whole, which is a matter for the Panel. He stated that the Panel does not adjudicate on disputed rights nor exercise judicial power to resolve disputes and, although the Court has to determine whether the directors were entitled to refuse to register the transfer from Equity Partners, the Court is entitled to determine whether the directors had just cause to refuse to register the transfer.  If there was any unacceptable circumstances found in the lead up to an implementation of Pendant Software's takeover offer, then it is for the Panel to make declarations in relation to it.  **(c) Decision**  It was held by Justice Goldberg that:   * Mr Hoff not be restrained from continuing with his application to the Panel; and * the second proceeding (regarding the first, fourth and fifth defendants) not be dismissed, so that the proceeding in the Takeovers Panel continue.   (Editor's note: The decision of the Takeovers Panel in relation to the application of Mr Hoff is discussed in Item 4.1 of this Bulletin).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.3 Receivers' costs and cross-examination on affidavit**  (By Julia Hammon, Blake Dawson Waldron)  Australian Securities and Investments Commission, In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 5) [2006] FCA 684, Federal Court of Australia, French J, 1 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca684.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca684.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case was an application by ASIC seeking:   * orders that the costs of receivers be met out of the assets of the defendants; and * an order that the first defendant, Mr Norm Carey, be required to attend for cross-examination before the court on the content of his affidavits.   His Honour adjourned the plaintiff's application that the receivers' remuneration be paid out of the assets of the defendant until 3 October 2006. His Honour stated that caution should be exercised when ordering that the receivers' costs be met out of the defendants' assets if liability had not yet been established.  His Honour ordered that Mr Carey make himself available for examination by ASIC and the receivers for examination on matters relevant to the affidavits he had sworn on 4 and 22 May 2006. French J found that there was a real possibility that the affidavits provided by Mr Carey did not include all the information that he was required to provide.  **(b) Facts**  On 29 March 2006, ASIC applied to the Court for orders for the appointment of receivers to the property of four companies in the Westpoint Property and Finance Group, and four individuals who were officers or former officers of companies in the group. On 20 April 2006, orders were made appointing receivers to the property of the four individuals and three of the corporations. Orders were also made requiring each of the defendants to prepare affidavits in respect of their assets and liabilities.  At this instance, ASIC sought orders that the costs of the receivers be met out of the assets of the defendants, and that Mr Carey be examined on the content of his affidavit.  **(c) Receivers' costs**  Section 1323 of the Corporations Act 2001 (Cth) provides for the appointment of a receiver by ASIC to a person or body corporate. His Honour stated that the primary object of an order made under section 1323 is to preserve and protect the assets of the defendants pending the outcome of the investigation, rather than to punish the defendant. A secondary object is to ascertain the extent of the defendant's assets.  French J stated that the Court's power under section 23 of the [Federal Court Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default) to impose a liability to pay a receiver's remuneration out of the defendant's assets was not to be lightly exercised. His Honour stated that there was a need for restraint in making the order under section 23, as ASIC was not required to demonstrate liability on the part of the defendants in its application. His Honour stated that of particular concern is the unjustified damage that is caused if security is given for a claim which may not be made out. His Honour also considered the impact on the position of the creditors of each of the defendants if the order was given.  **(d) Cross examination on affidavit**  In the orders made on 20 April 2006, Mr Carey and other individual defendants were ordered to produce affidavits setting out their assets and liabilities. Mr Carey provided an affidavit sworn on 4 May 2006, and a further affidavit sworn on 22 May 2006. ASIC disputed a number of statements sworn by Mr Carey in his affidavit, on the grounds that it was vague, incomplete and manifestly inadequate, and not sufficient to comply with the terms and spirit of the disclosure orders. ASIC further claimed that Mr Carey had made a number of inconsistent statements in his affidavit. These included inconsistencies in the disclosure of his income, living expenses, assets and liabilities, living arrangements, and statements relating to shareholdings and directorships.  Counsel for Mr Carey argued that the Court should not be required to look beyond the affidavits that he had filed, and submitted that cross-examination of a deponent of a disclosure affidavit would not normally be ordered. It was argued that an order for cross-examination should only be made when such an order is the only just and convenient way of ensuring the deponent would not deal with his assets so as to deprive a plaintiff of a judgment.  It was further submitted that the Court should guard against a 'fishing expedition' and a wide-ranging cross-examination. It was submitted that the court must be satisfied that there is substantial likelihood that Mr Carey had failed to comply with the Court's orders, and that mere speculation or a mere possibility of non-compliance would be insufficient to discharge that onus. Counsel for Mr Carey also argued that he had not been vague or inconsistent in his affidavits, and that ASIC had not supplied clear and cogent evidence to support its allegations.  **(e) Decision**  His Honour held that the receivers' costs should not be recovered out of the assets of the defendants. His Honour stated that ASIC may, however, apply again for the orders as circumstances change.  French J ordered Mr Carey to present himself for examination by ASIC and the receivers. His Honour found that there is a real possibility that the disclosure affidavits signed by Mr Carey had failed to disclose the full extent of assets or property owned or controlled by him or in relation to which he had an interest.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.4 Approving a scheme of arrangement under section 411(4) of the Corporations Act**  (By David van Dieren, Mallesons Stephen Jaques)  Re HIH Casualty and General Insurance Limited [2006] NSWSC 485, New South Wales Supreme Court, Barrett J, 26 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc485.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc485.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Part 5.1 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) provides for a mechanism by which a corporation may enter into a legally enforceable scheme of arrangement or compromise with its creditors. A scheme of arrangement allows a company to reach an agreement with its creditors to defer, rearrange or extinguish its obligations. This arrangement or compromise must be approved by creditors at meetings duly convened in accordance with section 411(1) of the Act and be sanctioned by an order of the court under section 411(4).  This case concerns certain subsidiaries of HIH Insurance Ltd (the Scheme companies) seeking an order of the court under section 411(4)(b) to have a scheme of arrangement or compromise (the Scheme) approved.  In determining whether the court should give approval to the Scheme, Barrett J examined the following matters:   * whether the creditors relevant to the Scheme were appropriately identified; * whether the procedure of the meeting of creditors complied with proper procedure contemplated by section 411(1); * whether any creditors will be treated in a discriminatory manner that causes them to be, for the purposes of section 411, a class of creditors distinct and separate from the remainder of the creditors; and * whether all material information with respect to the Scheme is disclosed to the relevant creditors in accordance with section 412. Indeed, if the Scheme has an operation that is prejudicial to particular creditors, whether the information relating to the prejudicial operation is material and therefore disclosed to the relevant creditors.   **(b) Facts**  The application for a court order concerned eight companies which are wholly owned subsidiaries of HIH Insurance Ltd and that are in the course of being wound up (the Scheme Companies). The Scheme companies (first plaintiffs) and the liquidators of each of the Scheme companies (second plaintiffs) sought an order under section 411(4)(b) of the Act for the approval of a compromise or arrangement between the Scheme companies and the creditors.  The issues listed above were raised by several creditors (Amaca Pty Limited and Gordian Runoff Limited) granted leave under rule 2.13 of the Supreme Court (Corporations) Rules 1999 to be heard without becoming parties to the application.  **(c) Decision**  Barrett J held that "the court will not make orders under section 411(1)(b) in respect of the Australian scheme as it applies to the eight companies" by reasons of the existence of a class of creditors affected prejudicially by the Scheme and an associated deficiency in disclosure of material information.  His Honour did, however, conclude that he was satisfied that the creditors were properly identified and proper procedure was followed in the meeting of creditors.  **(i) Identifying creditors**  The concern was raised that some holders of insurance were not identified as creditors for the purpose of the Scheme. In identifying the relevant creditors, steps were taken to identify such persons only in relation to commercial policies issued on or after January 1998; however, the relevant insurance businesses commenced "some forty years ago".  Barrett J held that the risk of non-identification of creditors was negligible for the reasons that most cases of insurance were renewed annually - meaning that a renewal of insurance would have occurred after 1998, and in any event the meetings were publicly advertised and the materials were available on the liquidators' website.  **(ii) Procedural matters**  Barrett J discussed several procedural matters with respect to the creditors meetings that "require[d] attention in connection with the section 411(4)(b) applications".  Firstly, each voting constituency (the creditors of a particular company) were not physically separated from the other voting constituency. Reference was made to, inter alia, Re Australian Consolidated Press Ltd (1994) 117 FLR 451, Cullen v Galloway Cattle Society of Australia Inc (1998) 27 ACSR 648 and Re Hills Motorway Ltd (2002) 43 ACSR 101. These cases recommended "an appropriate degree of separation … an independent expression of a decision on each matter for deliberation so that it can be separately recorded and reported to the court".  However, Barrett J, in light of his previous judgment in Re Hills Motorway Ltd (2002) 43 ACSR 101, observed that in any event all constituencies considered the same proposed scheme and each constituency was afforded the opportunity to consult and vote separately.  Secondly, the suggestion was made that the chairman of the meeting of creditors was not in a position to move a resolution at that meeting. Reference was made to Young J in Re Adams International Food Traders Pty Ltd (1988) 13 NSWLR 282 and National Australia Bank Ltd v Market Holdings Pty Ltd (2001) 37 ACSR 629. However, Barrett J pointed out that Young J "was speaking of no more than the need for a chairman to be impartial".  Indeed, his Honour made mention of the dictum of James LJ in Re Horbury Bridge Coal Iron & Wagon Co (1870) 11 ChD 109 in support of the proposition that there is no general rule that a motion moved by a chairman who is not himself a member of the deliberating body is invalidly moved and cannot be passed.  Thirdly, his Honour held that a vote decided by a show of hands rather than one "decided on the voices" (as contemplated by regulation 5.6.19(1) of the [Corporations Regulations 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default)) was adequate to determine the outcome of a resolution.  Fourthly, Barrett J did not accept the contention that a chairman may not demand a poll (by which the substantive question of approval of the Scheme was determined) unless there has first been a vote on the voices. Rather, His Honour held that a poll can be demanded without going through the formality of a vote.  Lastly, an amendment to the Scheme by three of the Scheme companies was held not to be an obstacle to the approval of the Scheme. Indeed, Barrett J was satisfied that the companies complied with the procedure noted in Re Adams International Food Traders Pty Ltd (1988) 13 ACLR 586 and Re Citec Corporation (2006) 56 ACSR 663. This procedure requires that the companies pass two resolutions - one to the effect that the Scheme should be amended and another approving the Scheme as so amended.  **(iii) The operation and effect of the prejudicial clause**  The Scheme contained a clause (clause 22) that dealt with liability arising under a contract of insurance or reinsurance between a Scheme company, one or more Scheme creditors and non-Scheme co-insurers. The effect of the clause was to reduce the entitlement of the creditor that is a party to this type of contract of insurance.  The effect of section 411(4)(a)(i) is that a compromise or arrangement cannot become binding on a class of a company's creditors unless it has been agreed to by the requisite majority of creditors included in that class. Therefore, if clause 22 has the effect of creating a separate class of creditors, the absence of any separate resolution passed at a meeting of the class agreeing to the Scheme will cause the court to lack the jurisdiction to approve the compromise or arrangement under section 411(4)(b).  Barrett J held that clause 22, by creating a mechanism where one group may be enriched at the expense of another, did indeed provide for differential treatment of a particular class of creditors. His Honour argued that this was enough to "destroy community of interest between the two groups of creditors in such a way that, having regard to their respective rights, each could not, in company with the other so as to make up a like-minded whole, consult together to decide whether the scheme promoted their common good". Consequently, the court had no jurisdiction to grant approval under section 411(4)(b).  **(iv) Non-disclosure**  Section 412 of the Corporations Act requires that information explaining the effect of the compromise or arrangement must be disseminated in an explanatory statement. Similarly, Maugham J in Re Dorman Long & Co Ltd [1934] Ch 635 held that approval for a compromise or arrangement should be refused where the accompanying circular was insufficient and misleading.  Barrett J explained that the disclosure requirement is a "matter of materiality" and therefore anything that has the capacity to influence a creditor’s decision and judgment with respect to a scheme must be disclosed.  His Honour held that, notwithstanding the fact that clause 22 was discussed in meetings with creditors, the prejudicial effect of the clause was not mentioned in the explanatory statement and any preceding discussion of the clause did not remedy the deficiency. Furthermore, creditors were not provided with information "of very real importance to those of them with debts or claims of the relevant kind".  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.5 Power to cancel or suspend a liquidator's registration is not judicial**  (By Richard Hillman, Freehills)  Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board [2006] FCAFC 69, Federal Court of Australia, Full Court, Emmett J, Allsop J and Graham J, 19 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/may/2006fca69.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/may/2006fca69.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The Full Court of the Federal Court of Australia unanimously held that the power invested in the Companies Auditors and Liquidators Disciplinary Board ("the Board") to cancel or suspend the registration of a liquidator is not a judicial power.  **(b) Facts**  Section 1292(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) confers upon the Board the power to cancel or suspend the registration of a person as a liquidator. Relevantly this power may be exercised under paragraph (d) where the Board is satisfied that the person:   * has failed to carry out or perform adequately and properly the relevant duties or functions of a liquidator or registered liquidator; or * is otherwise not a fit and proper person to remain registered.   The registration of a person as a liquidator is also provided for in the Act. A person who is not registered under the Act can only act as a liquidator in restricted circumstances.  The applicants, Albarran and Gould, were both liquidators who were the subject of proceedings that had been or were being conducted by the Board. They separately challenged the constitutional validity of section 1292 of the Act. The essence of their argument was that section 1292 is invalid because it invests the judicial power of the Commonwealth in a body that is not a court (the section is therefore not in accordance with the complete and exclusive power conferred on the Commonwealth Parliament by section 71 of the Constitution).  **(c) Decision**  The Full Court applied a "functional analysis" in order to characterise the power exercised by the Board under section 1292(2). This analysis involved a consideration of how the power is exercised and for what aim and consequence.  The character of the Board, which sits as a panel and includes representatives of the accounting profession and business community, was relevant to this analysis. The undoubted application by members of the panel of professional standards was considered evidence that the section 1292(2) power was not inherently judicial. It did not matter that Board had the power to order costs and adduce evidence in a formal hearing. The Full Court noted that these powers, and other aspects of the hearing procedure determined under the [Australian Securities and Investments Commission Act (2001) (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default), are not solely within the competence of a court.  The Full Court found that ultimately the sole sanction that can be ordered by the Board is the suspension or cancellation of a liquidator’s registration. Such an order would only deprive a person of a right that had been granted under the Act. The Full Court noted that there is a fundamental difference between deciding whether a statutory right should continue into the future and deciding what legal rights or obligations in fact exist.  It follows that the purpose of the hearing undertaken by the Board is not to ascertain a legal right or obligation or to punish a contravention of the Act. Rather, the purpose is to determine whether a right akin to a licence (which was granted subject to the power to cancel or suspend) should continue into the future. Although the inquiry under section 1292(d) involves a consideration of whether duties have been adequately and properly carried out in the past, given the context of the provision, this was considered by the Full Court to be a surrogate for an enquiry into the fitness of the person to remain registered under the Act. This enquiry is an evaluative or subjective determination of the adequacy or propriety of the liquidator's performance, and the Full Court held that the Board is not required to make a judgment involving a legal standard.  The "functional analysis" performed by the Full Court led it to conclude that the Board does not exercise judicial power under section 1292(2).  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.6 Agents of an undisclosed and deregistered principal**  (By Olivia Mak, Clayton Utz)  White v Baycorp Advantage Business Information Services Ltd [2006] NSWSC 441, New South Wales Supreme Court, Campbell J, 18 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc441.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc441.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This decision concerns the validity of acts by agents for an undisclosed principal which had been deregistered but subsequently reinstated by ASIC under section 601AH(5) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The decision reiterates the importance of an undisclosed principal granting actual authority to its agent to enter into a contract and of ensuring that the agent does not in any way hold itself out to be the real and only principal.  The decision also highlights the distinctions between ASIC- versus Court-ordered reinstatement, and of the latter's flexibility.  **(b) Facts**  In 2000, White Holdings took an assignment of an equipment rental agreement between Konica and a company which White Holdings had purchased. Konica entered into the assignment agreement on behalf of its undisclosed principal, Capital Corporate.  On 18 January 2004, Capital Corporate was deregistered pursuant to section 601AA(4) of the Corporations Act.  On 2 September 2004, Capital Finance, the parent of Capital Corporate, issued a notice to White Holdings, claiming that there had been an Event of Default under the rental agreement. That notice demanded payment of rent owed and advised that any defaulting account would be listed with the credit information company, Baycorp.  On 16 September 2004, a notice was issued to White Holdings notifying it that it had been listed with Baycorp.  On 29 November 2005, ASIC reinstated Capital Corporate's company registration pursuant to section 601AH(1).  White Holdings brought an action seeking an urgent hearing on the basis that the listing in Baycorp's database and the information contained in it was preventing it from raising finance at normal, commercial rates to repay a debt owed to another finance company.  **(c) Decision**  **(i) Finding - no authority to enter into assignment agreement**  The court found that White Holdings did not owe any monies to Capital Corporate or a company within the Capital group. The agency agreement between Capital Corporate and Konica prevented Konica from entering into the assignment agreement except with the former’s prior approval. The court found on the evidence before it that Capital Corporate had given its approval to the assignment after Konica had signed the agreement. As Konica did not enter into the assignment agreement with that authority, White Holdings did not owe money to Capital Corporate under either document. On this basis, the Court found the entries in Baycorp were misleading or deceptive representations and granted injunctive relief to White Holdings.  **(ii) Observation - Part 5A.1 of the Corporations Act and agency**  The court went on to consider (in obiter) the authority of Konica and Capital Finance to act on behalf of a deregistered principal whose registration was later reinstated by ASIC, and the interaction with Part 5A.1 of the Corporations Act.  First, the court observed that, even if Konica had the necessary authority to enter into the assignment agreement, no debt was owed to Capital Corporate. At the time White Holdings allegedly fell behind on rent payment, Capital Corporate had already been deregistered. Upon deregistration the right to receive the monies owed was vested in ASIC, not Capital Corporate (section 601AD).  Second, the court observed that Capital Finance, as agent for the undisclosed principal Capital Corporate, did not have actual authority from Capital Corporate to exercise the latter's contractual power to issue a notice to the plaintiffs:   * as a matter of fact, at the time the notices were issued, Capital Corporate was deregistered and had declared that it had no business to carry on; and * furthermore, as a matter of law, reinstatement under section 601AH(5) did not operate to validate Capital Finance's actions during the period of Capital Corporate’s deregistration, only actions taken after reinstatement.   Moreover, under general law an agent of an undisclosed principal must have actual authority to enter into a contract. That principle operated to prevent Capital Corporate, as a deregistered principal, from authorising Capital Finance to perform an act which would be binding on it.  As Capital Finance did not have authority from Capital Corporate to issue a notice to the plaintiffs on its behalf, the notices were invalid.  The court observed that the ASIC reinstatement and court-ordered reinstatement had different effects. Had Capital Corporate been reinstated by a court under section 601AH(2), section 601AH(3) would have allowed that court to make orders validating anything done during the period of deregistration and to make any other order it considered appropriate  **(iii) Observation - contracts inherently incapable of being held for an undisclosed principal**  The court also rejected (in obiter) the plaintiff's alternate submission that the rental agreement and assignment agreement were contracts that an agent of an undisclosed principal was inherently incapable of entering into.  The court noted that, in order to determine whether a particular contract was inherently incapable of being held for the benefit of an undisclosed principal, it must construe the whole of the contract and consider whether:   * the agent held itself out to be the "real and only" principal; and/or * whether there were any terms which would be inconsistent with the contract being held for the benefit of an undisclosed principal, neither of which had been made out in this case.   The court also noted that, although there were certain contracts which could not be held for the benefit of an undisclosed principal (such as a contract to paint a portrait), it did not consider either the rental or assignment agreement to fall within that category.  **(iv) Finding - tort of injurious falsehood claim rejected**  White Holdings also claimed that Capital Finance's act of having it listed by Baycorp amounted to the tort of injurious falsehood. The court was not satisfied that malice had been proved and dismissed this claim.  **(v) Relief**  The court ordered the defendants to procure the removal of the entries in Baycorp. It refused to award damages because it was not satisfied that the Baycorp entries had caused any loss.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.7 Double jeopardy and judges' discretion in sentencing: Rodney Adler appeal dismissed**  (By Eleanor McCracken-Hewson, Mallesons Stephen Jaques)  Adler v Regina [2006] NSWCCA 158, New South Wales Court of Criminal Appeal, McClellan CJ at CL, Sully and Hislop JJ, 18 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswcca158.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswcca158.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Background**  On 16 February 2005, the applicant pleaded guilty to two breaches of section 999 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), now section 1041E ("the section 999 counts") and a breach of section 178BB of the [Crimes Act 1900 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3907" \t "Default) and section 184(1)(b) of the Corporations Act 2001 (Cth) ("the BTS counts"). This case was an appeal from a sentence imposed by Dunford J in the Supreme Court of New South Wales on 14 April 2005.  **(b) Summary**  When making findings of fact, judges are required to analyse and make findings having regard to the evidence before them. This cannot be affected by agreements between the parties to the proceedings.  Double jeopardy only occurs where there are common elements in two or more offences for which an offender stands convicted. It does not occur merely when factors relevant to imposing a sentence relating to one offence, relate in some degree to the elements of another offence of which the offender stands convicted.  A sentencing judge must weigh up all of the circumstances and make a judgment as to what is the appropriate sentence. Judges are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.  **(c) Facts**  The section 999 counts:  Adler, as sole director and shareholder, caused Pacific Eagles Equities Pty Limited (PEE) to purchase shares in HIH. Following an ASX notice reporting that Adler had a "relevant interest" in the acquired HIH shares, a journalist for the Australian Financial Review ("AFR") mistakenly believed that Adler had purchased the shares on his own behalf. Speaking to the journalist on two consecutive days following the announcement, Adler fostered and encouraged the journalist’s mistaken view, as well as making direct statements to the effect that he was purchasing the HIH shares with his own money. The false information was published in the AFR following each occasion.  Dunford J found that, due to the applicant's prominent media profile as a director and shareholder of HIH and as an experienced, active and successful investor, the statements made to the journalist were likely to be reported and likely to induce others to purchase shares in HIH. He further found that this was the applicant's intention in making the misleading statements: so as to cause a rise in the share price. His Honour found that many of those who invested following the statements would have lost their money when the company collapsed. Dunford J described the offences as "serious" and displaying "an appalling lack of commercial morality".  The BTS counts:  Adler had approximately a 35% interest in Business Thinking Systems Pty Ltd (BTS). HIH had approximately a 15% share in BTS. In September 2000 Adler wrote to the CEO of HIH, requesting HIH to invest $2 million in BTS. The correspondence falsely stated (i) that BTS was $2.5 million short of funding an earlier capital raising, when in fact it was $5 million short; and (ii) that Adler himself would put in $500,000, when in fact he had no intention of doing so. He also forwarded a letter from BTS falsely acknowledging receipt of the $500,000 from Adler. At an HIH board meeting to consider whether to ratify the $2 million investment, Adler failed to disclose the falsity of the earlier statements, nor the fact that BTS was effectively insolvent. Dunford J also described these counts as displaying "a lack of commercial morality", emphasising that they were committed against a company by one of its own directors in direct breach of his fiduciary duties.  Civil penalty proceedings:  Prior to the commencement of these criminal proceedings, ASIC had taken civil proceedings against the applicant, amongst others. The applicant was disqualified and ordered to pay pecuniary penalties and compensation. Dunford J found that the civil penalty proceedings were only indirectly concerned with the dissemination of false information to the AFR journalist.  **(d) Decision**  There were nine grounds of appeal, all of which were dismissed. McClellan CJ at CL delivered the main judgment. Sully and Hislop JJ agreed with all, except the last, of his findings.  **(i) Grounds 1- 3**  The applicant submitted that Dunford J erred:   * in finding that the false statements made by the applicant induced small investors to purchase shares in HIH and that such investors lost their money when HIH collapsed. There was no evidence to support such findings; * in finding that the false statements by the applicant caused the price of HIH shares to rise. There was no evidence to support such a finding; and * in attributing to the applicant an intention to induce other persons to buy shares in HIH, based upon a finding of a causal link between the false statements by the applicant and a rise in the share price.   McClellan CJ of CL found as follows:  No evidence was tendered from investors who said that they had purchased HIH shares because of the published false statements. However ASX trading records which were tendered showed that, after a period of decline, the share price did in fact rise following publication of the false statements. Dunford J was correct in finding that the false statements induced investors to purchase HIH shares. This finding was a reflection of the evidence before him. Logically, and in the absence of any other evidence, this would also cause the price of HIH shares to rise. Dunford J's finding that the applicant intended to influence the market in a positive direction was also satisfactory. Small investors would likely be influenced by stories in the AFR indicating that a well-known investor, shareholder and director of HIH was acquiring substantial shares in the company. Given the speed at which the share price then declined, it was inevitable that some of these investors would still be holding the shares beyond the period for which they were profitable.  Dunford J's findings were not affected by the fact that, unbeknownst to him, counsel for the applicant and for the prosecution had agreed not to tender evidence in relation to whether or not the publication of the statements had caused persons to buy shares and thereafter lose money. His Honour was required to analyse and make findings having regard to the evidence before him.  The only adjustment made to Dunford J’s findings was that the quantity of investors found to have lost money as a result of the false statements should be downgraded from "many, if not all" to "some".  **(ii) Ground 4**  The applicant submitted that Dunford J, having regard to the civil penalty orders already made in the action brought by ASIC, failed to give adequate consideration to the principle of double jeopardy.  The applicant submitted that Santow J, in the ASIC proceeding, had already had regard to the conduct which formed the basis of the section 999 counts in fixing the pecuniary penalty imposed upon the applicant. McClellan CJ acknowledged that there was a close relationship between the civil penalty proceedings under the Corporations Act 2001 and the criminal proceedings. However, double jeopardy can only occur where there are common elements in two or more offences for which an offender stands convicted (Pearce v The Queen (1998) 194 CLR 610). Here, although findings in relation to the applicant's conduct for the civil proceedings were relevant background to the present proceedings and vice versa, they were each directed to quite distinct aspects of wrongdoing. The civil penalty proceedings related to provisions concerning directors' duties and financial assistance, whereas these proceedings related to the dissemination of false information. None of the elements of the different provisions overlap. Santow J appropriately had regard to the dissemination of false information as one of many indicia of dishonesty relied upon to characterise the nature of the applicant’s breach and the length of time that he should be disqualified from being a director.  **(iii) Grounds 5 and 6**  The fifth ground of appeal, which related to the principle in R v De Simoni (1981) 147 CLR 383, was swiftly dismissed as having no merit at all. The sixth ground was not pressed by the applicant.  **(iv) Ground 7**  The applicant submitted that, in relation to the section 999 counts, specifying a starting point of imprisonment for a period of 3 years and 6 months, against a statutory maximum of 5 years, was excessive having regard to the objective criminality. He pointed out that there was no certainty that he would be contacted by a journalist after the ASX announcements were published. Nor had he actually made any financial gain from the offences, not having sold his shares when the price rose. However, McClellan CJ referred to Dunford J's findings that the applicant's statements to the journalist were "totally untrue", "blatant" and "direct" and intended to induce persons to purchase HIH shares and drive up the prices. The applicant made the false statements expecting that a journalist would contact him and knowing it would be likely that these statements would make their way into the public domain. McClellan CJ saw Dunford J's discount of just over 15% to take into account the applicant's plea as too lenient, rather than excessive, and so declined to make an order overturning it. The applicant's actions "motivated by his own commercial ambitions and financial aspiration involved criminality of a high order".  **(v) Ground 8**  The applicant submitted that Dunford J failed to give adequate weight to the applicant's plea of guilty in relation to the fourth count. However, McClellan CJ held that the 25% discount given would in the usual case be the maximum discount appropriate.  **(vi) Ground 9**  The applicant submitted that, in relation to count 4, Dunford J erred in fixing a starting point of 4 years imprisonment, against a statutory maximum of 5 years, as reflecting the objective criminality. The applicant pointed out that HIH had a significant interest in BTS and the money paid to it was used to repay its legitimate debts. However, one of these debtors was a company in which the applicant had a 70% interest.  Although the offences displayed a lack of commercial morality, McClellan CJ agreed that the sentence was excessive. However, Sully and Hislop JJ held that the sentence imposed appropriately reflected the applicant's involvement in a succession of deliberately and intentionally fraudulent acts. Sully J emphasised that the applicant, a high profile professional operator in the financial and insurance markets, must have done real and substantial damage to the commercial integrity of those markets by his actions. Furthermore, the offences were committed against a company by one of its directors, whose fiduciary duty was to manage that company for the benefit of its shareholders. Hislop J, making reference to Markarian v R (2005) 215 ALR 213, stated that "judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies".  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.8 Mortgages to lenders voided by court**  (By Jennifer Ball, Clayton Utz)  Ziade Investments Pty Ltd v Welcome Homes Real Estate Pty Ltd [2006] NSWSC 457, New South Wales Supreme Court, Gzell J, 18 May 2006  Full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc457.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc457.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court held that grants of mortgages by Ziade Investments Pty Ltd ("Ziade"):   * were voidable as an insolvent and uncommercial transaction (section 588FE(3) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)); * constituted a disposition of property within the meaning of section 588 FDA(1)(a)(ii); and * were grants to close associates within the meaning of section 588FDA(b)(ii).   The transactions were voidable in terms of sections 588FE(3) and 588FE(6A), thus allowing the court to make orders under section 588FF(1).  **(b) Facts**  On 12 March 2004, Ziade granted second mortgages over two of its properties for $700,000 each to secure past loans said to be owing by Ziade to the Defendants. Two of the Defendants were the parents of the sole director and shareholder of Ziade. The remaining Defendants were companies which were controlled by the parents.  Ziade's Liquidator sought orders that the mortgages were unenforceable and that he be paid monies received on a discharge of them. He further sought an order that the proceedings be referred to an Associate Judge for determination of the amount of debt, if any, owed by Ziade to the second mortgagees on 12 March 2004.  The Liquidator alleged that the entry into the mortgages by Ziade constituted:   * insolvent and uncommercial transactions; or * unreasonable director-related transactions.   **(c) Decision**  In considering whether the transactions of Ziade were insolvent and uncommercial transactions, Gzell J considered the relevant provisions of the Corporations Act, namely, sections 588FB(1), 588FC and 588FE(3).  The grants of the mortgages would constitute voidable transactions under section 588FC(3) if entered into during the 2 years ending on the relation back day. As the application to wind up Ziade was filed on 17 November 2004, it was common ground that that was the relation back day as that term is defined in the Corporations Act.  It followed that, as the mortgages were granted by Ziade within 2 years of the relation back day, if each of the elements were established by the Liquidator, it was open to his Honour to grant relief under section 588FF(1) and make various orders, including an order declaring the mortgages to be unenforceable and an order requiring a person to pay Ziade the amount that, in the Court's opinion, fairly represented some or all of the benefits that the person received because of the transaction.  His Honour also considered section 588FDA (1), which deals with unreasonable director-related transactions.  **(i) Insolvent and uncommercial transactions**  In determining whether the grants of the mortgages by Ziade were uncommercial transactions, Gzell J considered the benefits, if any, and the detriment to Ziade and the respective benefits of other parties to the transaction.  There was no evidence before his Honour that Ziade entered into the mortgages in consideration of the mortgagees' forbearing to sue for recovery of existing debts. Nor was there any evidence before his Honour that the mortgages were granted in consideration of future advances. The mortgages did not secure future advances. Although there existed an acknowledgment of loan assigned by a related party on behalf of Ziade regarding an advance totalling $671,100, his Honour found that the document was inconsistent with any claims that the monies were owed by Ziade to the Defendants.  On the evidence before him, his Honour found that the grants of the mortgages by Ziade to the Defendants gave no benefit to Ziade. In fact, the evidence showed that Ziade suffered great detriment by the granting of the mortgages.  On the other hand, the benefits to the Defendants were obvious. They had obtained the advantage of the security that they had not previously held and, together with the Liquidator's report that unsecured creditors were unlikely to receive any dividend, a clear benefit to them was established.  His Honour concluded that a reasonable person in Ziade's circumstances would not have entered into the two mortgages. He found that the Liquidator had made out his case that the grants of the mortgages were uncommercial transactions in terms of section 588FB(1).  As to the question of whether Ziade was insolvent as at the date of granting the mortgages on 12 March 2004, his Honour considered the cash flow test rather than a balance sheet test and found that, despite there being a dearth of evidence on the issue, Ziade was insolvent as at 12 March 2004.  In consequence, the grants of the mortgages by Ziade to the Defendants were insolvent transactions in terms of section 588FC.  It therefore followed from his Honour's finding that the grants of the mortgages were insolvent transactions and uncommercial transactions made within 2 years of the relation back day; that the transactions were voidable in terms of section 588FE(3); and that the Court could make orders under section 588FF(1).  **(ii) Director-related transactions**  In view of this finding, Gzell J considered it unnecessary to make any finding as to whether the grants of mortgages constituted unreasonable director-related transactions under section 588FDA. However, in case he was wrong in his view, he considered the issue and was satisfied that the creation of the quarter interest in the mortgages in favour of the parents of the sole director and shareholder of Ziade was voidable as an unreasonable director-related transaction under section 588FE(6A), as it was entered into within 4 years before the relation back day. As separate legal entities, the remaining Defendant companies gained the benefit of the grants of the mortgages in their own right and not for the benefit of their shareholders.  **(d) Comment**  There has been little litigation regarding section 588FDA, which permits liquidators to reclaim "unreasonable" payments made to a director or "close associate" during the four years ending on the relation back day. It is a useful power available to a liquidator appointed to an insolvent company. Unlike uncommercial transactions and unfair preferences, the liquidator does not need to satisfy the Court that the company was insolvent at the time the payment was made to a director in order to be able to reclaim the amount paid.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.9 Corporations and individuals as shadow directors and officers**  (By Peter Hulbert, Blake Dawson Waldron)  Akai Pty Limited (in liq) v Ho [2006] FCA 511, Federal Court of Australia, Justice Gyles, 5 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/may/2006fca511.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/may/2006fca511.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In an interlocutory application to set aside service outside Australia, Justice Gyles of the Federal Court of Australia affirmed the view that a corporation may be a shadow director and a shadow officer of a company within the meaning of section 9 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  This case involved allegations by Akai Pty Limited (Akai Australia) that five individuals and two corporations were shadow officers or directors, or holding companies, of Akai Australia by reason of a management agreement and conduct arising from it. Akai Australia's liquidator sought declarations that the respondents had breached their directors', officers' and holding company's duties and had allowed the company to trade while insolvent.  **(b) Facts**  Akai Australia was the Australian distributor of the popular Akai electronics brand. By late 1999 the global Akai group of companies was in financial difficulty. It entered into an arrangement with the Grande group of companies, of which The Grande Holdings Limited (Grande Holdings), a Bermudan company listed on the Hong Kong stock exchange, was the ultimate parent. Under the arrangement, The Grande Group Limited (Grande Group) (a Singapore company) was appointed to manage the whole business of the global Akai group.  Its business having failed, in early 2000 Akai Australia was liquidated. The case concerned the financial dealings of Akai Australia in the months prior to the appointment of the provisional liquidator, and in particular, allegations that Christopher Ho, Grande Group and Grand Holdings were shadow directors and/or officers of Akai Australia, and that they had variously breached their duties under sections 588G (trading while insolvent); 180 (duty of care and diligence); 181 (duty of good faith); and 182 (use of position) of the Corporations Law and/or Act. It was also alleged that Grande Holdings and Grande Group were holding companies of Akai Australia, and were liable for the insolvent trading of their subsidiary under section 588V of the Corporations Law and/or Act.  This decision by Gyles J related specifically to motions by the respondents in the action to set aside service of process under the various heads of the claim.  **(c) Decision**  **(i) Akai Australia was insolvent**  The basis of all the allegations was that Akai Australia was insolvent, at least prior to the execution of the management agreement with Grande Group, and continued to be insolvent thereafter, in which time various transactions were conducted by Akai Australia which resulted in the losses to that company. Justice Gyles found there to be sufficient evidence that this was the case.  **(ii) Shadow director basis**  A shadow director of a company is a person who is not validly appointed as a director and the directors of a company are accustomed to act in accordance with the person's instructions or wishes (section 9 Corporations Act).  Was Grande Group a shadow director?  It was clearly established that the executives of Akai Australia regarded themselves as bound to follow the instructions of Grande Group, by virtue of the management agreement. Justice Gyles found that a corporation can be a shadow director, even though a corporation may not be validly appointed as a director (section 201B(1) Corporations Act), citing Standard Chartered Bank of Australia Ltd v Antico (1995) 131 ALR 1. Grande Group did not seriously challenge the allegation that it was a shadow director of Akai Australia.  Was Christopher Ho a shadow director?  Justice Gyles considered whether the executives of Akai Australia were also accustomed to act in accordance with the instructions or wishes of Ho. Justice Gyles found that the mere fact that Grande Group (a shadow director) was a subsidiary of Grande Holdings and that Grande Holdings was accustomed to act in accordance with the instructions or wishes of Ho was not sufficient to establish such a case.  Was Grande Holdings a shadow director?  Gyles J considered that a possible view of the facts was that the executives of Akai Australia were accustomed to act in accordance with the instructions or wishes of the wider Grande group of companies, and in particular from those speaking with authority of Grande Holdings and its controller, Ho. Accordingly, Gyles J found there to be a prima facie case that Grande Holdings was a shadow director of Akai Australia. The same conclusion was not reached in relation to Ho because there was no sufficient basis for an argument that Ho had given any direct instructions, or that those who did give instructions gave them in Ho's name.  **(iii) Deemed officer basis**  An 'officer' of a company includes (section 9 Corporations Act):  '(b) a person:  (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation's financial standing; or (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).'  Was Grande Group a deemed officer?  Justice Gyles argued by analogy with shadow directors that a corporation can be a deemed officer of a company. Accordingly, Gyles J found a prima facie case that Grande Group was a deemed officer of Akai Australia.  Was Christopher Ho a deemed officer?  In considering whether Ho was a deemed officer of Akai Australia, Gyles J referred to Australian Securities and Investments Commission v Adler (2002) 168 FLR 253. In that case Rodney Adler, who was a director of HIH, was held to be an officer of a subsidiary company by virtue of his participation in decisions by the board of HIH affecting the affairs of the subsidiary. This was found on the basis of the first limb of the definition of officer.  In Justice Gyles' view it was arguable that the effect of the agreement was to substitute the board of Grande Group for the board of Akai Australia for all practical purposes. It was also arguable that the position of Ho viz a viz Grande Group was more significant than was the role of Adler in the HIH subsidiary. Accordingly, Gyles J found there to be a prima facie case that Ho was a deemed officer of Akai Australia, although not a shadow director.  **(iv) Holding company basis**  Justice Gyles found that prima facie there was no case that either Grande Group or Grande Holdings was a holding company of Akai Australia, because the agreement was not capable of any construction that would give Grande Group any power of control over the composition of the board of Akai Australia, or any power to cast or control the casting of votes at a general meeting.  **(v) Outcome of interlocutory hearing**  Of lesser significance was the actual outcome of the motions, being that service upon Grande Group and Grande Holdings was set aside only in respect of the holding company and employer/principal allegations. Although a prima facie case was made on the officer basis only, relief from service was not granted to Ho (either in relation to the officer or director allegations) because the underlying facts were likely to be similar in relation to both.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.10 Nature of a direction under section 424 of the Corporations Act**  (By Zoe Bateman, Corrs Chambers Westgarth)  White v Huxtable, in the matter of Lake Federation Pty Ltd (receivers and managers appointed) [2006] FCA 559, Federal Court of Australia, Young J, 29 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca559.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca559.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiffs were the receivers and managers of Lake Federation Pty Ltd ('Lake Federation'), which was the developer of a residential and recreational development in Victoria. The plaintiffs were appointed by a financier to the development, Thorney Properties (Ballarat) Pty Ltd ('Thorney'). After a failed public tender, the plaintiffs sought to sell the Lake Federation property to TIGA (Ballarat) Pty Ltd ('TIGA') which was ultimately owned by Thorney.  The plaintiffs originally sought a direction that the proposed sale to TIGA was not "improper", notwithstanding the relationship between TGIA and the appointer (based on the facts and in the circumstances presently known to them). The form of direction requested was revised prior to the hearing, to be confined to a direction that it is not unlawful, solely by reason of the relationship between TIGA and Thorney, for the plaintiffs to enter into a contract for sale between Lake Federation and TIGA.  Young J considered a number of authorities on directions made pursuant to section 424, in order to determine whether it was appropriate for the court to make the directions requested. He concluded that the case law on this issue supported the making of this type of direction.  **(b) Facts**  On 7 July 2005, the plaintiffs, Ian Carson and Warren Brian White, were appointed by Thorney as receivers and managers of the secured property of Lake Federation. The appointment occurred after Lake Federation defaulted under a Facility Agreement under which Thorney advanced funds to Lake Federation for the purposes of financing a proposed property development project.  After a failed attempt to sell the property via public tender, the receivers commenced separate negotiations with a number of parties. The most acceptable offer was an offer from TIGA. TIGA was associated with Thorney in that TIGA was ultimately owned by Thorney and they had a common director.  On 17 January 2006, the contract between Lake Federation and TIGA was signed and exchanged. The contract contained a special condition to the effect that the sale was subject to, and conditional on, the vendor and the receivers and mangers obtaining 'Court Approval' pursuant to section 424 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The plaintiffs brought the application seeking directions under section 424 to satisfy that condition precedent.  **(c) Decision**  Justice Young considered a number of authorities on the nature and scope of section 424, in order to determine whether it was appropriate for the court to make directions in the form of the revised directions being sought by the plaintiffs. In referring to the authorities, Young J emphasised the limited scope of a direction under section 424. He stated that a direction under section 424 is a direction only, and is not binding on third parties in such a way as creates any kind of legal estoppel.  By way of example, Young J cited the case of Deputy Commissioner of Taxation v Best & Less (Wollongog) Pty Ltd (1992) 7 ACSR 245, in which Lockhart J said that the extent to which directions of the court under section 424 and similar sections can bind anyone is a matter of considerable doubt.  He also noted that authorities such as Networks Holdings Pty Ltd (2001) 40 ASCR 83 ('One.Tel') clearly establish that it is not appropriate for the court to give directions about the commercial propriety or reasonableness of a transaction that the receiver proposes to enter into as a direction in such broad terms may appear to compromise the rights of a third party to challenge the actions of a controller. Young J provided a further example of this principle, by citing the case of Franbridge Pty Ltd v Societe & Generale Finance Corporate Pty Ltd (1994) 14 ASCR 304 ('Franbridge'), in which Enfield J refused to make directions (similar to those sought under the original direction in this case) to the effect that a particular transaction was not improper and that the receiver had acted reasonably.  His Honour contrasted the relatively narrow approach in section 424 with the broader approach in section 447A, which is concerned with external administration. Section 447A(1) provides that the court may make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company. He illustrated the breadth of power under section 447A by reference to the case of Re Ansett Australia Ltd Mentha (2001) 39 ASCR 335, where Goldberg J gave a direction approving a particular agreement to be entered into by the administrators. In that case, Goldberg J commented, in relation to section 447A, that whilst it was not the role of the courts to make a commercial judgment for the liquidators or administrators, the courts "will act in an appropriate case to protect liquidators and administrators from claims that they have acted unreasonably in entering into particular transactions." Young J concluded that the power to make directions in section 424 is not as broad as the power to make orders in section 447A, and for that reason should be exercised with caution.  Young J concluded that the nature of the revised orders sought in this case was consistent with the limited scope of the power in section 424.  Young J emphasised that the direction in this case was only intended to establish that the sale contract is not unlawful solely by reason of the relationship between TIGA and Thorney. Significantly, the direction did not address the question of whether the plaintiffs properly exercised their powers of sale. Young J felt that such a determination depends upon considerations of good faith, proper procedure and fair price, which are considerations that are outside the scope of section 424.  Young J noted that the form of direction sought by the plaintiffs was analogous to the directions made by Austin J in One.Tel, and Hodgson J in Re Vartex Petroleum Industries Pty Ltd (Unreported, Supreme Court of New South Wales, Hodgson J, 17 August 1989 ('Vartex'). His Honour commented that these cases established that it may be appropriate to make a direction to the effect that a particular transaction is not unlawful solely because the counter-party to the transaction is a company associated with the entity which appointed the receivers and the managers.  The following orders were made by Young J:  (i) A direction in the revised form sought by the plaintiffs, to the effect that it is not unlawful solely by reason of the relationship between TIGA and the appointor of the plaintiffs, Thorney, for the plaintiffs to enter into a contract of sale dated 17 January 2006 between Lake Federation (receivers and managers appointed) and TIGA in respect of the Lake Federation property. (ii) An order that the defendants' costs of, and incidental to, the application be paid out of the funds in the hands of the plaintiffs as receivers and managers of Lake Federation.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.11 Directors of corporate trustees are not liable to satisfy debts incurred as trustee on the ground that the trust does not have adequate assets to satisfy the debt**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  RJK Enterprises Pty Ltd v Webb [2006] QSC 101, Supreme Court of Queensland, Douglas J, 5 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/may/2006qsc101.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/may/2006qsc101.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case the Supreme Court of Queensland considered how section 197 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) should be interpreted and rejected the reasoning in Hanel v O'Neill (2003) 48 ACSR 378 ("Hanel's Case"), holding that decision to be "plainly wrong". The implication is that directors of trustee companies will not be liable to satisfy debts incurred by acting as trustee merely because the trust does not have enough assets to indemnify the trustee. There has to be some other ground as to why the indemnity is not available to the directors.  **(b) Facts**  This was an application that the respondents be ordered to pay the applicant, RJK Enterprises Pty Ltd ("RJK") the amount of $138,540.22 pursuant to section 197 of the Corporations Act 2001 (Cth), as that section was before 18 November 2005 (Old Section 197). The respondents were directors of a company, LJAW Enterprises Pty Ltd ("LJAW"), which was the trustee for a family trust that incurred a liability to RJK for moneys loaned to the trust. On 17 November 2005, RJK obtained judgment against LJAW. In April 2006, LJAW was placed into liquidation (on application by RJK). RJK subsequently sought to obtain relief from the directors of LJAW, relying on the interpretation of section 197 applied in Hanel's Case.  The Old Section 197, which relates to the liability or that part of directors for debts and other obligations incurred by a corporation as trustee, set out the following:  (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:  (a) has not, and cannot, discharge the liability or that part of it, and (b) is not entitled to be fully indemnified against the liability out of trust assets.  This is so even if the trust does not have enough assets to indemnify the trustee. The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.  This section was amended by Commonwealth Parliament in late 2005. However, the focus of this case was interpreting the Old Section 197.  The majority of the Full Court of the Supreme Court of South Australia in Hanel's Case decided that where there were no assets comprising a trust fund, then there was no entitlement to be indemnified (Mullighan J) and that a director would be personally liable where a debt was in incurred and there were insufficient trust assets to meet the debt (Gray J).  **(c) Decision**  Douglas J used both the reasoning behind the Commonwealth amendments to section 197 and relevant case law that has critiqued Hanel's Case to justify his Honour's view that the decision in Hanel’s Case was plainly wrong. As liability arising out of the Old Section 197, as it was interpreted in Hanel's Case was the only grounds on which liability was argued by RJK, his Honour dismissed the application.  The Commonwealth amendments to section 197, made in late 2005, were intended to ensure that the liability of directors of trustee corporations would extend only as far as intended when section 197 was introduced. Douglas J used extracts from the explanatory memorandum for the amending Bill to illustrate that the decision in Hanel's Case went against parliamentary intention. The explanatory memorandum stated that the decision in Hanel’s Case "departed from the longstanding interpretation of section 197 of the Corporations Act" and that the practical implication of the decision was that "directors of corporate trustees may be held to be guarantors for any liability entered into by the trustee", which would expose them to greater potential for personal liability than directors of other companies.  In further support his Honour's finding, Douglas J cited subsequent cases that have critiqued the reasoning behind the decision in Hanel's Case: Intagro Projects Pty Ltd v Australia and New Zealand Banking Group Ltd (2004) 50 ACSR 224, Edwards v Attorney General (NSW) (2004) 208 ALR 605 and Saffron Sun Pty Ltd v Perma-Fit Fitness Pty Ltd (in liq) [2005] NSWSC 1317.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top)  **5.12 Court able to extend times fixed by ASIC pursuant to a class order**  (By Sharon Burnett, Clayton Utz)  In the matter of Dana Australia (Holdings) Pty Limited [2006] FCA 355, Federal Court of Appeal, Finkelstein J, 11 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca355.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/april/2006fca355.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The issue before the court was whether section 1322(4)(d) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) empowered the court to extend times fixed by a class order made by the Australian Securities and Investments Commission ("ASIC") pursuant to section 341 of the Act. Justice Finklestein noted that it was necessary to distinguish between a period that is fixed by ASIC directly in the class order and a period that is fixed by the Act itself but which is picked up by the class order. His Honour concluded that section 1322(4)(d) will operate in respect of periods fixed by both the Act (and the rules and regulations made under that Act) and by instruments made under the Act by a regulatory authority, such as a class order.  **(b) Facts**  Section 341 empowers ASIC to relieve a company from complying with the reporting obligations found in Part 2M.3. The class orders made by ASIC under this section provided for that relief but only if certain conditions were satisfied.  The plaintiffs were members of the Dana Australia group of companies. Since 1993 the subsidiaries of Dana Australia had taken advantage of the class orders made by ASIC under section 341 and had not prepared or lodged any financial reports.  The plaintiffs discovered, following an internal review, that they had not complied fully with the conditions in the class orders in that:   * annual reports had been filed later than required; * notices that the subsidiaries had taken advantage of the class order were not filed at all; * the directors had not filed resolutions of their intent to remain party to the deed of cross guarantee required by the class orders; and * no statements, ensuring the ability of members of the group to meet any obligations or liabilities arising under the deed of cross guarantee, had been lodged.   The appropriate documents were prepared and filed, and the plaintiffs applied to the court (under section 1322(4)(d)) for an extension of the time limits fixed by the class orders for filing. Section 1322(4)(d) of the Act empowers the court to extend and abridge the period for doing any act in relation to a corporation.  **(c) Decision**  In determining whether section 1322(4)(d) of the Act conferred the necessary power, Justice Finkelstein noted that it was necessary to distinguish between:   * a period that is fixed by the Act itself but which is picked up by a class order; and * a period that is fixed by ASIC directly in a class order.   In the first case, his Honour held that the incorporation of a time fixed by the Act into a class order will include that time as extended under section 1322(4)(d) of the Act. In those circumstances, where a period fixed by the Act is extended by an order made under section 1322(4)(d) of the Act and the relevant act is performed within the extended period, then the condition of the class order will have been satisfied.  However, the case of periods fixed by ASIC directly was a more difficult question. In addressing this issue, his Honour noted that section 1322(4) of the Act, although derived from section 366(4) of the Uniform Companies Act 1961, was in different terms and, in particular, that unlike section 366(4) there was no reference to the period that could be extended or abridged as being a period that was fixed by the Act or by the rules and regulations made under the Act. On this basis, and despite noting that the reason for the change was not clear, he determined that one thing was certain, namely, that parliament did not intend to narrow the operation of the section and that it allowed the court to extend or abridge periods prescribed not only by the Act and any rules or regulations made under the Act but also periods prescribed by some other instrument or authority.  His Honour referred to the fact that section 1322(4)(d) empowers the court to make an order "extending the period for doing any act ... in relation to a corporation". He stated that it was clear that the power could not be read literally, as it would apply to every period within which a corporation is required to do an act, whether prescribed by a public authority or by private treaty. However, since the power clearly applied to periods fixed by the Act and by the rules and regulations made under the Act, it would not be going much further to read the provision as applying to instruments made under the Act by a regulatory authority, such as a class order.  [http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up1.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%235)[http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006_files/go_up.gif](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1D4/LAWLEX%20Corporate%20Law%20Bulletin%20No%20106%20June%202006.htm%23top) |
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