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| **1.1 Recent IOSCO publications** The International Organization of Securities Commissions has recently published the following reports:* Principles for the Valuation of Hedge Fund Portfolios
* Final Report on Board Independence of Listed Companies
* Final Report of Examination of Governance of Collective Investment Schemes (Part 2)
* Report on Market Intermediary Management of Conflicts that arise in Securities Offerings.

The reports are available on the [IOSCO website](http://www.iosco.org/%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.2 CalPERS focus list targets 11 companies** On 15 March 2007, the California Public Employees' Retirement System (CalPERS) released its annual Focus List - naming 11 underperforming companies in such sectors as retail, electronics, pharmaceuticals, and media, responding to dismal stock performance and poor governance practices. Companies identified this year include food industry giant Sara Lee; Eli Lilly, the big drug company; Tribune Company, a media titan; and the Marsh & McLennan insurance firm.Also on the 2007 Focus List were International Paper, Tenet Healthcare, data company EMC, Dollar Tree Stores, Corinthian Colleges, the Kellwood textiles and apparel company, and electronics-maker Sanmina-SCI."The long term performance of all 11 companies is at least 20 percent behind their peers, and they have resisted appeals to change corporate practices that make their boards unresponsive to shareowner interests," said Rob Feckner, CalPERS Board President. "In several cases, their entrenched boards refuse to discuss our grievances."Sara Lee and Eli Lilly allow shareowners no opportunity to amend bylaws by employing restrictions used by only 4 percent of S&P 500 companies.CalPERS is pursuing shareowner proposals at four 2007 Focus List companies. One proposal, at Eli Lilly, would allow a simple majority of shareowners the right to amend bylaws. At Kellwood, CalPERS seeks to declassify the board whose staggered terms for directors impedes upon accountability to the shareowners. Other proposals at Dollar Tree and Marsh & McLennan address supermajority voting rules for bylaw changes and excessive severance pay agreements.Corinthian Colleges, International Paper and Tribune Company have classified boards and other objectionable governance practices. International Paper would not declassify its board after 79 percent of shareowners voted in favor of the amendment at its 2006 Annual Meeting.Tenet Healthcare would not remove supermajority voting requirements for articles of incorporation. Sanmina-SCI would not agree to adopt a clawback policy to recapture bonus and incentives payments in the event of officer fraud or misconduct, and EMC has resisted efforts to change excessive pay practices.To select Focus List companies, CalPERS begins by screening underperforming companies in the pension fund's largest equity portfolio - the CalPERS 2500 Index Fund. Its objective is to engage publicly traded companies to improve their business models and governance practices to gain positive investment returns. It uses the Focus List to call attention to companies that at the end of the engagement process have failed to make CalPERS' requested changes.To assess financial performance, CalPERS uses stock performance and economic valued-added (EVA) evaluation to identify companies where poor market performance is due to underlying company specific operating problems as opposed to industry or extraneous factors alone. EVA ® measures a company's net operating profit after tax, minus its cost of capital.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.3 Commission on the regulation of US capital markets in the 21st century report and recommendations** On 12 March 2007, the Commission on the Regulation of US Capital Markets in the 21st Century published its report and recommendations. The Commission was established by the US Chamber of Commerce.The principal recommendations are:* Reform and modernize the US federal government's regulatory approach to financial markets and market participants.
* Give the Securities and Exchange Commission (SEC) the flexibility to address issues relating to the implementation of the Sarbanes-Oxley Act of 2002 (SOX) by making it part of the Securities Exchange Act of 1934.
* Convince public companies to stop issuing earnings guidance or, alternatively, move away from quarterly earnings guidance with one earnings per share (EPS) number to annual guidance with a range of EPS numbers.
* Call on domestic and international policy-makers to seriously consider proposals by others to address the significant risks faced by the public audit profession from catastrophic litigation, as well as the Commission's suggestion that national audit firms be allowed to raise capital from private shareholders other than audit partners.
* Increase retirement savings plans by connecting all employers of 21 or more employees without any retirement plan to a financial institution that will offer a retirement arrangement to those employees.
* Encourage employers to sponsor retirement plans and enhance the portability of retirement accounts through the introduction of a simpler, consolidated 401(k)-type program.

The report is available on the [US Chamber of Commerce website](http://www.uschamber.com/NR/rdonlyres/eozwwssfrqzdm3hd5siogqhp6h2ngxwdpr77qw2bogptzvi5weu6mmi4plfq6xic7kjonfpg4q2bpks6ryog5wwh5sc/0703capmarkets_full.pdf%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.4 EU Commission adopts measures on company transparency** On 12 March 2007, the European Commission adopted measures supplementing the EU legal framework established by the Directive on transparency obligations of listed companies (2004/109/EC). This follows a positive vote of the European Securities Committee and endorsement from the European Parliament on 24 October 2006. The Transparency Directive and its implementing measures will improve the quality of information available to investors on companies' performance and financial position as well as on changes in major shareholdings.The Commission's implementing measures supplement the Transparency Directive with regard to: * issuers' disclosure of financial information in half-yearly reports;
* investors' disclosure of major holdings;
* minimum standards for the pan-European dissemination of regulated information to the public; and
* minimum requirements for accepting equivalence of third-country regulations in respect of some elements of the Directive.

These implementing measures do not go beyond the requirements already contained in the Transparency Directive.Member States are due to write the Transparency Directive into their national laws by 20 January 2007, and the implementing measures a year later.In addition, the Commission has launched an open consultation on the design of a possible network of national mechanisms to store regulated financial information, as envisaged by the Transparency Directive.Further information is available on the [Europa website](http://ec.europa.eu/internal_market/securities/transparency/index_en.htm%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.5 FSA publishes updated measure of UK market cleanliness** On 7 March 2007, the UK Financial Services Authority (FSA) published the results of its latest work to measure the cleanliness of UK financial markets OP25 - Updated Measurement of Market Cleanliness. The recent exercise extended the period examined to include trading data from 2004/2005 as well as improving the methodology used to determine the level of market cleanliness. The results show that in 2004/05 there was a significant decrease in the level of possible informed trading ahead of FTSE 350 companies' trading announcements, with only 2% of significant announcements being preceded by informed price movements compared to 11.1% in the period 2002/03 and 19.6% in 1998-2000. The 2005 figures also include the six month period following the introduction of the new Disclosure Rules for listed companies under the Market Abuse Directive.For takeover announcements there was a decrease in the level of possible informed trading ahead of takeover announcements from 32.4% in 2004 to 23.7% in 2005. But the level still remains high and little changed from the situation in 2000 of 24% before the implementation of the Financial Services and Markets Act.The FSA will continue to repeat the analysis as data for subsequent years becomes available. Further information is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/031.shtml%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.6 Director fees in Australia's largest listed companies: study** The directors of Australia's largest companies have seen their fees double in the last five years, although fee growth as a proportion of operating cash flow has not changed significantly, according to research published on 6 March 2007 by Institutional Shareholder Services.Between 2001 and 2006, the average non-executive director of a S&P/ASX 100 company saw their fee increase by 81%.Over the five year period, director fees increased five times greater than inflation (over the same period, the consumer price index increased 15.3%) and nearly three times greater than wages growth (adult average weekly earnings increased by 27.2% over the five-year period).**Table 1: Individual director fee increases 2001-2006**

|  |  |  |
| --- | --- | --- |
|   | **2001** | **2006** |
| Average company director  | $90,342  | $163,548 |
| Median company director | $85,187  | $156,000 |

Note: Averages calculated excluding retirement benefits (other than statutory superannuation).In 2001, 68.1% of Top 100 directors received less than $100,000 in fees; in 2006, 89.5% received more than $100,000 in fees.The increase in average fee levels for the chairperson of a top 100 company was even larger than the increase in director fees, with the average fee for a chairperson increasing by 98.9% over the five years to 2006.**Table 2: Individual chairperson fee increases 2001 - 2006**

|  |  |  |
| --- | --- | --- |
|   | 2001 | 2006 |
| Average company chairperson | $201,960  | $401,660 |
| Median company chairperson | $193,877 | $341,862 |

Note: Averages calculated excluding retirement benefits (other than statutory superannuation).In 2001, 51.1% of top 100 company chairpersons received more than $200,000; in 2006 91.8% of chairpersons received more than $200,000 per annum.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.7 Reviews of sanctions in Australian corporate law and infringement notice provisions** On 5 March 2007, the Australian Treasurer, the Honourable Peter Costello MP, released a discussion paper reviewing sanctions in the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default).The review of sanctions is being conducted as part of a broader strategy to reduce regulatory burden and achieve simpler and more effective regulation. The purpose of the review is to engage with stakeholders about areas where they see complexity and inconsistency in the current system of sanctions in corporate law. One of the issues examined in the paper is whether the expanded use of civil sanctions in corporate law would provide additional options in deterring inappropriate corporate behaviour.The paper also examines whether higher penalty amounts for civil breaches would better protect consumers and reflect community expectations.The Treasurer also released a separate paper, seeking comments on the use and effectiveness of infringement notices issued by the Australian Securities and Investments Commission in preparation for the Government's review of the notices.Written comments on the issues raised in either paper should be received by 1 June 2007 and may be submitted by mail, fax or email to:Review of Sanctions for Breaches of Corporate LawCorporations and Financial Services DivisionThe TreasuryLangton CrescentPARKES ACT 2600Fax: 02 6263 2770Email: reviewofsanctions@treasury.gov.au The papers are available on the [Treasury website](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.8 Use of PPPs in Australia: study** Australia is a leading practitioner in the use of Public-Private partnerships (PPPs), according to a global Deloitte study entitled 'Closing the Infrastructure Gap: The Role of Public-Private Partnerships' published on 5 March 2007.As more and more governments around the world are teaming with the private sector to design, build, finance and operate everything from roads and ports to hospitals and prisons, Australia and the UK have been identified as an example from which other countries can learn.According to the report:* as of October 2005, approximately 25 per cent of all contracted PPP projects within Australia were related to the transport sector;
* a report by Standard & Poor's showed increasing investor interest in PPPs in the Australian education sector, with projects valued at $3.7 billion in the pipeline; and
* Australia has the highest proportion of prisoners in private prisons with 28 per cent in contract managed facilities.

The PPP report showed that the UK, Ireland and Canada also lead the way in their use of PPPs:* the UK pioneered the trend over a decade ago and today, partnership models account for between 10 and 13 percent of all UK investment in public infrastructure;
* Ireland has a projected need of €100 billion for investment in infrastructure of which a significant portion will be delivered through public-private partnerships; and
* in Canada, 20 percent of all new infrastructure is now designed, built and operated by the private sector.

According to the report, well structured PPPs are able to allocate risks to the party best placed to manage them. The risks that can typically be assumed by the private partner include:* design;
* meeting required standards of delivery;
* cost overrun;
* late completion;
* underlying costs to the service delivery operator, and the future costs associated with the asset;
* industrial action against or physical damage to the asset; and
* certain market risks associated with the project.

Further information is available on the [Deloitte website](http://www.deloitte.com/dtt/cda/doc/content/UK_and_Australia_world_leaders_in_use_of_PPPs.pdf%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.9 Insider trading review** On 2 March 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce MP, released for public comment the "Insider Trading Position and Consultation Paper". The paper sets out the Government's position on many of the recommendations contained in the "Insider Trading Report" released by the Corporations and Markets Advisory Committee (CAMAC).The Government proposes to accept most of the recommendations of CAMAC, but is seeking the views of the public to ensure that the right decisions are made on particular questions. In particular, comments are sought on the recommendations CAMAC made with regard to focussing the prohibition on insider trading.CAMAC published its Insider Trading Report on 20 November 2003. The Report followed a discussion paper issued in June 2001 by the then Companies and Securities Advisory Committee (CASAC) and a proposals paper issued in September 2002 by CAMAC on insider trading laws. The Report made 38 recommendations on a broad range of issues. CAMAC's Discussion Paper, Proposals Paper and Report are available from the [CAMAC website](http://www.camac.gov.au/%22%20%5Ct%20%22_new).The Government proposes to accept most of the recommendations of the CAMAC report. However, as discussed in this paper, there are a number of recommendations on which the Government seeks further input from the market. The paper lists those recommendations that the Government proposes to accept. The remaining recommendations on which comment is sought are: * Recommendation 2: Restrict the on-selling exemption for underwriters;
* Recommendation 3: Repeal the exemption for external administrators;
* Recommendation 10: Amend the test of generally available information;
* Recommendation 11: Informed party exercising option rights;
* Recommendation 14: Entity making an individual securities placement;
* Recommendation 15: Share buy-backs (as it applies to issuers buying back securities); and
* Recommendation 38: Focus the prohibition.

On several of these recommendations CAMAC was split on the recommended course of action. In some cases the initial government reaction to these recommendations has been indicated. Even so, further input from the market and interested parties is invited to assist the Government's consideration of these issues. The Insider Trading Position and Consultation Paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1235" \t "_new).Comments on the paper can be sent to insidertradingpaper@treasury.gov.au.Submissions should be received no later than 2 June 2007. [top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.10 Progress report on the single market in financial services in the EU** On 1 March 2007, the European Commission published its regular Progress Report on the Single Market in Financial Services, highlighting achievements made in the course of 2006. Some of the key achievements included in the Progress Report are the publication of the White Paper on Investment Funds, the adoption of the industry-led Code of Conduct on Clearing and Settlement, the completion of the inquiry into competition in the retail financial services sector, and the extension of the period for acceptance of third-country Generally Accepted Accounting Principles (GAAPs) in the EU until 2009.The report also makes reference to other significant developments such as the achievement of an improved inter-institutional balance in EU policy making and the progress being made in enhancing co-operation between financial supervisory authorities in Europe.The full text of the progress report is available on the [Europa website](http://ec.europa.eu/internal_market/finances/progress-report/index_en.htm%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.11 Wall Street insider trading charges** On 1 March 2007, the US Securities and Exchange Commission (SEC) charged 14 defendants in an insider trading scheme that netted more than US$15 million in illegal insider trading profits on thousands of trades, using information stolen from UBS Securities LLC and Morgan Stanley & Co., Inc. The SEC complaint alleges that eight Wall Street professionals, including a UBS research executive and a Morgan Stanley attorney, two broker-dealers and a day-trading firm participated in the scheme. The defendants also include three hedge funds, which were the biggest beneficiaries of the fraud.According to the SEC complaint, Mitchel Guttenberg, an executive director in the equity research department at UBS, provided material, nonpublic information concerning upcoming UBS analyst upgrades and downgrades to traders Eric Franklin and David Tavdy, in exchange for sharing in the illicit profits from their trading on that information. Franklin and Tavdy illegally traded on this inside information personally, for the hedge funds Franklin managed, and for the registered broker-dealers where Tavdy was a trader. Franklin and Tavdy also had a network of downstream tippees who illegally traded on this inside information, including a third hedge fund, a day-trading firm, and three registered representatives at Bear, Stearns & Co., Inc.Several of those who illegally traded on the UBS information, and others, also traded ahead of corporate acquisition announcements using information stolen from Morgan Stanley. According to the complaint, Randi Collotta, an attorney in the global compliance department of Morgan Stanley, together with her husband, Christopher Collotta, an attorney in private practice, provided material, nonpublic information concerning upcoming corporate acquisitions involving Morgan Stanley's investment banking clients to Marc Jurman, a registered representative at a Florida broker-dealer. Jurman then traded on this information and shared his illicit profits with the Collottas. Jurman also tipped Robert Babcock, a registered representative at Bear Stearns, who traded on the information and tipped Franklin, a hedge fund managed by Franklin, and another registered representative at Bear Stearns.As a result of the conduct described in the complaint, the Commission alleges that each named defendant violated the antifraud provisions of the federal securities laws. The Commission's complaint seeks permanent injunctive relief, disgorgement of illicit profits with prejudgment interest, and the imposition of civil monetary penalties.Further information is available on the [SEC website](http://www.sec.gov/%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.12 Report on institutional investors, global savings and asset allocation** On 28 February 2007, the Committee on the Global Financial System released a report entitled 'Institutional investors, global savings and asset allocation'. The portfolio decisions of institutional investors have a major impact on world financial markets. The main focus of the report is how recent and prospective regulatory and accounting changes in several countries might influence the investment decisions of such investors. These changes include moves towards fair-value accounting in pension funds and insurance, risk-based solvency requirements for insurance companies and a call for more transparency in company accounts about pension commitments and funding positions.The following are key points in the report:* While regulatory and accounting changes are increasingly global, their consequences are likely to differ significantly across different types of institutional investors and across countries as national conditions differ. Defined benefit pension funds (DBPF) and life insurance companies may be particularly affected because they directly bear investment risks. In contrast, defined contribution pension funds and mutual funds - where individuals directly bear investment risk - are not likely to be significantly affected.
* Regulatory and accounting changes encourage DBPF and life insurance companies either to shift risks to households or to adopt lower risk investment strategies by directly incorporating liabilities into asset allocation decisions. In shedding risks from their balance sheets, institutional investors have thus followed a similar strategy to that of the banking sector.
* No major portfolio shifts have yet been observed at a global level as a result of recent accounting and regulatory reforms and the latter therefore do not appear to be a major cause of the current low levels of global long-term interest rates. However, data, analysis and market research suggest that recent regulatory reforms have had an impact on long-term interest rates in the United Kingdom.
* The impact of these reforms on financial prices across countries are expected to be more pronounced in those cases where: (i) the size of DBPF and insurers is very large; (ii) the initial asset allocations of pension funds and insurers are particularly weighted towards equities; (iii) their initial solvency positions and funding gaps are weak; (iv) the regulatory changes are profound and allow only a short transition period.
* Overall these reforms are expected to enhance the functioning and stability of the financial system. However, the design of regulatory reforms should take into account the possibility that such reforms may temporarily distort prices in financial markets and could drive long-term interest rates below the levels justified by macroeconomic fundamentals. Consequently, this should be taken into account both when designing regulatory changes and when interpreting asset prices movements after their implementation.
* The growing demand from global institutional investors for emerging market assets is likely to be positive for these economies and should contribute to the depth of local financial markets. This growing role, however, might alter the transmission mechanism of domestic monetary policy, especially if long-term bond yields become more dependent upon global factors.
* As a result of the reforms, households are becoming increasingly exposed to financial markets. Retirement incomes in the future may thus become more subject to financial market volatility. This suggests that financial supervision and regulation as well as consumer protection have an important role to play.

Further information is available on the [Bank for International Settlements website](http://www.bis.org/publ/cgfs27.htm%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.13 UK Companies Act implementation timetable** On 28 February 2007, the full implementation timetable for the UK Companies Act 2006 was announced by Industry and Regions Minister Margaret Hodge. All of the Act will be in place by October 2008 with many elements implemented earlier.The areas coming into effect in October 2007 include the provisions in Part 9 of the UK Companies Act relating to the rights of indirect investors. These will help investors to be better informed about the performance of companies and allow them to participate more fully in company decision-making.Most of the provisions relating to directors' general duties will also take effect in October 2007. The provisions for the enhanced business review and derivative claims will be implemented at the same time.The provisions relating to directors' conflict of interest duties will take effect from October 2008. This will give companies the opportunity to change their articles of association before commencement of these provisions. The Act permits authorisation of conflicts of interest by independent directors, subject to the company's articles of association.The parts of the Act relating to accounts and reports, audit and statutory auditors will commence in April 2008.Draft regulations, following the policy approach outlined in the consultation document, will be placed on the DTI website for comment as they become available. Any changes to the policy decided in the light of the consultation will then be reflected in revised drafting of the regulations.Further details in relation to the implementation of the Companies Act are available on the [DTI website](http://www.wired-gov.net/EDP8203R7W/WGArticle.aspx?WCI=htmArticleView&WCU=ARTCL_PKEY=44394,ALERT_TYPE=16" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.14 Managed funds growth in Australia** On 27 February 2007, the Australian Bureau of Statistics (ABS) released data on the Australian managed funds industry as of December 2006. Some of the key data is the following: * Total consolidated assets of managed funds institutions was $1095.9b at 31 December 2006, an increase of $48.4b (4.6%) on the revised September quarter 2006 figure of $1047.5b. Of this amount of $1095.9b, $596,518m was in superannuation funds, $209,467m was in life insurance offices (investments by superannuation funds which are held and administered by life insurance offices are included under life insurance offices), and $289,949m was in other managed funds.
* Consolidated assets of superannuation funds increased by $32.6b (5.8%), public unit trusts were up by $8.5b (3.7%), life insurance offices up by $6.2b (3.1%), and cash management trusts up by $1.0b (2.6%). Consolidated assets of common funds and friendly societies increased marginally on their September quarter 2006 figures.
* " Investment in equities and units in trusts increased by $25.7b (6.4%). Other increases were recorded in long-term securities, up $6.4b (7.4%), assets overseas, up $5.5b (2.4%), land and buildings, up $4.1b (3.5%) and cash and deposits, up $3.2b (4.3%). During the December quarter 2006, the S&P/ASX 200 rose 10.0%, the price of foreign shares (represented by the US S&P 500) rose 6.2% and the $A appreciated against the $US by 5.8%. In addition the 5 year Treasury Bond yield, averaged over the three months within the quarter, increased from 5.77% to 5.90%.
* Investment managers had $1052.0b in funds under management at 31 December 2006, up $50.3b (5.0%) on the revised September quarter 2006 figure of $1001.8b. They managed $750.4b (68.5%) of the consolidated assets of managed funds institutions.

The full report is available on the [ABS website](http://www.abs.gov.au/AUSSTATS/abs%40.nsf/mf/5655.0?OpenDocument" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.15 Report on implementation of the takeover directive in the EU** On 27 February 2007, the European Commission published a report on Member States' implementation into national law of the Directive on takeover bids (2004/25/EC). The Directive allows Member States to opt out of certain key provisions and to exempt companies from those provisions if the bidder is not subject to the same obligations. The Commission's report shows that in many cases Member States have made use of these options and exemptions. The report concludes that this could bring about new barriers in the EU takeover market, rather than eliminate existing ones.Internal Market and Services Commissioner Charlie McCreevy said: "Too many Member States are reluctant to lift existing barriers, and some are even giving companies yet more power to thwart bids. The protectionist attitude of a few seems to have had a knock-on effect on others. If this trend continues, then there is a real risk that companies launching a takeover bid will face more barriers, not fewer. That goes completely against the whole idea of the Directive."The Directive on takeover bids aims to create favourable regulatory conditions for takeovers and to boost corporate restructuring within the EU.However, the Directive's main provisions, which would restrict the possibilities for companies to defend themselves against bidders - for example by subjecting "poison pills" to shareholder approval or by making share transfer restrictions unenforceable against the bidder - are not mandatory. Furthermore, the Directive allows Member States to exempt their companies from applying these provisions if the bidder is not subject to the same obligations.A large number of Member States have used these options and exemptions, and some have even strengthened the role of the management with regard to using takeover defences against a bidder. The Commission intends to closely monitor the way in which the Directive works in practice.The report is available on the [Europa website](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/251&format=HTML&aged=0&language=EN" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.16 Data on Australian businesses** On 26 February 2007, the Australian Bureau of Statistics published data on Australian businesses. There were 1,963,907 actively trading businesses in Australia as at June 2006. Growth in the number of businesses slowed slightly in each of the three most recent financial years. The number of businesses grew by 2.2% during 2003-04; by 1.5% during 2004-05; and by 1.3% during 2005-06. In comparison, GDP (in chain volume terms) over the corresponding periods grew by 4.1%, 2.7% and 2.8%, respectively, while Australia's population grew by 1.1%, 1.2% and 1.3% over the same periods. The slowing growth in the number of businesses over the three years to June 2006 was mainly due to decreasing entry rates. The entry rate for new businesses during 2005-06 was 16.2%, which was marginally lower than the entry rates of 17.4% in 2003-04 and 16.9% in 2004-05. The business exit rate over the three year period was relatively constant: 15.2% in 2003-04; 15.4% in 2004-05; and 14.9% in 2005-06. Of the 1,868,969 businesses operating in June 2003, 65.0% were still operating in June 2006. Of the 654,704 businesses which did not survive, 43.4% exited during 2003-04, 32.7% during 2004-05 and the remaining 23.9% during 2005-06. Of the 325,935 business entries during 2003-04, 58.3% were still operating in June 2006. Of the 135,817 which did not survive, 59.1% had exited by June 2005. In combination, the above two points indicate that, over the short to medium term, business survival is very dependent on the age of the business. That is, the longer a business survives, the greater its chances of continuing survival. Survival rates are also heavily influenced by non-employing businesses, which have survival rates significantly lower than employing businesses but contribute the greatest proportion of both the stock of existing businesses and business entries (67.9% of businesses operating in June 2003 and 72.9% of business entries in 2003-04 were non-employers). For example, while 58.3% of all entries in 2003-04 were still operating in June 2006, 80.4% of new employing businesses, compared to 49.9% of new non-employers, were still operating. **(a) Industry**At June 2006, Property and business services had the greatest number of businesses with 492,453 (or 25% of the total), followed by Construction (16%), Retail trade and Agriculture, forestry and fishing (11% each). During 2005-2006, Electricity, gas and water supply (26%) and Mining (22%) had the highest entry rates, although these were the two smallest industries in terms of the total number of businesses. Over the same period, exit rates were highest for Communication services (21%) and Electricity, gas and water supply (20%). Only Communication services (-1.7%) and Manufacturing (-1.3%) experienced net decreases in total number of businesses from the previous year (June 2005). The survival rates at June 2006 for businesses operating since June 2003 were highest for Health and community services (75.8%) and Agriculture, forestry and fishing (71.1%). Survival rates were lowest for businesses operating in Communication services (52.6%) and Education (55.7%). The survival rates for business entries during 2003-04 were similar in terms of their industry breakdown to those for the stock of businesses at June 2003. **(b) Main state of operation** At June 2006, the proportion of businesses by state (as defined by the main state of operation) was broadly aligned with the proportion of Australia's population by state. The main difference was that the larger states (New South Wales, Victoria and Queensland) had a slightly greater proportion of Australia's businesses than they did Australia's population (for example, New South Wales had 34.2% of businesses and 33.1% of the population) while, for the smaller states, the opposite was the case (for example, Tasmania had 1.9% of businesses and 2.4% of the population). Western Australia contained the same proportion (10.0%) of Australia's businesses and population. In the year to June 2006, Queensland (2.6%) and Western Australia (2.2%) had the highest net growth in the number of businesses, while New South Wales and the Australian Capital Territory each had the lowest growth (0.4%). Entry rates were highest in Queensland and the Northern Territory and lowest in South Australia and Tasmania. Tasmania also had the lowest exit rate of all the states. Of those businesses operating in June 2003, the survival rates at June 2006 were highest in South Australia and Tasmania and lowest in the Northern Territory and the Australian Capital Territory. The survival rates for business entries during 2003-04 were similar across the States. **(c) Institutional sector**At June 2006, 1,249,994 (or 63.6%) of businesses were classified to the Household sector (which includes most unincorporated businesses), followed by Non-financial corporations (584,766 or 29.8%) and Financial corporations (129,147 or 6.6%). The Non-financial corporations sector grew by 1.6% from June 2005 to June 2006, compared to growth at 1.2% in the Household sector and 0.5% in the Financial corporations sector. The churn of businesses in the Non-financial corporations sector was significantly lower than for the other sectors. While the entry rate of Non-financial corporations in 2005-06 was 13.2%, it was 17.5% for Households and 17.3% for Financial corporations. Similarly, Non-financial corporations had an exit rate of 11.6% compared with exit rates of 16.3% and 16.9% in the Household and Financial corporations sectors, respectively. This pattern was similar in the preceding two financial years. In line with these lower exit rates, the survival to June 2006 of businesses which were operating in June 2003 was higher for Non-financial corporations (71.6%) than for Households (62.2%) or Financial corporations (63.0%). Survival rates for Non-financial corporations which entered in 2003-04 were also higher than for the other sectors. **(d) Employment size ranges**At June 2006, there were 807,581 (41.1%) employing businesses and 1,156,326 (58.9%) non-employing businesses. The majority of employing businesses, 721,569 (89.3%) employed less than 20 employees as at June 2006. This comprised 494,196 (68.5%) businesses with 1-4 employees and 227,373 (31.5%) businesses with 5-19 employees. There were also 80,215 (9.9%) employing businesses with 20 to 199 employees and 5,797 (<1%) employing businesses with 200+ employees. The survival rates for businesses operating since June 2003 varied significantly between the employing (87.3%) and the non-employing (53.8%) populations. In addition, for employing businesses, survival rates were slightly higher for businesses employing between 5-19 employees (90.4%) and 20-199 employees (90.2%). In the period June 2005-06, entry rates were higher for non-employing businesses (18.4%) and business employing 1-4 employees (16.8%). Conversely, entry rates for businesses employing five or more employees were at noticeably lower levels. Exit rates over the same period were highest for non-employing businesses (18.2%) and businesses employing 1-4 employees (12.2%), but were lowest for businesses employing between 20-199 staff (6.1%). **(e) Annual turnover size ranges** At June 2006, businesses reporting annual turnover between $50k to less than $200k made up the largest share of the total business population with 780,062 (39.7%). Businesses reporting annual turnover between $200k to less than $2m were next at 652,798 (33.2%), followed by businesses reporting between zero to less than $50k at 404,643 (20.6%), and businesses reporting $2m or more at 126,404 (6.4%). The survival rates for businesses operating since June 2003 fluctuated across most turnover ranges, but were noticeably lower for those businesses reporting in the range $50k to less than $200k (59.8%). In the period June 2005-2006, entry and exit rates were higher for businesses who reported annual turnover in the ranges $50k to less than $200k (18.0% and 18.1% respectively). Entry and exit rates were generally lower for businesses who reported annual turnover in the $2m or more range.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.17 Leveraged buyouts in Australia** On 25 February 2007, Standard & Poor's published a report on leveraged buyouts in Australia.The report states "Standard & Poor's Ratings Services' global experience of LBOs isn't pretty: the credit ratings of acquired companies typically fall to the 'B' or low 'BB' speculative-grade ratings. At these ratings, probability of default increases substantially, with a 'B' rated issuer historically having a one-in-three probability of default over a 10-year period. "LBO activity in the Asia and Pacific regions has grown substantially in the past 12 months, with Australia and New Zealand accounting for more than half of total activity. The number of transactions completed in 2006 also highlights the breadth of industries susceptible to the private-equity phenomenon. "Of growing concern in Australia is that 'mum and dad' retail investors are increasingly being targeted to provide some of the high-risk subordinated debt funding for these transactions. These instruments can offer retail investors a seemingly attractive yield of 300-400 basis points (bps) over swap; however, the risks can be substantial. This return is only 100-200 bps above the senior secured debt, even though these lenders are exposed to a substantially higher expected loss given default due to their subordinated recovery position. "Retail investors are typically targeted where the issuer is a household name with strong brand appeal: for example, Myer Notes, BIS Cleanaway Notes. Although institutional investors also participate in these instruments, retail investors play a key role in driving demand and take-up. Unlike institutional investors, retail investors rarely have sufficient investment diversity to accommodate the significant risks associated with these instruments. "Given these subordinated retail instruments in Australia are typically unrated, it is difficult for retail investors to readily understand the risks of these complex instruments. Furthermore, given there is a strong disincentive for arrangers of these transactions to seek a credit rating-because of the clarity it would provide regarding the instruments' default and recovery prospects-it appears that retail investors will be "on their own" for the foreseeable future." The report is available on the [Standard and Poor's website](http://www2.standardandpoors.com/portal/site/sp/en/au/page.hottopic/lbo_viewpoint_3_1_hottopic/3%2C1%2C1%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0.html%22%20%5Ct%20%22_new). [top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.18 Proposed changes to the Trade Practices Act** On 22 February 2007, the Australian Government announced that it will be introducing legislation to strengthen the secondary boycott provisions of the [Trade Practices Act 1974 (TPA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default). The legislation will amend section 87 of the TPA to enable the ACCC to bring representative actions on behalf of persons who have suffered, or are likely to suffer, loss or damage as a result of a breach of sections 45D and 45E of the TPA.Allowing the ACCC to take representative action in relation to the secondary boycott provisions will assist small businesses in recouping losses suffered as a result of illegal boycott conduct. The amendments will also place the secondary boycott provisions in the same position as other provisions in Parts IV, IVA, IVB V and VC of the TPA, for which the ACCC can bring representative actions.These amendments are part of the Government's TPA reform agenda, which began with the passage of the [Trade Practices Legislation Amendment Act (No. 1) 2006](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=93406" \t "_default) (the Dawson Bill) in October 2006. The Dawson Bill introduced wide-ranging reforms to merger laws, a new collective bargaining regime for small business, and increased penalties for contraventions of the TPA. The Government has also been consulting on a separate Bill to strengthen the misuse of market power and unconscionable conduct provisions of the TPA. The Government will introduce these amendments into Parliament in the near future in a separate Bill. Further information is available on the [Treasury website](http://www.treasurer.gov.au/tsr/content/pressreleases/2007/006.asp?pf=1" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.19 Regulation of hedge funds** On 22 February 2007, The US President's Working Group on Financial Markets (PWG) released a set of principles and guidelines that will guide US financial regulators as they address public policy issues associated with the rapid growth of private pools of capital, including hedge funds. The agreement among the PWG and US agency principals, which will serve as a framework for evaluating market developments, specifically concentrates on investor protection and systemic risk concerns.The group has designed the principles to endure as financial markets continue to evolve. They provide a clear but flexible principles-based approach to address the issues presented by the growth and dynamism of these investment vehicles.The principles are intended to reinforce the significant progress that has been made since the PWG last issued a report on hedge funds in 1999 and to encourage continued efforts along those same lines. The principles are:* Private pools of capital: maintain and enhance information, valuation, and risk management systems to provide market participants with accurate, sufficient, and timely information.
* Investors: consider the suitability of investments in a private pool in light of investment objectives, risk tolerances, and the principle of portfolio diversification.
* Counterparties and creditors: commit sufficient resources to maintain and enhance risk management practices.
* Regulators and supervisors: work together to communicate and use authority to ensure that supervisory expectations regarding counterparty risk management practices and market integrity are met.

The PWG, chaired by the Treasury Secretary and composed of the chairmen of the Federal Reserve Board, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, was formed in 1988 to further the goals of enhancing the integrity, efficiency, orderliness, and competitiveness of financial markets and maintaining investor confidence. The PWG worked with the Federal Reserve Bank of New York and the Office of the Comptroller of the Currency in developing the guidance. The agreement among PWG and US agency principals on principles and guidelines regarding private pools of capital is available on the [Treasury website](http://www.treas.gov/cgi-bin/redirect.cgi?http://www.treasury.gov/press/releases/reports/hp272_principles.pdf" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.20 Guide to direct voting by shareholders** On 21 February 2007, Chartered Secretaries Australia (CSA) published a guide to implementing direct voting by shareholders.CSA is not calling for companies to substitute proxy voting with direct voting but rather offer shareholders the choice. According to CSA, there is a common misunderstanding that appointing a proxy is the same thing as voting. Under the current proxy system proxy holders, other than the chairman, are not legally bound to vote the proxy if it does not support their own agenda.Appointing a proxy means shareholders transfer some of their rights to another party over whom they have no control. Indeed, the proxy holder can still turn up at a meeting with many proxies, and for one reason or another, exercise only some, or even none of the proxies they are holding. To implement direct voting a company has to amend its constitution. Like all other types of voting, a shareholder who wishes to vote directly completes a voting form which can be lodged by post, by fax or electronically 48 hours before the meeting. CSA's guide to implementing direct voting identifies the practical issues relating to implementation. It also contains draft constitutional provisions, draft rules governing voting and a draft voting form.The guide to implementing direct voting is available on the [CSA website](http://www.csaust.com/AM/Template.cfm?Section=Thought_leadership&Template=/CM/ContentDisplay.cfm&ContentID=8086" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.21 Forum of Firms releases paper on application of IFRS** The Forum of Firms (a group of large accounting firms forming part of the International Federation of Accountants (IFAC)) has released a document entitled "Perspectives on the Global Application of IFRS". The document, developed based on interviews with ten Forum members, illustrates the progress made with International Financial Reporting Standards and sets out examples of good practices that the firms are implementing. The report is available on the [IFAC website](http://www.ifac.org/Members/Pubs-Details.tmpl?PubID=11721554404571484&Category=_Other" \t "_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.22 Disclosure of directors share trading** In 2005 BT Governance Advisory Service (BT GAS) was mandated by a group of institutional superannuation funds to research S&P/ASX200 company performance in relation to Director Share Trading.That research discovered widespread non-compliance with legal requirements, as well as widespread director share trading practices that appear at odds with effective governance. The research culminated in a Position Paper issued by superannuation funds and is available on line at [http://www.btonline.com.au/](http://www.btonline.com.au/%22%20%5Ct%20%22_new). Since that research and Position Paper, AICD, ASIC and ASX have each included a focus on director share trading as part of their governance initiatives.As part of the original governance mandate, BT GAS revisited its original research in an effort to gauge efforts in improving governance of share trading by company directors.The original research involved a review of 2,936 share trades by directors of S&P/ASX200 companies in the Calender year 2004. The review involved a biased sample of the 29 companies regarded as having been the most impacted under the 2004 study. These 29 companies ranged across the S&P/ASX200 index in terms of market capitalisation. This biased "sample" was selected as being a universe that might reasonably be expected to exhibit the most improved governance of share trading between 2004 and 2006.As a general statement, disclosure practices improved - for example BT GAS found an increased number of trades being notified. This appeared to signal greater clarity of individual trades (as opposed to bulking of transactions). In addition, sales of share parcels at or above 1% of market capitalisation were more frequently accompanied by a disclosure of reasons for the trades. In combination, these results point to an increased focus on director share trading, albeit the best results were in passive trading, where shareholder interests are least compromised.In 2006, 4 of the 29 companies notified passive trades outside the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_defaulg) 14 day rule (2004; 17 of 29). In 2006, 12 companies notified outside the 5 day ASX listing rule - meaning that 8 companies in the sample notified their trades more than 5 days but less than 14 days after the trade. On the other side of the ledger, active trades notified outside of the 5 day listing rule hardly changed at 7 of 29 (2004; 8 of 29). Active trades notified outside the 14 day rule were 3 of 29 companies (2004; 4 of 29).Trading between books close and results announcement increased to 10 of 29 companies (2004; 9 of 29). In only one case did the market announcement provide a clear indication that the trade was accompanied by governance processes. BT GAS excluded that notification from its results as it regards such a trade as having effective governance attached to it.Trading in apparent breach of the company policy increased to 5 of 29 companies (2004; 4 of 29). This data is after BT GAS adjusted for companies where their policies were tightened following the AICD/ASX/ASIC/BT GAS focus. BT GAS did not count breaches of the tighter policy, meaning it has been conservative in determining this result.Trading prior to earnings upgrades/acquisitions fell to 6 of 29 companies (2004; 12 of 29). This measurement is problematic as BT GAS used a 60 day test and the data does not distinguish between trades 59 days prior, or 5 days prior. BT GAS also notes trades notified in this category rose to 25 (2004; 19 trades), which BT GAS believes reflects the overall greater disclosure focus rather than a greater number of active trades ahead of earnings upgrades relative to 2004.Sales ahead of earnings downgrades were nil in the sample (2004; 1 company). This is a weak measure as the universe is tiny, and the period under review was one where earnings downgrades were relatively uncommon. In summary, according to BT GAS, efforts to address passive trading appear to be having an affect, while active trading does not appear to have enjoyed anywhere near the same improvement in governance. This is of concern as the improvement for passive trading is the area of least governance "harm" to integrity and confidence in market behaviour. The failure to observe improvements in trading between books close and results announcement, as well as breaches of own company policies does little to boost confidence that matters of governance substance are improving. BT GAS will be communicating further with companies in relation to this work.In addition, BT GAS encourages ASX to consider its notification processes, specifically appendix 3Y - the trading notification form. Engagement with a number of companies by BT GAS has led to a conclusion that Appendix 3Y would be a highly effective means to signal governance practices attaching to share trading that but for such disclosure might appear contentious.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**1.23 Financial services reform conference** On 13 July 2007 a full day conference is being held at Macquarie University (at its Sydney city campus) on the topic "Financial Services Reform Third Anniversary - Where Next?" More information is available at: [http://www.law.mq.edu.au/html/pdf/busl\_fin\_serv\_reform\_flyer.pdf](http://www.law.mq.edu.au/html/pdf/busl_fin_serv_reform_flyer.pdf%22%20%5Ct%20%22_new) |

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| **2.1 ASIC extends disclosure relief for general insurance products** On 21 March 2007, the Australian Securities and Investments Commission (ASIC) announced class order relief that extends the current transitional relief from dollar disclosure requirements for general insurance products. Class Order [CO 07/123] Variation of Class Order [CO 05/683] Dollar disclosure: further transitional relief, extends current transitional relief for issuers of general insurance products from the dollar disclosure requirements in product disclosure statements (PDS) from 1 April 2007 to 30 June 2008.In August 2006, the Parliamentary Secretary to the Treasurer, the Honourable Chris Pearce MP, announced that he proposed to introduce changes to the dollar disclosure requirements for general insurance products. In these circumstances and following consultation with industry, ASIC considers that requiring compliance with the dollar disclosure requirements at this time would impose an unreasonable burden on industry.This extension of transitional relief from dollar disclosure requirements for general insurance products to 30 June 2008 will allow time for the implementation of the Parliamentary Secretary to the Treasurer's reform proposal.For further background information refer to: * Class Order [CO 05/683]: Dollar disclosure: further transitional relief
* Information Release [IR 05-35]: Transitional relief for deposit product (and related non-cash payment facility) issuers and general insurers.
* Class Order [CO 06/476]: General transitional relief for dollar disclosure.

Further information is available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**2.2 Promina pays $100,000 fine for continuous disclosure breach** On 20 March 2007, listed general insurer Promina Group Limited (Promina), paid a $100,000 fine following an investigation by the Australian Securities and Investments Commission (ASIC) into an alleged failure to comply with the continuous disclosure obligations contained in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Promina agreed to pay the fine after ASIC issued an infringement notice on 21 February 2007. This notice, and payment of the penalty by Promina, is the first involving a company with a market capitalisation greater than $1000 million.ASIC issued the notice because it believed Promina had contravened the continuous disclosure provisions of the Act by failing to inform ASX Limited (ASX) that it had received a proposal from Suncorp-Metway Limited (Suncorp) to acquire all the ordinary shares of Promina. According to ASIC, Promina first became aware of the proposal at 6:00 pm on 10 October 2006 and became obliged to disclose the proposal to the market at 12:03 pm the next day, following publication of a Dow Jones Newswire article which read:"Suncorp (SUN.AU) is looking to buy Promina (PMN.AU) for A$7.50/share, according to talk circulating amongst hedge funds...."ASIC believes the article contained reasonably specific speculation about the proposal and that, as a result, the proposal ceased to be confidential for the purposes of ASX listing rule 3.1A(2).Promina did not make an announcement concerning the proposal until 8:29am on 12 October 2006.Promina elected to comply with the notice. As provided under the Act, compliance with the notice is not an admission of guilt or liability, and Promina is not regarded as having contravened subsection 674(2) of the Act.Further information about ASIC's administration of infringement notices is available on the [ASIC website](http://www.asic.gov.au/clerp9%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**2.3 ASIC releases enforceable undertakings guide** On 13 March 2007, the Australian Securities and Investments Commission (ASIC) launched a new guide which clarifies its approach to accepting enforceable undertakings (EUs) under the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (ASIC Act). Enforceable undertakings are one of a number of remedies available to ASIC for breaches of the legislation it is responsible for enforcing. They are generally accepted by ASIC as an alternative to civil or administrative action but are not appropriate in place of criminal proceedings or in matters involving deliberate fraud and misconduct.There can be a number of advantages for ASIC in accepting an EU rather than pursuing litigation. For instance, an EU can produce a swift result that can require improved compliance arrangements and where appropriate, include compensation to those who have suffered loss. The guide outlines: * what an enforceable undertaking is;
* when ASIC will consider accepting an enforceable undertaking;
* what terms are or are not acceptable to ASIC; and
* what happens if an enforceable undertaking is not complied with.

ASIC plans to release example enforceable undertaking templates on its website in the near future as a supplement to the guide. These templates will be expanded upon and updated as necessary or regularly. The guide is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EU_guide.pdf/%24file/EU_guide.pdf%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**2.4 Report on oversight of ASIC** On 1 March 2007, the latest report of the Parliamentary Joint Committee on Corporations and Financial Services on oversight of ASIC was tabled in Parliament. The matters discussed in the report are:* the government's proposed reforms to corporations and financial services regulations;
* ASIC's first survey on superannuation fees and costs;
* professional indemnity insurance for financial planners;
* AMP's enforceable undertaking to ASIC to improve the quality of advice provided by its planners;
* ASIC's handling of the Westpoint matter and other high-risk mezzanine schemes generally;
* ASIC's work to better educate investors;
* the Vizard matter;
* implications for ASIC of the Cole Commission report;
* proposed prohibition on hedging executive share options;
* corporate governance standards of Australia's listed property trust sector; and
* implications for ASIC of the expansion of private equity investment in Australia.

The report is available at: [http://www.aph.gov.au/senate/committee/corporations\_ctte/asic/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/asic/index.htm%22%20%5Ct%20%22_new)[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**2.5 ASIC releases policy on disclosure in reconstructions** On 23 February 2007, the Australian Securities and Investments Commission (ASIC) released a policy statement regarding disclosure in reconstructions or capital reductions involving an issue of securities. Titled, "Disclosure in reconstructions [PS 188]", the statement confirms invitations to vote on an issue of securities constitute an 'offer' for the purposes of the prospectus provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). This means a prospectus must accompany the notice of meeting.'Reconstructions' are not formal schemes of arrangement under Pt 5.1 of the Act, but bear similarities to them. A foreign scheme of arrangement or a trust scheme is a reconstruction. Policy Statement 188 discusses prospectus relief for offers of securities under schemes of arrangement in certain foreign jurisdictions. This relief is similar to the prospectus exemption for Australian schemes of arrangement under section 708(17) of the Act. The policy also sets out the circumstances in which ASIC may grant case-by-case prospectus relief for other reconstructions and capital reductions. An example is relief for a reconstruction where there is no change to the underlying business or assets of the company.Policy Statement 188 also provides the following relief: * various technical relief for prospectuses that accompany a notice of meeting;
* relief from the unsolicited offers provisions for reconstructions, including foreign schemes in certain jurisdictions; and
* PDS relief for Pt 5.1 schemes and foreign schemes in certain jurisdictions.

The release of PS 188 follows public consultation on the policy proposal paper - Disclosure in Reconstructions.ASIC has also granted licensing relief for schemes of arrangement in certain foreign jurisdictions by adding foreign scheme documents to its list of exempt documents in Class Order 'Financial product advice - exempt documents' [CO 03/606]. Entities sending these documents to Australian residents do not need an Australian financial services licence for general product advice contained in them.Further information is available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new). |

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| **3.1 RBA PSNA approval**The ASX Settlement and Transfer Corporation (ASTC) has applied to the Reserve Bank for the multilateral netting arrangement operated by it to be approved under Section 12 of the [Payment Systems and Netting Act 1998](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5859" \t "_default) (the Act). ASTC is the settlement system for the Australian equities market and for related markets including some derivatives. The Payments System Board approved the application at its February meeting.The approval is subject to a number of rule changes being made by ASTC. These changes need to be lodged with ASIC, and are then subject to a 28 day disallowance period. Once this process is complete, the Reserve Bank will issue a formal approval. This approval will protect the netting undertaken by ASTC from legal challenge in the event that a party to the arrangement enters external administration.  |

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| **4. Recent Takeovers Panel Developments** | [top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) | own |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007_files/spacer%281%29.gif |
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| **4.1 Magna Pacific (Holdings) Limited - Panel decision** On 21 March 2007, the Takeovers Panel advised that it has made a final decision in relation to the application from Magna Pacific (Holdings) Limited (Magna Pacific), concerning an off-market, cash takeover bid for Magna Pacific by Lionsgate Australia Pty Ltd (Lionsgate).The Panel considered that there were statements in, and omissions from, the Lionsgate bidder's statement dated 13 February 2007 (Lionsgate Bidder's Statement) which were sufficiently misleading to give rise to unacceptable circumstances. Lionsgate has agreed to dispatch a replacement bidder's statement to Magna Pacific shareholders (Lionsgate Replacement Bidder's Statement). The Panel considers that the Lionsgate Replacement Bidder's Statement addresses its concerns and accordingly, decided that it was unnecessary (in the public interest) to make a declaration of unacceptable circumstances. **(a) Lionsgate opinions and emotive language**The Panel considered that Lionsgate had not provided adequate information as to how it formed certain views and forward looking statements expressed in the Lionsgate Bidder's Statement in relation to:* its statement, and accompanying graph, on Magna Pacific's cash balances which were given prominent focus in the opening section of the Lionsgate Bidder's Statement;
* Lionsgate's expectation as to future performance of a number of films for which Magna Pacific had bought the full Australian rights;
* a statement that Lionsgate considered that Magna Pacific's business model may have an adverse effect on Magna Pacific's business; and
* a heading claiming "Highly uncertain dividends", where the paragraph under the heading merely said that a decline in Magna Pacific's future financial performance (and other financial matters) would affect Magna Pacific's ability to pay dividends (collectively, the Lionsgate Statements).

The Panel considered that the Lionsgate's Statements were forward looking statements and some were also prospective financial statements. The Panel considered that: * Lionsgate should have reasonable grounds for all forward looking statements; and
* where those statements were material, Magna Pacific shareholders would be likely to expect, and would reasonably expect, to find those grounds clearly disclosed in the Lionsgate Bidder's Statement.

The Panel considered that Lionsgate's use of the chart, and expressing the above opinions without adequate supporting information, created a misleading impression.The Panel considered that emotive language in relation to Lionsgate's view on Magna Pacific's business model and its ability to pay dividends was not adequately supported. It was the Panel's view that the stronger and more emotive the language a bidder or target uses, the more accompanying evidence and explanation that will be required to substantiate the statement.The Panel is satisfied that the Lionsgate Replacement Bidder's Statement addresses its concerns in relation to the Lionsgate Statements.**(b) Reference date for calculation of premium**The Panel also had concerns with the presentation of the date against which Lionsgate had calculated the premium which it stated its offer represents over market values for Magna Pacific shares. In the Lionsgate Bidder's Statement, Lionsgate chose 23 January 2007 as the reference date against which Lionsgate calculated its premium, rather than 1 February 2007 which was the date on which Lionsgate announced its takeover offer. Whilst Lionsgate's bidder's statement footnoted the fact that discussions with a shareholder had commenced on the date that Lionsgate had chosen, the Panel did not consider that Lionsgate had adequately explained why the date was chosen or why the discussions were significant for the calculation of the offer premium. Therefore, the Panel has required Lionsgate to provide additional information on this issue in the replacement bidder's statement.The Panel accepted that Lionsgate may have valid reasons for calculating the premium by reference to a date other than the date immediately prior to the announcement of its offer (Pre-announcement date). The Panel considered, however, that where Lionsgate chose an alternative date to the Pre-announcement date it should have provided an explanation for why it considered that the date chosen is more appropriate than the Pre-announcement date. The Panel also considered that that Lionsgate's comparison of the premium under its takeover offer against the premiums cited for other takeover offers was likely to have been misleading. The Panel considered that the normal practice in calculating offer premiums in the market is to use the market price immediately prior to the offer announcement. The Panel considered it misleading for Lionsgate to compare the offer premium which it chose to calculate with other takeover premiums without making the difference in calculation bases clear in all comparisons. In this respect, the Panel further decided that Lionsgate should also show the calculation of its premium against the market price of Magna Pacific shares on 1 February 2007. The Panel did not suggest that in every instance where a bidder chooses a date other than the Pre-announcement date for calculating a premium, the bidder will also be required to show the premium by reference to the Pre-announcement date. However, the Panel considered additional disclosure was required in this case given Lionsgate's use of the premium offered under its bid and its comparison of its premium against premiums offered under other takeover bids (which are more commonly calculated by reference to Pre-announcement dates). Lionsgate made some corrections of items which it had previously agreed with Magna Pacific, and there were other claims raised by Magna Pacific in its application to the Panel on which the Panel did not require Lionsgate to make additional disclosures. **(c) Reasons**The Panel will publish its reasons for its decision in due course on the [Takeovers Panel website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**4.2 Qantas Airways Limited - Panel decision** On 20 March 2007, the Takeovers Panel advised that it has made a final decision in relation to the application from the Australian and International Pilots Association (AIPA), concerning an off-market, cash takeover bid for Qantas Airways Limited by Airline Partners Australia Limited (APA).The Panel considered that there were a number of statements in, and omissions from, the APA bidder's statement dated 2 February 2007 (APA Bidder's Statement) which were sufficiently misleading to give rise to unacceptable circumstances. On the basis of an undertaking by APA to dispatch a supplementary bidder's statement to Qantas shareholders (APA Supplementary Bidder's Statement) which addresses the Panel's concerns, the Panel determined not to make a declaration of unacceptable circumstances. **(a) Prominence of statements concerning TPG's experience**The primary issue before the Panel was the adequacy of statements in the APA Bidder's Statement concerning the airline industry experience of Texas Pacific Group (TPG), one of the members of the APA consortium. AIPA submitted that APA had made prominent statements in the front section of the APA Bidder's Statement that the airline experience of TPG was a reason for Qantas shareholders to be able to accept the APA offer. AIPA also submitted that APA had made further misleading statements describing TPG's experience investing in three airlines (Continental Airlines, America West Airlines and Ryanair). APA disputed that there were any statements in the Bidder's Statement in relation to its airline industry experience which were misleading.On the basis of submissions from AIPA, the Panel considered that APA's statements concerning: * the timing of TPG's investments in the three international airlines;
* the relative size of the three airlines now compared to the time of TPG's original investments; and
* the size of TPG's investments in the airlines were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.

The Panel asked the parties to seek to agree a form of disclosure which would provide a better view of TPG's airline investments. The Panel was particularly pleased by the cooperative manner in which the factual issues were resolved by APA and AIPA. The parties prepared a form of wording to address the issues raised by AIPA and with which the Panel had concerns. The Panel advised the parties that it was prepared to accept the facts agreed between APA and AIPA in the proposed wording as being an adequate description of TPG's airline experience.**(b) Statements concerning APA's committed investment in Qantas** AIPA also submitted that a number of statements in the APA Bidder's Statement and other documents relating to the APA takeover offer, described APA as being a "responsible and committed" owner, and that APA represented "Patient capital".. AIPA submitted that these and similar statements, and the sections of the APA Bidder's Statement which related to TPG's investment in the airline industry, were likely to mislead Qantas shareholders as to the committed nature of TPG's investments in the three airlines and the future of TPG's investment in Qantas. The Panel, on the other hand, was concerned that if the APA ownership consortium had no commitment from TPG to remain in the consortium while the consortium owns or controls Qantas, reference to TPG's experience in the airline industry had the potential to mislead unless it was clearly qualified by disclosure that TPG retains the ability to sell down its entire investment in APA at any time from completion of the APA offer. In response, APA agreed to make additional disclosure to clarify TPG's current intentions as to its investment in the APA consortium. The Panel considered that APA's additional disclosure adequately addressed its concerns on this issue. **(c) Non economic issues**An issue raised within the proceedings was whether the issues which AIPA complained of in the APA Bidder's Statement did not relate to the value being offered under the APA takeover, especially given that the APA offer was for cash, and were therefore not relevant to Qantas shareholders' decisions whether or not to accept the APA offer. The Panel considered that it did not need to decide this issue, nor whether the issues were, would be, or may be, material to Qantas shareholders' decisions. The Panel considered that the prominence given by APA to the issues of airline experience and committed investments, meant that the statements that APA made concerning TPG's experience in the airline industry, and information about its intentions, should not be misleading. Therefore, the Panel did not need to address whether the information originally was or was not required to be disclosed by APA. Once disclosed, and once it was given the prominence that APA chose, the Panel considered APA had a material obligation to ensure the disclosure was correct and not misleading. **(d) Third supplementary bidder's statement** On Friday 2 March 2007, before AIPA made its application, APA issued a third supplementary bidder's statement. APA submitted that the third supplementary bidder's statement adequately addressed the issues raised by AIPA. The Panel did not consider that the third supplementary bidder's statement adequately addressed any of AIPA's complaints.**(e) Standing**The issue of whether or not AIPA was a person whose interests were affected by the circumstances of the APA Bidder's Statement, and therefore had standing to make the application, was briefly raised in the proceedings. The Panel adopted a preliminary decision that AIPA could be a person affected by the relevant circumstances and advised the parties that it proposed to proceed on that basis. However, the issue was not argued fully before the Panel. Therefore, the decision is unlikely to stand as any material precedent on this issue in future applications before the Panel.**(f) Reasons**The Panel will publish its reasons for its decision in due course on the [Takeovers Panel website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new). |

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| **5. Recent Corporate Law Decisions** | [top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) | own |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007_files/spacer%281%29.gif |
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| **5.1 The importance of certainty and 'clean hands' in joint venture agreements**(By Thea Schwartz, Mallesons Stephen Jaques)ICA Group Pty Limited v MK River Pty Ltd [2007] NSWSC 145, New South Wales Supreme Court, Windeyer J, 2 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc145.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc145.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**This case concerned a confusing set of circumstances relating to an agreement to form a joint venture to purchase and develop a property. The main issues raised were whether the agreement was enforceable, and whether a claim for breach of fiduciary duty owed by one joint venturer to the other should be upheld.Windeyer J found the agreement void for uncertainty. His Honour held that because the memorandum of agreement contained false recitals, and was ambiguous in respect of the parties involved, it was too vague and uncertain to be enforceable.This case also explores the equitable defence of 'clean hands'. Windeyer J held that where a party made misrepresentations in a memorandum of agreement, that party was precluded from making a claim for breach of fiduciary duty. This is because, in order to succeed in an equitable cause of action, the person seeking the help of equity 'must come with clean hands'.**(b) Facts**Matarol Pty Ltd ("Matarol") was the registered proprietor of 2-6 Murray Street, South Yarra. Mr Brian Cully and his son, Mr Wesley Cully ("the Cullys"), were either directors of Matarol or persons involved directly as shareholders of Matarol. The first mortgagee of 2-6 Murray Street was Owenlaw Pty Ltd ("Owenlaw").In December 2004, Owenlaw, as mortgagee exercising its power of sale, arranged for the sale of the Murray Street property to W E Streamline Pty Limited ("W E Streamline") for just under $4.5 million. W E Streamline was controlled by the Cullys together with the second cross-claimant, Mr Edwards (the Cullys' solicitor), and Mr Kyriackou (Mr Edwards' office assistant). Matarol owed moneys to a company controlled by Mr Edwards and Mr Kyriackou, M K River Pty Ltd ("MK River"), for legal work done and valuations obtained on behalf of Matarol relating to the Murray Street property.In March 2005, W E Streamline and the Cully interests found themselves unable to provide the 10% deposit on the Murray Street property. Mr Brian Cully's accountant contacted Mr Greg Huxley, consultant to ICA Group Pty Ltd ("ICA"), to discuss the possibility of a loan. On 3 March 2005, Mr Greg Huxley sent Mr Kyriackou an email, agreeing to proceed with the loan on certain terms. Discussions of a joint venture began. On 5 March 2005, ICA's two directors, Mr Adam Huxley and Mr Robert Huxley ("the Huxleys"), met with Mr Edwards, Mr Kyriackou and Mr Brian Cully. At that meeting, Mr Kyriackou misrepresented that:* he could arrange for Capital Finance to fund the deal and that he had fallback contacts at the Bank of Queensland and from a lawyer if necessary; and
* the intellectual property associated with plans for the development of the property belonged either to Matarol, Mr Brian Cully or Mr Edwards. In fact, copyright in the plans remained with the architects. Furthermore, the fact that the intellectual property referred to was subject to two prior charges was not disclosed.

At the meeting's conclusion, it was envisaged that a new company would be formed as a joint venture vehicle to purchase and develop the Murray Street property for the Huxley and Edwards interests. A memorandum of agreement was signed. This document, amongst other things, established that:* MK River would advance the sum of $200,000 to the joint venture vehicle for a term of one week;
* ICA would provide the balance of the funds for the deposit; and
* the joint venture vehicle would acquire the intellectual property from Mr. Edwards for the sum of $2 million.

Lumina (South Yarra) Pty Limited ("Lumina") was incorporated by the Huxleys as the joint venture company on 7 March 2005. The Huxleys became the 2 directors of Lumina. The shares in Lumina were held as to 50% non-beneficially by Kwok Wah (Australia) Pty Ltd ("Kwok Wah"), 48% beneficially by Kwok Wah and 1% by each of the Huxleys. There was no novation of the Memo of Agreement to Lumina. W E Streamline Pty Ltd was not heard of again. Lumina's name was inserted as purchaser on the documents relating to the sale of the Murray Street property.Settlement took place on 8 July 2005. Up to and after the date of settlement, there was acrimonious correspondence, usually between Mr Kyriackou and Mr Greg Huxley, about the failure of the Huxley interests to repay MK River the $200,000 initial deposit that MK River had advanced, less $24,000 which had been repaid. By the end of 2005, relations between the Huxley interests and the Edwards interests had become very tense. On 22 July 2005, Mr Kyriackou sent a letter to the Huxleys, which stated that:* the Huxleys were in default of the Memorandum of Agreement dated 5 March 2005;
* the amount outstanding to MK River Pty Ltd to August 2005 was $310,000, less $24,000 already paid; and
* the Huxleys had committed to purchasing the intellectual property that was assigned to Edwards for $2 million.

The letter concluded, 'in view of the breakdown in our relationship we do not wish to proceed any more as a joint venture partner pursuant to the Memo of Agreement dated 5 March' and proposed that the Murray Street property be listed for auction.**(c) Decision****(i) Claim for return of $200,000 plus interest**Windeyer J found that there should be judgment for MK River against Lumina for $200,000 less the sum of $24,000. The question was the interest to be paid on this sum.His Honour stated, 'the frenzied finance circles in which these parties were operating makes simple interest at court rates an insufficient recompense for the loss by MK River'. He held that interest should be allowed at court rates but compounded monthly from 17 March 2005.**(ii) Contract claim**Windeyer J rejected Mr Edward's claims in contract (to the effect that ICA/the Huxleys, on the one hand, and Edwards, on the other, had agreed to share equally in the property and its development) because there were three serious problems with the Memorandum of Agreement dated 5 March 2005:* The recitals of the agreement were untrue.
* The Agreement required Lumina to provide the deposit funds. Unless Lumina was recognised as a Huxley company, the Huxley's seemed to be providing no consideration for the joint venture.
* The agreement was said to be signed by Mr Adam Huxley, representing ICA, but ICA was not a party to the agreement. Nor was Matarol, yet Mr Brian Cully signed for it.

His Honour held, 'this was not a joint venture, nor an agreement to negotiate on terms' because it was too vague for that. He concluded that 'the memorandum of agreement is so vague and uncertain as to be unenforceable and void for uncertainty'.**(iii) Claim for breach of fiduciary duty**It was argued that Lumina and ICA breached their fiduciary duty not to divert any interest in the property to their own benefit. However, Windeyer J held that the claim must fail because Mr Edwards and MK River brought the joint venture discussions into being through false representations. This allowed Lumina and ICA to rely on the 'clean hands' defence, which precludes anyone who has acted in an unreasonable or dishonest manner from bringing a claim in equity.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.2 In what circumstances will a court take action under section 233 of the Corporations Act to remedy oppressive, prejudicial or discriminatory conduct?** (By Justin Fox and Faisal Mian, Corrs Chambers Westgarth)Harrington v Sensible Funerals Pty Ltd [2007] SASC 66, Supreme Court of South Australia, Duggan J, 2 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc66.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc66.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**In this case, the court made an order under section 233 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), setting aside a share allotment which was found to be oppressive, unfairly prejudicial and unfairly discriminatory against a member of a company. The case focused on a Shareholder Loan Agreement under which each of the three shareholders loaned funds to the company, but not in proportion to their existing shareholding. Under the Shareholder Loan Agreement, each shareholder had the right to convert the loans to shares in the event of default. As a result of the exercise of this provision, the plaintiff's holding in the company was reduced from 50 per cent to 33 per cent. The resulting share allotment was subsequently set aside on the grounds that it was unfairly prejudicial and unfairly discriminatory to the plaintiff. **(b) Facts**The plaintiff established a funeral services business with the second and third defendants. A proprietary company was incorporated on 6 July 1999 with both the plaintiff and third defendant appointed as directors. By 4 July 2000, the plaintiff had a 50 per cent interest in the business and the remaining 50 per cent was held by the second and third defendant jointly. During the course of the business, the plaintiff's father, who also conducted a funeral business, began to provide services to the company in return for a fee. On 3 July 2000, the second defendant, purporting to rely on the company's constitution, declared that the plaintiff must vacate his position as director on the grounds he entered or intended to enter into a contact with a party in which he had an interest. The second defendant then proceeded to appoint the third defendant as director. The plaintiff did not accept this position.The third defendant later approached the plaintiff, claiming it was necessary to inject more funds into the business. The plaintiff agreed to sign a Shareholder Loan Agreement for these purposes. Under the terms of the Shareholder Loan Agreement, the plaintiff and defendants each advanced further sums of money to the company. The Shareholder Loan Agreement provided that in the event of default, the loans would be converted into shares in the company.The amount advanced by the plaintiff was almost half that of each defendant. A repayment schedule was established, but it was not long before the company declared that it was in default. Each shareholder loan was converted to shares. As a result the plaintiff's holding in the company was reduced to 33 per cent.The plaintiff requested the court to make an order under section 233 of the Corporations Act, setting aside the issue of shares under the Shareholder Loan Agreement. Section 232 of the Corporations Act provides that a court may make an order under section 233 where (among other things) the conduct of a company's affairs is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity". Section 233 authorises the court to make orders in relation to a company which it considers appropriate.**(c) Decision**Duggan J found that the removal of the plaintiff as director was not authorised by the company's constitution. From the outset the defendants were aware the plaintiff had a potential interest in having his father involved in the business of the company, and in entering into a contract to retain his services. There had not therefore been any failure to disclose that interest.Duggan J then went on to consider the circumstances in which the Shareholder Loan Agreement was entered into.Duggan J found it unusual that the plaintiff would knowingly become a party to that transaction, considering his previous determination to maintain a 50 per cent holding in the company. In hearing evidence, Duggan J formed the view that the defendants had sought to take advantage of the plaintiff's lack of business experience and knowledge. Moreover Duggan J questioned how the amount each shareholder loaned the company was calculated, and more importantly, the effect this had on the number of shares issued to each shareholder in the event of default. Simply on its own, the terms of the Agreement raised clear potential in Duggan J's mind for an unfair dilution of the plaintiff's shareholding.Ultimately, Duggan J was significantly persuaded by the fact that there was no reasonable explanation put forward by the defendants as to why the company defaulted on the loan. Financial records indicated the company had the capacity to meet all its debts. As directors, the defendants were in the position to declare that the company had insufficient funds to satisfy its obligations. Indeed, as Duggan J recognised, it was to their advantage that they made this assessment and to the disadvantage of the plaintiff. In light of the above facts, Duggan J had little difficulty in concluding that the conduct of the company's affairs by the second and third defendants was unfairly prejudicial and unfairly discriminatory to the plaintiff. Accordingly it was appropriate that the share allotment be set aside, and the plaintiff restored to his position as the holder of 50 per cent of issued share capital.In making that order, Duggan J noted that the trend of more recent legislation is to enlarge the range of circumstances in which the courts are empowered to intervene and that the current wording of section 232 which adopts the concepts of "unfairly prejudicial" and "unfairly discriminatory" behaviour is beyond the earlier and narrower concept of "oppression".[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.3 Exercise of discretion under section 411(1) of the Corporations Act**(By Sarah French, Freehills) Re Mincom Ltd [2007] QSC 037, Supreme Court of Queensland, Fryberg J, 28 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/february/2007qsc37.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/february/2007qsc37.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**In this case the court considered whether it should exercise its discretion to approve an application under section 411(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) that a meeting of members be ordered to consider a proposed scheme of arrangement, and to approve the accompanying explanatory statement. **(b) Facts** Mincom Ltd (Mincom) is an unlisted public company with 170 shareholders and approximately 5.7 million employee options on issue. It entered into an agreement (the Agreement) with EAM Software Finance Pty Ltd (EAM). EAM is promoted by Francisco Partners II, L.P. (Francisco), a global private equity firm. The Agreement allowed EAM to acquire the ordinary shares in Mincom pursuant to a scheme of arrangement, and contained exclusivity clauses which restricted Mincom's ability to seek or formalise alternative proposals. However Mincom was permitted to enter into discussions in relation to unsolicited proposals from reputable parties if the Board, having taken financial and legal advice, believed that the proposal was more favourable to Mincom's shareholders. Further, if a court or tribunal determined that the exclusivity arrangements breached the Board's fiduciary or statutory duties, Mincom would not be obliged to comply with them, although it was required to submit in proceedings that no such determination be made.Clause 6(d) of the Agreement contained a deemed warranty from each shareholder to Francisco that the transfer shares were fully paid and free from encumbrances, and that the shareholder had full power and capacity to sell and transfer those shares. **(c) Decision** Fryberg J considered the discharge of the court's dual discretions under section 411(1) - whether the court should order the meeting and whether it should approve the explanatory statement.**(i) Convening a meeting**While exercising the court's discretion to convene a meeting, Fryberg J considered whether it had been demonstrated that, if the arrangement were passed by the shareholders, there was a reasonable chance that the court:* would not be required to refuse approval under section 411(17) of the Act;
* would approve it, or approve it subject to alterations or conditions, having regard to a possible breach of fiduciary duty by the directors; and
* would approve it, or approve it subject to alterations or conditions, having regard to section 6(d) of the Agreement.

Fryberg J noted that the court will not summon a meeting unless the scheme is likely to be approved by the court on the hearing of an unopposed petition. He referred to the High Court's statement in ASC v Marlborough Gold Mines Ltd (1993) 117 CLR 485 that "at the section 411(1) stage…the Court should be alive to the difficulties which may arise subsequently when it is called upon to decide whether the arrangement should be approved."Section 411(17) provides that a court must not approve an arrangement unless it is satisfied that the scheme isn't an attempt to avoid the provisions of chapter 6 of the Act, or if ASIC has stated that it does not object. Fryberg J noted that non-approval is the default position and that there is an onus on the applicant to demonstrate that it is likely to be able to satisfy the court that the arrangement hadn't been proposed for the purpose of avoiding chapter 6. This is a factual question to be assessed objectively and it is the purpose of the proposal (not the proposer) which is relevant. Although Fryberg J was not satisfied that full disclosure of all matters affecting this question had been made, he noted that the relevant test at the first stage was whether the court would be likely to approve the arrangement at a second hearing. This test was satisfied. Fryberg J considered the interaction of sections 411(17)(a) and (b), believing that, in contrast to Santow J's opinion in Re Advance Bank Australia Ltd (1997) 22 ACSR 513 at 519, the question of avoidance 'does not completely vanish even if ASIC makes a statement.' Fryberg J agreed that, while the literal interpretation of subsection (17) was that a statement from ASIC prevented the court from withholding approval under section 411(17)(a), the purpose of the arrangement remained relevant to the ultimate exercise of the court's discretion to approve.In considering whether fiduciary duties had been breached, Fryberg J highlighted a number of factors, stating that, in the context of a company takeover, the discharge of the directors' duty to act in the best interests of the company would generally include securing the best transfer price for the shareholders. In this light, problematic aspects included the fact that:* Mincom's directors were restricted from seeking third party proposals or considering unsolicited proposals;
* Mincom was prohibited from making any application to a court in relation to a determination that the restrictions in the implementation agreement were unlawful;
* the directors' recommendation and financial adviser's report were prefaced by the words 'in the absence of a superior proposal';
* the price proposed in the arrangement was not at the top of the range recommended by Mincom's expert report;
* there was no evidence given about the likelihood of an alternative proposal being found by active solicitation by the directors;
* there was no evidence given of steps taken by the directors to obtain an alternative proposal prior to disabling themselves from doing so;
* there was little evidence given regarding the publicity given to the proposal.

Fryberg concluded that the possible breach of fiduciary duty did not negate the likelihood that the court would grant the application at the second hearing if it were unopposed. This conclusion was reached because there was no evidence of any realistic likelihood of an alternative proposal during the period of the Agreement. However, Fryberg J noted that ASIC may wish to consider any possible breach of fiduciary duty prior to stating that it has no objection to the arrangements. In evaluating section 6(d) of the Agreement, Fryberg J noted that the court's role is not to consider the arrangement's commercial efficacy. However, the court must be satisfied that the arrangement warrants approval. It had previously been held that it would be improper for the court to allow an arrangement to be forced upon a class of shareholders if it could not reasonably be supposed to be for the benefit of that class. Fryberg J thought that the arrangement should not be approved whilst section 6(d) was included, as it was 'onerous, unreasonable and calculated to catapult unsuspecting shareholders…into a state of breach of warranty.'The court ordered that Mincom convene meetings to consider the scheme of arrangement.**(ii) Approving the explanatory statement**Section 411(1) allows the court to 'approve the explanatory statement required by paragraph 412(1)(a)' where it makes an order convening a meeting. Fryberg J approved the explanatory statement as the conditions for the exercise of that power had been fulfilled. However, he thought that in addition to considering whether the statement satisfies section 412, the court should also ensure that it makes a full and true disclosure of all material matters and is not substantially misleading or deceptive. Two aspects of the explanatory statement were considered potentially misleading:* it did not canvas the possible breach of the board's fiduciary duties or whether the directors have received legal advice regarding this issue;
* it did not disclose the date, existence or effect of a confidentiality and exclusivity deed between the parties;
* it stated that the restrictions upon Mincom pursuing discussions or negotiations with other parties were "subject to the board's fiduciary duties", when these obligations were in fact only subject to a determination by a court or tribunal that fiduciary obligations had been breached.

The explanatory statement contained a summary of reasons to vote for or against the proposal. Although these were not even-handed, Fryberg J held that a lack of balance did not necessarily make the document misleading. However he suggested that the explanatory statement should have provided further guidance regarding matters which may affect employee- shareholders, such as the likelihood of continuing employment, the nature of Francisco's past operations as a private equity firm or the manner in which private equity takeovers generate profit.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.4 The extent of the Graywinter principle and the meaning of "debt"** (By Patrick Reynolds, Clayton Utz)Hansmar Investments Pty Ltd v Perpetual Trustees Company Ltd [2007] NSWSC 103, New South Wales Supreme Court, White J, 23 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc103.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc103.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Hansmar Investments Pty Ltd ("Hansmar") successfully applied for the setting aside of a statutory demand served upon it by Perpetual Trustee Company Ltd ("Perpetual"). In doing so, the court:* considered the principle arising from Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund (1996) 70 FLR 452 that the affidavit in support of an application to set aside a statutory demand filed within 21 days from service of the statutory demand must disclose facts showing that there is a genuine dispute between the parties ("Graywinter principle"). The court held that it would be sufficient if the ground of challenge to the statutory demand was an "available" inference from the supporting affidavit (as opposed to a "necessary" inference);
* examined the requirement that a statutory demand could only be served in relation to a "debt". The court held that a claim could (and, in this case, was) both a claim for "liquidated damages" and a "debt". They were not mutually exclusive; and
* held that there was a genuine dispute concerning whether a debt was owed to Perpetual on the basis that there was no evidence that the debt to which the statutory demand related to had been assigned to Perpetual and complied with the notice requirements of section 12 of the [Conveyancing Act 1919 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3880" \t "_default).

**(b) Facts** Permanent Trustees Australia Ltd ("Permanent") held 76/94-98 Alfred Street, Milsons Point ("Property") as "custodian" for Challenger Managed Investments Limited ("Challenger") pursuant to a Custody Agreement. Challenger in turn was the responsible entity of a managed investment scheme. Permanent entered into a contract to sell the land to Hansmar ("Sales Contract"). Hansmar defaulted and forfeited the deposit. Challenger later terminated Permanent's role as "custodian" of its property (including the Property) and purported to appoint Perpetual as its new "custodian".Perpetual sold the Property and served a statutory demand on Hansmar, claiming the difference between the sale price of the Sales Contract ($1,125,000) and the sale price of the subsequent sale ($850,000) less the forfeited deposit ($112,500). It relied on clause 9.3 of the Sales Contract, which provided:"If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can terminate by serving a notice. After the termination the vendor can -…9.3 Sue the purchaser either - 9.3.1 Where the vendor has resold the property under a contract made within 12 months after termination, to recover -- the deficiency on resale (with credit for any of the deposit kept or recovered and after allowance for any capital gains tax for goods and services tax payable on anything recovered under this clause); and- the reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or9.3.2 to recover damages for breach of contract."Hansmar applied to set aside the statutory demand on the basis that:1. the claim was for liquidated damages rather than for a debt;2. there was no evidence of any assignment of the Property by Permanent to Perpetual, and notice had not been provided to Hansmar as required by section 12 of the Conveyancing Act 1919 (NSW); and3. in view of a valuation valuing the Property at $1,100,000, Perpetual had failed to mitigate its loss when selling the Property.Perpetual argued that the issues raised by Hansmar failed to comply with the Graywinter principle.**(c) Decision** **(i) The Graywinter principle**Perpetual argued that the matters sought to be raised by Hansmar were not available because they were not identified expressly or by necessary inference in the supporting affidavit to the set aside application so as to be clearly delineated as a ground for challenging the statutory demand, thereby breaching the Graywinter principle, as interpreted by Barrett J in Process Machinery Australia Pty Ltd v ACN 057 262 590 [2002] NSWSC 45 ("Process Machinery").The court rejected this argument. First, it found that the grounds were raised by necessary inference from a combination of the supporting affidavit and the documents annexed to it. Second, the court stated that it would not follow Process Machinery to the extent that it required the court to find that a ground was raised by "necessary" inference (as opposed to an "available" inference). In departing from Process Machinery, it noted POS Media v B Family Pty Ltd (2003) 21 ACLC 533 in which Austin J permitted a ground that was "obvious" on the face of a document attached to the supporting affidavit to be raised and Callite Pty Ltd v Adams [2001] NSWSC 52, in which Santow J relied on an available inference rather than a necessary inference. It concluded:"In my respectful opinion, it is not necessary for the applicant to expressly articulate the grounds in the affidavit, or to do so by necessary inference, as distinct from available inference."**(ii) The meaning of debt**The court then considered the arguments raised by Hansmar in support of the set aside application. First, Hansmar argued that section 459E permitted a statutory demand to be served in relation to a "debt" only and, because Perpetual's claim was for liquidated damages pursuant to clause 9.3 of the Sales Contract, it could not be a "debt". The court accepted that a claim under clause 9.3.1 was properly characterised as a claim for liquidated damages. However, it held that a claim for liquidated damages payable under a contract could also properly be characterised as a claim for money due under the contract. It concluded:"In my view, where, under a contract, a person promises to pay a specific or readily calculable sum which does not depend upon an assessment, albeit that the sum is payable as liquidated damages for breach of contract, the person's contractual liability is properly characterised as giving rise to a debt in that sum."**(iii) Whether the debt was assigned**The court, however, upheld Hansmar's argument that there was no evidence before it that Permanent assigned the Property to Perpetual and that notice (as required by section 12 of the Conveyancing Act 1919 (NSW)), had been provided to Hansmar. Although Challenger replaced "Permanent" with "Perpetual" as its "custodian", this did not in itself effect an assignment and there was "no reason" for an "unstated assumption" that changing "custodians" had the same effect as the execution and registration of a deed of appointment of a new trustee and retirement of an existing trustee under section 9 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "_default). Accordingly, the court set aside the statutory demand.**(iv) Mitigation of loss**It is also noted that the court briefly considered and rejected the argument that Perpetual failed to mitigate its loss. The valuation for $1,100,000 predated the sale by a year and the valuation stated that the market in the subject area was slow and that there would be "buying opportunities over the next 6-12 months".[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.5 Statutory demand - Service by post to a post office box and setting aside statutory demand** (By Roger Ouk, DLA Phillips Fox) Polstar Pty Ltd v Agnew [2007] NSW 114, New South Wales Supreme Court, Barrett J, 22 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc114.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc114.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**The case considered whether or not a statutory demand sent by post to a post office box had been served, and if it had been served, whether there existed "some other reason" that the demand should be set aside pursuant to section 459J(1)(b) of the Act.It was held that sending the demand by post to a post office did not satisfy the statutory requirements of service under the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the "Act") or [Acts Interpretations Act 1901 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_default). There was nonetheless informal service as the statutory demand did actually reach the Plaintiff and the Plaintiff acted upon the statutory demand as if it was duly served. The court held that a person making the statutory demand must not be aware of a genuine dispute regarding the debt. As there was a genuine dispute about the debt owed in this instance, the court ordered that the statutory demand be set aside pursuant to section 459J(1)(b). **(b) Facts**The Plaintiff, a real estate agency business, applied under section 459G of the Corporations Act 2001 (Cth) (the "Act") for an order setting aside a statutory demand served on it by the Defendant, a sales person who had been employed by the Plaintiff.The debt stated in the statutory demand related to commissions allegedly owed to the Plaintiff in the sum of $14,485. Notwithstanding a genuine dispute as to the amount of the debt between the Plaintiff and the Defendant, the Defendant, through her solicitor, sent the statutory demand to the Plaintiff by post on 4 October 2006 to a post office box address. The Plaintiff did not collect, and thus was not made aware of, the posted statutory demand until 19 October 2006. On 8 November 2006, the Plaintiff filed and served an application to have the statutory demand set aside under section 459G of the Act arguing in the alternative that no statutory demand was ever served, and that there existed some other reason other than a defect in the statutory demand (under section 459J(1)(a)) as to why the demand should be set aside as referred to in section 459J(1)(b) of the Act. In effect the latter argument required the Plaintiff to show that not setting aside the statutory demand would give rise to a substantial injustice or abuse of process.The court was asked to decide the following questions:i. whether the statutory demand was served on the Plaintiff;ii. if so, whether the day on which the statutory demand was served on the Plaintiff was such as to warrant the conclusion that the Plaintiff's application for an order setting it aside was made "within 21 days after" the demand was served; andiii. if so, whether there was, within section 459J(1)(b), "some other reason why the demand should be set aside".**(c) Decision** **(i) Whether the statutory demand was served on the Plaintiff.**The court held that the relevant statutory provisions in interpreting a provision of the Act contemplating a document being "served" on a company are: * section 109X of the Act which deals specifically with service on a "company"; and
* section 28A of the Acts Interpretations Act 1901 (Cth) which deals with service on a "body corporate".

It was held that these two sections are not mutually exclusive. The court focused on the use in both of these statutory provisions of the word "office" and concluded that the word contemplated a physical location capable of being "open to the public". The court did not regard a post office box as capable of being a company's office and accordingly held that the statutory demand sent by post to the post office box did not satisfy sections 109X of the Act or 28A of the Acts Interpretation Act. Hence the statutory demand had not been formally served in accordance with these sections.The court, referring to Macrae v St Margaret's Hospital (1999) 19 NSWCCR 1, did however acknowledge that there are cases where posting a document to a post office box would constitute proper service. For example, when the recipient of the served document has requested all correspondence be addressed to a nominated post office box. This was not the case in this instance.However, whilst the court held that the statutory demand had not been formally served it did find that there was informal service on 19 October 2006 as the statutory demand did actually reach the Plaintiff (by virtue of it having been collected by the Plaintiff's sole director who was the Plaintiff's directing mind). Further, the Plaintiff acted upon the statutory demand as if it was duly served (by applying for an order to set it aside instead of seeking declaratory relief). Thus, it was not the posting of the statutory demand that constituted the service but the "receipt, acceptance and dealing with the document".**(ii) If the statutory demand was served, was the Plaintiff's application for an order setting it aside made within 21 days of it being served?**As service of the statutory demand was held to have occurred, albeit informally, on 19 October 2006 (this is when it was collected by the Plaintiff's sole director as opposed to when it was actually sent), the Plaintiff's application to have the statutory demand set aside on 8 November 2006 was made within 21 days as required under section 459G. **(iii) Was there "some other reason why the demand should be set aside" pursuant to section 459J(1)(b)?**The court cited Arcade Badge Embroidery Co Pty Ltd v Deputy Commissioner of Taxation (2005) 157 ACTR 22 which held that section 459J(1)(b) "is a discretion of broad compass which extends to conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice."The court then referred to Meehan v Glazier Holdings Pty Ltd (2005) 53 ACSR 229 where it was held that "'some other reason' under 459J(1)(b) cannot be based on some need to bring to the relationship between the parties some broad form of perceived fairness or reasonableness" but required a "'sound or positive ground or good reason' to set aside the statutory demand which was consistent with the legislative intent of Pt 5.4 of the Act".The court held that "implicit in the underlying statutory scheme is the proposition that a person claiming to be a creditor will not resort to the statutory demand where the person is already aware of the existence of a genuine dispute". In this instance, at the time the statutory demand was sent, the Defendant was aware that there was a genuine dispute regarding how her commission was to be calculated and this dispute was evidenced in correspondence between the parties prior to the date of the service of the statutory demand. Therefore the court ordered that the statutory demand be set aside pursuant to section 459J(1)(b). [top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.6 Liquidator's personal liability for cost orders can be limited to assets of the company in liquidation** (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)In the matter of Mendarma Pty Ltd (in liquidation) (No 2) [2007] NSWSC 99, New South Wales Supreme Court, White J, 20 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc99.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc99.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The court considered when a liquidator's liability to pay costs of successful proceedings should be indemnified out of the assets of the company or whether, if the assets of the company are insufficient to meet the liability, the liquidators could be required to satisfy a costs order personally. The court further considered whether an order can be made to direct payment out of company assets in circumstances where the company is not a party to the proceedings.White J ordered that the liquidators were liable to pay the costs only to the extent that company assets were available to satisfy the order after meeting all expenses in priority of the winding up process. The court did not make an order against the company directly. **(b) Facts**The creditor appointed liquidators of Mendarma Pty Ltd (in liq), which was being voluntarily wound up, sought to investigate the company's affairs by applying to the court to issue examination summonses pursuant to section 596B of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The persons that the examination summonses were directed to (the Applicants) commenced proceedings to set aside the examination summonses on the grounds that the liquidators failed to make adequate disclosure of material matters on their application for the issue of the examination summonses. The Applicants were successful in having the examination summonses set aside. This case considers the issue of costs arising from the Applicants' successful interlocutory proceedings. Specifically, it considers whether the liquidators should be ordered to personally pay the costs of the successful Applicants and thereby be exposed to the risk that the assets of the company may be insufficient to satisfy their right to indemnity.White J found that the liquidators non-disclosure was "inadvertent, rather than deliberate". This is relevant to the issue of liability as in circumstances where liquidators are shown have acted improperly, judges are more inclined to order that the liquidators satisfy costs ordered against them personally. **(c) Decision**White J held that in circumstances whether the interlocutory application had not been brought by the liquidators and there had not been any impropriety on the part of the liquidators, any order that the liquidators pay costs should not be made without a limitation as to their personal liability. His Honour cited Kirwan v Cresvale Far East Ltd (in liq) (2002) 44 ACSR 21 as recent authority for the general principle that where liquidators are joined to proceedings as a defendant or respondent, and act appropriately, they should not be ordered to pay the successful plaintiff's or applicant's costs beyond the amount of assets available to the liquidator to do so. White J distinguished this general approach from circumstances where liquidators choose to commence litigation to which he or she is a party (and therefore takes on the risk of being ordered to pay costs) and where a liquidator may act with "some degree of impropriety" in proceedings. White J further considered whether an order could be made directing payment out of the company's assets. However, his Honour found that section 98 of the [Civil Procedure Act 2005](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "_default) and Part 42.3 of the [Uniform Civil Procedure Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "_default) operated to prevent a direct order being made against a company as the company was not a party to the proceedings. Accordingly, White J ordered that the liquidators pay the costs to the extent that company assets are available to satisfy the order after meeting all expenses in priority of the winding up process. The implication of this order is that the liquidators would be required to satisfy the order for costs prior to any personal entitlement to remuneration.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.7 Provision of accounting services -misleading or deceptive conduct, negligence and breach of fiduciary duty** (By Stephanie New, Freehills)Townsend v Roussety & Co (WA) Pty Ltd [2007] WASCA 40, Supreme Court of Western Australia, Court of Appeal, Wheeler, McLure and Buss JJA, 20 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/new%20folder/february/2007wasca40.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/new%20folder/february/2007wasca40.htm%20%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**An accountant and a company of which he was the sole director and shareholder were found to have engaged in misleading or deceptive conduct by telling half-truths and then failing to disclose the whole truth in relation to a proposed business investment, despite the fact that the acquisition agreement had already been signed. After making statements about the proposed investment, the company and accountant were also found to owe a duty of care to provide accurate, complete and balanced information and advice about that investment, even though such advice was not a subject of the contract of retainer. **(b) Facts** Ellen Townsend and Caroline Morris ('the Appellants') brought proceedings against Roussety & Co (WA) Pty Ltd ('Roussety') and Stanley Pilkadaris ('Pilkadaris') (together 'the Respondents') after losing money due to a failed business venture. Each of the Appellants paid $100,000 to Poppies Corporation Pty Ltd ('Poppies') to acquire an investment in a proposed business. The proposed business was a retail franchise to be supplied by a wholesale business operated (initially) by CRJ Assets Pty Ltd ('CRJ'). Carlo Collova ('Collova') was a director of CRJ and also controlled Poppies. The Appellants signed an acquisition agreement on the basis of representations, information and predictions Collova had given. The Appellants then retained the Respondents to assist them in securing finance for the acquisition. Collova suggested the Appellants engage the Respondents as the Respondents performed accounting work for Collova and his companies. In the course of assisting the Appellants to obtain finance the Respondents created a positive impression of Collova and the prospects of the proposed business, stating that it was a 'solid investment opportunity'. This was despite the fact that the Respondents knew Collova and CRJ were experiencing serious financial difficulties. At first instance the Appellants pleaded causes of action in contract; for contravention of section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default) ('TPA') or alternatively section 10 of the [Fair Trading Act 1987 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15168" \t "_default) ('FTA'); in negligence; and for breach of fiduciary duty. Collova became bankrupt so proceedings against him were discontinued. The trial judge found that the Appellants had not established any of the causes of action and dismissed their claim. The Appellants appealed against those findings. **(c) Decision** Buss JA analysed the issues raised on appeal in the context of the Appellants' claims at trial. The appeal was allowed and the Appellants were awarded damages. Wheeler JA and McLure JA agreed with the reasons of Buss JA. **(i) Appeal regarding the claim in contract**Buss JA dismissed this ground of appeal. It was inferred that the Appellants retained Roussety to assist them in obtaining finance, but did not impliedly retain Roussety to act as their accountant/adviser in respect of their investment in the proposed business. **(ii) Appeal regarding contravention of section 52 of the TPA**Buss JA only referred to sections 52 and 82 of the TPA after stating that these sections were not materially different from sections 10 and 79 of the FTA. In characterising the misleading or deceptive conduct, Buss JA reviewed authority on the circumstances in which silence and half-truths may be misleading or deceptive: * the significance of silence must be examined in the context in which it occurs: Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 at 32 per Black CJ; and
* where there is a half-truth the disclosure of the partial truth itself creates an obligation to disclose the whole truth. Failure to do so is misleading or deceptive because the standard of conduct prescribed by section 52 can only be satisfied by disclosing the full truth: McMahon v Pomeray Pty Ltd (1991) ATPR 41-125 at 52,858 per Hill J.

In this case the Respondents' conduct was misleading or deceptive due to the telling of half-truths. The Respondents made voluntary statements which created a positive impression of the proposed business and gave rise to an obligation to reveal the full truth. The deliberate failure to disclose the financial difficulties and the risk those difficulties posed to the proposed business was misleading or deceptive. In line with previous authority on causation, Buss JA confirmed that:* the issue of causation should be approached by asking whether the misleading or deceptive conduct can properly be said to be a cause of the loss and not by asking what caused the loss; and
* a causal connection will ordinarily exist if a contravention of section 52 materially contributes to the loss or damage suffered, even if the contravention alone would not have brought about the damage.

In this case Roussety's misleading or deceptive conduct (in which Pilkadaris was knowingly involved) induced the Appellants to complete the purchase of the proposed business and expend money which they lost. The conduct was a cause of the Appellants' loss in that the Appellants would not have proceeded with the investment (if they were able to do so) had Pilkadaris informed them of Collova and CRJ's financial circumstances and the impact of this on the proposed business. Buss JA found that the Appellants could have avoided continuing with the investment because the acquisition agreement contained the following provision:"This offer is only subject to the parties entering into a formal agreement for sale prepared by the vendors [sic] solicitors on terms in [sic] condition [sic] mutually agreed between the parties."This provision indicated an intention by the parties not to make a concluded bargain or be immediately bound unless and until the formal agreement was executed. Buss JA was alternatively satisfied that the agreement could have been rescinded before completion due to Collova's misleading or deceptive conduct on behalf of Poppies.Importantly, the conduct was a cause of the Appellants' loss notwithstanding that:* the Appellants has decided to proceed with the investment and signed the acquisition agreement (which they believed was binding subject only to obtaining finance) before they met Pilkadaris; and
* the Appellants had signed the acquisition agreement in reliance upon information given to them and representations made by Collova.

Further, in Buss JA's opinion even if the business failed due to an unsuitable location and inadequate customer base rather than due to Collova's financial difficulties that would not wholly negative the causal effect of the misleading or deceptive conduct.**(iii) Appeal regarding the claim in negligence**Buss JA made the following statements in respect of the negligence claim:* professional negligence may give rise to concurrent liabilities in both tort and contract;
* where there is a contract of retainer with a professional person, it is the contract that defines the relationship of the parties so that, ordinarily, the presumed intention of the parties is that any duty in tort is limited or excluded; and
* the absence of a retainer with a professional person does not necessarily mean that a duty of care is not owed by the professional person.

In this case the contract of retainer did not include a term obliging the Respondents to advise the Appellants with reasonable skill, care and diligence (or at all) regarding the proposed investment. However, to the extent that Pilkadaris (on behalf of Roussety) made statements concerning the proposed business and the Appellants' proposed investment he was being trusted to give an accurate, complete and balanced account. In those circumstances the Respondents owed a duty to the Appellants to provide accurate, complete and balanced information and advice in relation to the subject matter of Pilkadaris's statements. Buss JA held that this duty was breached but the negligence claim was not considered further because the Appellants had succeeded in their claim under the TPA.**(iv) Appeal regarding breach of fiduciary duty**Buss JA stated that the nature of the relationship between a professional adviser and their client, including whether the adviser owes any fiduciary duties to the client, depends on the particular circumstances. In this case the Respondents did not owe any fiduciary duties to the Appellants with respect to their investment in the proposed business. Pilkadaris did not act for and on behalf of the Appellants in relation to the negotiation of their investment nor did he agree/undertake to act for the Appellants in the exercise of any power or discretion that would affect their interests in their investment.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.8 The impact of general deterrence in determining whether to disqualify a director from acting** (By Bronwyn Thomas, Blake Dawson Waldron)Australian Securities and Investments Commission v Peter Cornelius Beekink, Hersch Solomon Majteles and Gregory Phillip Gaunt [2007] FCAFC 7, Federal Court of Australia, Full Court, Mansfield, Jacobson and Siopis JJ, 7 February 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/february/2007fcafc7.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/february/2007fcafc7.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)(a) SummaryASIC appealed to the Full Court of the Federal Court against:* the leniency of pecuniary penalties issued against three directors of Australian Managed Funds Limited (AFM) (Beekink: $25,000, Mejteles $10,000 and Gaunt: $10,000, who all admitted to breaching their duties as officers of AFM) on the basis that the penalties were "manifestly inadequate"; and
* the fact that an order was not made disqualifying Beekink from managing corporations for a period of time, despite the seriousness of his breach.

ASIC contended that the trial judge had failed to "give sufficient weight to the requirement of general deterrence and the seriousness of the conduct" and had "[given] too much weight to other factors".On appeal, the court ordered that Beekink be disqualified from managing corporations for a period of 12 months and increased the pecuniary penalties to $40,000, $20,000 and $20,000 respectively. **(b) Facts** **(i) Background**Beekink, Majteles and Gaunt (all Partners at a national mid-tier legal firm) were the directors of AFM from 13 September 1999 to 30 May 2000. In 1999, the directors registered the "Clifton Partners Finance Mortgage Scheme" (Scheme) with ASIC. AFM was granted a licence to operate as the responsible entity for the Scheme. The Scheme was designed to, "offer interests in the form of participation in private mortgage loans originated and managed by Clifton Partners". Clifton Partners Finance Pty Limited (Clifton Partners) were appointed by AFM as the custodian of the Scheme assets and as AFM's agent in the implementation and running of the Scheme. In late 1999, AFM lodged a first part prospectus with ASIC, together with a Compliance Plan under which Beekink was named as the Senior Compliance Officer (SCO) under the Scheme. The plan made it clear that AFM was responsible for compliance by Clifton Partners under the relevant corporations law and that the SCO would be responsible for monitoring such compliance. It also made it clear that any prospectus would be subject to a "due diligence procedure". Beekink (with the knowledge and consent of Majteles and Gaunt) was responsible for the day-to-day management of AFM. In December 1999, Beekink gave Clifton Partners the authority to prepare and execute second part prospectuses on AFM's behalf (after review by Beekink). In early 2000, Beekink extended this authority to allow Clifton Partners to issue such prospectuses, "without [the prospectus] first being subjected to detailed review by Beekink or AFM". Neither Majteles or Gaunt knew that this authority had been granted to Clifton Partners. A second part prospectus (Prospectus), offering the public participation in private mortgage loans, was prepared and lodged by Clifton Partners with ASIC in February 2000. The Prospectus was not reviewed by any of the directors before lodgement, nor was it the subject of any due diligence by the directors. It transpired that the prospectus was materially false and misleading in a number of aspects. This led to a capital loss by investors of approximately $207,000. **(ii) Breach of duties as officers of AFM**Each of the directors admitted to the following breaches in their duties as officers of AFM (constituting breaches of sections 601FD(1)(f)(b), 601FD(1)(c) and 601FD(1)(f)(iv) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default)):* failure to take reasonable steps to ensure that AFM read the Prospectus;
* failure to take reasonable steps to ensure that AFM undertook adequate due diligence with respect to material statements in the Prospectus; and
* failure to provide adequate training to Clifton Partners to ensure they understood their obligations.

**(iii) Federal Court decision**At first instance, the trial judge imposed a pecuniary penalty of $10,000 on both Majteles and Gaunt on the basis that they had, "neglected their duties and put misplaced reliance on Mr Beekink, acquiescing in his assumption of power'. The trial judge imposed a pecuniary penalty of $25,000 on Beekink for his three breaches, but declined to make a disqualification order against Beekink on the basis that:…[A]lthough I regard [Beekink's] contraventions as serious, I consider that an order of disqualification in this case would be disproportionate and unmerited in the circumstances. This is because it would not be warranted to protect the public and personal deterrence and is not required by that means.ASIC appealed to the Full Court of the Federal Court on the basis that, "the primary judge erred in the exercise of his discretion in failing to disqualify [Beekink]" and "erred by imposing inadequate penalties on each of the respondents".**(c) Decision**The court found that the trial judge had erred in failing to disqualify Beekink and in determining the quantum of the pecuniary penalties. **(i) Disqualification**In ordering that Beekink be disqualified from managing corporations for 12 months, their Honours stated that, "the overwhelming weight of authority is that general deterrence is a factor to be taken into account in deciding whether, and if so for what period, disqualification ought to be imposed". The court held that in deciding not to disqualify Beekink the trial judge had focused too much on the "personal considerations" that affected Beekink (eg. the fact that Beekink was a partner in a law firm, he held a number of voluntary board positions and was of "exemplary character") and had not taken "general deterrence into account at all when deciding not to make a disqualification order…". Beekink was found to have intentionally engaged in misconduct, without any explanation for doing so. On this basis, and in conjunction with the need to take into account the aim of general deterrence when sentencing such breaches, it was held that Beekink should be disqualified from managing corporations for a period of 12 months. When determining the length of the disqualification, their Honours made the point that, "[t]he appropriate period for disqualification is a difficult one to determine. The guidance which can be obtained from earlier cases is limited…each case must turn upon its own considerations".**(ii) Pecuniary penalty - Beekink**In considering the quantum of the pecuniary penalty, their Honours stated:The principal purpose of a pecuniary penalty is to act as a personal and general deterrent against the repetition of like conduct. It should be no greater than is necessary in order to achieve this objective. The court accepted ASIC's submission that in formulating the amount of the pecuniary penalty the trial judge had, "failed to give sufficient weight to the objective of general deterrence…the seriousness of the breaches or the fact that Beekink [was] an experienced solicitor…". In determining the appropriate amount of the penalty (ultimately $40,000), their Honours took into account the fact that Beekink had been disqualified from managing corporations for one year. Had Beekink not been the subject of a disqualification order, the pecuniary penalty would have been in the order of $80,000-$100,000. **(iii) Pecuniary penalty - Majteles and Gaunt**The court held that the pecuniary penalties imposed on Majteles and Gaunt were "manifestly inadequate". In calculating the quantum of the pecuniary penalties, the trial judge had begun with a starting point of $8,000, for an offence that carried a maximum penalty of $200,000. Further, the trial judge had stated that $8,000 constituted a higher starting point, given Majteles and Gaunt's qualifications as solicitors.The court held that the trial judge had, "[a]t the very least, failed to take account the seriousness of the directors' breaches". Given the seriousness of the breach, the court increased the pecuniary penalty against each of Majteles and Gaunt to $20,000.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.9 Section 232 of the Corporations Act 2001: What constitutes oppressive conduct?** (By Lisa Thomas, DLA Phillips Fox)Bessounian v Australian Wholesale Mortgage Pty Ltd [2007] NSWSC 35, New South Wales Supreme Court, Hamilton J, 2 February 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc35.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/february/2007nswsc35.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**Mr Bessounian ('the plaintiff'), an aggrieved shareholder of Australian Wholesale Mortgages Pty Ltd ('the first defendant'), brought proceedings against the other shareholders, Mr Sengoz ('the second defendant'), Ms Pireh ('the third defendant') and AWM Pty Ltd ('the fourth defendant'), seeking relief against the conduct of the affairs of the first defendant, which was alleged to be oppressive to, unfairly prejudicial to or unfairly discriminatory against the plaintiff within the meaning of section 232 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act').Hamilton J stated that the test to be met to satisfy section 232 of the Act, is one of commercial unfairness, as enunciated in the High Court case of Wayde v New South Wales Rugby League Limited (1985) 180 CLR 459. Relying on this test (as approved in subsequent cases), his Honour found that in the circumstances, the plaintiff failed to prove oppressive conduct on the part of the defendants and dismissed the proceedings. **(b) Facts** The second and third defendants started a company called The Willow Group Pty Ltd ('Willow Group') in May 2000. The business of the Willow Group included mortgage origination. That aspect of the business was operated under the business name 'Australian Wholesale Mortgages' which was registered in the names of the second and third defendants. A mortgage originator operates as a 'middle man' between a lender and a mortgage broker. A mortgage broker liaises with the borrower and forwards the borrower's mortgage application to the originator to evaluate and submit to the lender. The originator receives a fee from the borrower for this service and if the mortgage is settled, the originator then receives a further up-front commission and further trail commissions for the life of the loan. The oral evidence of the events that followed varied between the parties, with Hamilton J remarking that the quality of evidence given by the witnesses was "dubious". **(i) The plaintiff's contentions**The plaintiff alleged that he was invited by the second and third defendants to join the Willow Group as a partner and head of the finance origination arm of the business in June 2000. In February 2002, a new entity was formed (the first defendant) to run the mortgage origination business of the Willow Group, of which the plaintiff became a shareholder and director. However, crucially, the first defendant did not commence trading until July 2002, by which time the relationship between the parties had collapsed and the plaintiff had resigned as director.The plaintiff further alleged that on 2 April 2002, he was informed by the second and third defendants that he had to achieve a target of $5,000,000 in approved loans for the month of April 2002 and was subsequently dismissed on 26 April 2002 for failing to reach this target (falling $600,000 short in approved loans). On 1 May 2002, he purported to have resigned as director of the first defendant, although the relevant ASIC form was not filed until 26 June 2002. He remained as shareholder of the first defendant. On 11 March 2003, the second and third defendants incorporated AWM Pty Limited (the fourth defendant), of which the plaintiff was not a shareholder. Subsequently, the business of the first defendant was transferred to the fourth defendant. The plaintiff contended that the conduct of the affairs of the first defendant and specifically the transfer of its business to the fourth defendant, was oppressive to, unfairly prejudicial to or unfairly discriminatory against him, within the meaning of section 232 of the Act. **(ii) The defendants' contentions**The defendants contended that the plaintiff was never invited to join the Willow Group as partner and was employed by the group to run the mortgage origination arm of the business in June 2000. When the plaintiff failed to achieve his target of approved loans of $5,000,000 for the month of April 2002, he was dismissed.During the plaintiff's involvement in the business, all business was conducted in the Willow Group and the plaintiff was paid for his services. The first defendant, of which the plaintiff was a shareholder, did not commence trading until July 2002. In cross examination, the defendants admitted that the business was transferred from the first defendant to the fourth defendant in order to deprive the plaintiff of the benefit of the assets in the first defendant. However, they maintained that they had only continued to trade through the first defendant after July 2002 in the mistaken belief that the plaintiff was no longer a shareholder. On becoming aware of the plaintiff's continuing interest in the first defendant, the second and third defendants transferred the business to the fourth defendant. They refuted the plaintiff's claims of oppressive conduct on the basis that the first defendant had not started trading until after the plaintiff had been dismissed and had resigned as director.The defendants contended that for a course of conduct or transaction to be oppressive, it must involve unfairness, and unfairness must be judged in the context of all relevant circumstances. In this situation, the plaintiff had no interest in the business when it was conducted as a partnership. Further, the plaintiff did not contribute in any way to the business of the first defendant. It was argued that in those circumstances, there was no unfairness in diverting the business from the plaintiff's grasp. **(c) Decision** **(i) The law**Under section 232 of the Act, a shareholder can apply to the court for an order under section 233 of the Act if the conduct of a company's affairs is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. In this case, the plaintiff sought an order under section 233 of the Act that the second and third defendants buy the plaintiff's shares in the first defendant, assessed at fair value and on the basis that the business of the fourth defendant was owned by the first defendant.Hamilton J acknowledged that the test to be met to satisfy section 232 of the Act is one of commercial unfairness and is well settled law. Referring to the High Court judgment of Wayde v New South Wales Rugby League Limited (1985) 180 CLR 459, his Honour accepted the following passage of Brennan J's judgment, that the "court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate objective on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision".For further guidance, his Honour referred to Young J's decision in the New South Wales Supreme Court decision of Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 962, in which Young J stated that "it has been accepted that one no longer looks at the word 'oppressive' in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair".Concurring with the view that courts should be reluctant to interfere with the management decisions of companies, his Honour referred to another of Young J's decisions in John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'sia) Pty Ltd (1991) 6 ACSR 63, quoting that "courts must be slow to interfere with the responsibility of management of a company committed to its board of directors. The mere fact that decisions made adversely affect the applicant is insufficient. It should normally be shown that there is a lack of good faith or that no reasonable board could have come to the decision reached". **(ii) Was the defendant's conduct oppressive?**Hamilton J accepted the contentions of the defendants. His Honour found that the plaintiff had failed to establish that the defendant's conduct amounted to commercial unfairness in the circumstances. His Honour came to this conclusion based on his findings that the plaintiff was not a member of the partnership and had no interest in the business operations of Australian Wholesale Mortgages as conducted by the partnership. The plaintiff had no entitlement to the trail commissions derived by the partnership other than through his remuneration. Even though the plaintiff was a shareholder of the first defendant, the business of the first defendant did not begin until July 2002 which was after the relationship between the parties broke down. Conceding that some of the defendant's conduct may be interpreted as oppressive, his Honour concluded that viewed objectively, the removal of business from the first defendant ought not to be regarded as commercially unfair because the plaintiff never contributed to that business. This decision meant that the court did not need to consider whether or not the plaintiff's shares in the first defendant should be bought by the second and third defendants or what the fair value for those shares should have been.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.10 Equitable lien of a Part 5.3A administrator has the same priority ranking as statutory lien** (By Sharon Burnett, Clayton Utz)Hamilton v Donovan Oates Panaford Mortgage Corporation Limited [2007] NSWSC 10, New South Wales Supreme Court, Barrett J, 29 January 2007The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/january/2007nswsc10.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/january/2007nswsc10.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The plaintiffs were former administrators under a voluntary administration pursuant to Part 5.3A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Act") of the second defendant, Perfection Developments Pty Ltd ("the company"). The plaintiffs sought a declaration that they had a valid equitable interest by way of an equitable lien securing a sum of $18,968.58 and that their equitable lien had priority over the interests of the first defendant, Donovan Oates Panaford Mortgage Corporation Limited ("DOHM", which held a legal mortgage over the assets of the company), the company and the subsequent mortgagees named as third defendants. At general law, in certain circumstances, rights secured by an equitable lien may be recognised as ranking in priority over rights secured by a legal mortgage. Following a review of the authorities regarding an administrator's right to an equitable lien and an assessment of the statutory scheme under the Act by which an administrator enjoys a statutory lien, Barrett J held that, although the plaintiffs had an equitable lien, it could not be recognised as existing in a form which made it capable of enjoying a higher ranking, in point of security, than their statutory lien. Accordingly, the administrators' equitable lien in this case did not rank in priority to the interests of DOHM.**(b) Facts**The company undertook a residential flat development. On 18 December 2003, the company granted DOHM a mortgage over the land, which was duly registered under the provisions of the [Real Property Act 1900](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4197" \t "_default). At the same time, the company granted to DOHM an equitable mortgage and floating charge over its assets generally. That security was registered under the Act. Both securities stood as security for all monies owing by the company to DOHM. On 10 March 2006, a winding up order was made in respect of the company. Shortly thereafter, the liquidator appointed the plaintiffs to be voluntary administrators of the company under Part 5.3A of the Act. The creditors of the company subsequently approved a proposed deed of company arrangement and that deed was executed on 18 May 2006 and terminated on 15 June 2006. On 5 April 2006, DOHM took physical possession of the residential flat site, which was virtually the only asset of the company, and later obtained judgment for possession and, exercising its power of sale, began to sell the individual home units. The plaintiffs withdrew caveats to allow the sale of units to proceed. This was done in accordance with an agreement under which DOHM caused monies to be isolated in a controlled monies account pending determination of the plaintiffs' claim of an equitable lien securing $18,968.58. It was also agreed that the entitlement the plaintiffs claimed in respect of the land would be regarded as attaching to the monies held in the controlled account. The plaintiffs' claim for $18,968.58 was wholly attributed to the period during which they had been voluntary administrators (that is, before they became administrators of the deed of company arrangement). It consisted of three components, namely remuneration at rates approved by the creditors under section 449E of the Act, general out of pocket expenses and insurance premiums. The only available assets of the company were essentially those realised by sale of the residential flat development on the land at Guildford. Between 23 March 2006 and 5 April 2006, the plaintiffs were involved in arranging insurance for the residential flat development, taking action to bring the development to a state where the occupancy certificate could be obtained, including supply of a chairlift, the installation of which was essential to the completion of the building, and involvement in preparations for the sale of the units in the development. All activities of the plaintiffs in relation to the completion of the building, the marketing of the units and other matters concerning the real property ceased when DOHM went into possession on 5 April 2006.**(c) Decision**His Honour noted that the plaintiffs' claim to an equitable lien had to be assessed having regard to their rights, as administrators, to a statutory lien arising under the Act by operation of section 443F. Under section 443A(1) of the Act, the administrators were liable for the debts they incurred in taking steps to complete the building, in preparing for the sale of the units and in the marketing of the units. Under section 443D of the Act they were entitled to be indemnified out of the company's property for those debts as well as their remuneration. That right of indemnity, by operation of section 443E(1), took priority over all the company's unsecured debts and the debts secured by a floating charge of the company's property. By operation of section 443F(1) the administrators' right of indemnity was secured over the company's property by a statutory lien and enjoyed the right of priority provided by section 443F(2) of the Act.The plaintiffs claimed that, in addition to their statutory lien, they enjoyed an equitable lien arising by operation of general principles of equity and that that equitable lien ranked in priority to DOHM's land mortgage (a secured charge). Under the Act, by operation of section 443F(2), DOHM's land mortgage ranked in priority to the administrator's statutory lien. In determining the plaintiffs' claim, his Honour gave consideration to three cases concerning the availability of an equitable lien to a Part 5.3A administrator.In Commonwealth of Australia v Butterell (1994) 35 NSWLR 64, it was held by Young J that Part 5.3A administrators were entitled to an equitable lien as distinct from their right to a statutory lien and that equitable lien was an adjunct or supplement to the statutory lien. Barrett J noted that that case was concerned with the administrator's right to resort to company property to recoup liabilities beyond those covered by the statutory lien. Barrett J stated that Young J in that case approached the matter by considering the availability of the statutory lien and, when it appeared that that lien did not apply, addressing the question whether an equitable lien was available.In Western v Carling Constructions Pty Ltd (2000) 35ACSR 100, Austin J likewise found that a Part 5.3A administrator was entitled to an equitable lien over the company's property. In considering whether that equitable lien added anything to the statutory lien created by the Act, Austin J expressed the view that:* the statutory provisions confirmed the position at general law and the statutory lien did not replace the equitable principles; and
* nothing in Part 5.3A of the Act imposed any limitation on the scope of the equitable lien.

Barrett J noted that, in that case, Austin J was not considering any question concerning the ranking of either of the liens as against other securities affecting the company's property. In Lockwood v White (2005) 11 VR 402, the Court of Appeal of Victoria recognised the coexistence of a statutory and an equitable lien but did not look beyond the position occupied by the administrator's lien (whether general law or statutory) vis-à-vis the claims of unsecured creditors. Having regard to those three cases, his Honour noted that in this instance, by contrast, the relevant competition was a competition between secured creditors. There was no suggestion in this case that the rights and monies secured by the equitable lien claimed by the plaintiffs were not the same rights and monies as secured by the statutory lien. Accordingly, the question was whether both liens were independently available:* the statutory lien with the ranking, as against DOHM securities, dictated by section 443F(2); and
* the equitable lien with such ranking, as against DOHM securities, as might be created by the general law apart from section 443F(2).

His Honour held that the equitable lien could not be recognised as existing in a form which makes it capable of enjoying some ranking, in point of security, that did not correspond with the ranking prescribed by section 443F(2) of the Act. As his Honour noted, to find otherwise would be to deny the intended operation of section 443F(2) which dictates the ranking of the administrator's statutory lien. His Honour considered that the general law lien enjoyed by a Part 5.3A administrator in respect of the company's property should be regarded principally as a means of affording protection in respect of rights of recoupment not secured by the statutory lien. Where, as here, precisely the same rights are secured by the statutory lien and by the equitable lien, the statutory specification of the ranking of the former, by comparison with other securities over an interest in the company's property, must also affect the latter. On this basis, his Honour determined that the plaintiffs were not entitled to the statutory relief they sought. However, his Honour went on to consider the consequence of the view, which he did not favour, that the general law equitable lien of a Part 5.3A administrator is not confined to the priority position occupied by the statutory lien, where the two operate as security for the same rights. His Honour noted that according to that view, the plaintiffs' general law lien, could in certain circumstances, be seen to have attained priority over the legal interests represented by DOHM's land mortgage. Having regard to the principles discussed in Dean - Willcocks v Nothintoohard Pty Ltd [2006] NSWCA 311, the administrator's equitable lien could take priority:* pursuant to the principles of salvage whereby those taking the benefit of an administration should not escape bearing the burden of the proper cost of it. On this basis a receiver is entitled to be reimbursed for costs, and to be paid remuneration, before other persons entitled to the funds. Such a right will not however arise where, as in Dean-Willcocks v Nothintoohard Pty Ltd, the expenditures are directed simply towards putting the receivers in a position where they might sell property; and
* where the holder of a legal mortgage might have agreed to cede priority to the receivers.

The plaintiffs argued that all the actions taken by them relating to the completion of the development, marketing of the units and other matters concerning the real property, involved the care or preservation of the property of the company in such a way as to cause benefit to enure to DOHM. Having regard to the activities undertaken by the plaintiffs, his Honour was of the opinion that none of the expenditure and effort of the plaintiffs between 23 March 2006 and 5 April 2006 protected, preserved or enhanced the company's property or created any benefit for DOHM in relation to that property so as to make it unconscionable for DOHM not to acknowledge a right of the plaintiffs to be reimbursed and remunerated out of that property in priority to DOHM. His Honour considered that the steps taken by the plaintiffs were not such as to give rise to an expectation that DOHM would be beholden to them for the benefit or advantage conferred. Having regard to the second basis upon which the plaintiffs might claim that their general law lien ranked in priority to the mortgage of DOHM, his Honour stated that the highest point the evidence reached in this regard was a letter of 20 March 2006 from DOHM to one of the plaintiffs. However, having regard to the terms of that letter, his Honour found that nothing in it could possibly be construed as any form of agreement by DOHM to cede priority to the plaintiffs for their reimbursement and remuneration over the claims secured by DOHM's securities.His Honour also considered that nothing in the course of conduct leading up to the appointment of the plaintiffs as administrators, or during the period 23 March 2006 to 5 April 2006, indicated any agreement by DOHM to cede priority.Accordingly, even if the plaintiffs' equitable lien was not capable of having some priority superior to that given by statute to their statutory lien, nothing on the facts of the case before Barrett J activated any of the general law principles by which any rights secured by the equitable lien could be recognised as ranking in priority to the right to payment secured by DOHM's legal mortgage.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.11 Carrying on a business as defined in section 5 of the Partnership Act 1958 (Vic)** (By Nathan Stirling, Blake Dawson Waldron)Goudberg v Herniman Associates Pty Ltd [2007] VSCA 12, Supreme Court of Victoria, Court of Appeal, Maxwell P, Neave JA and Kellam AJA, 22 January 2007The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/january/2007vsca12.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/january/2007vsca12.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**This judgment provides an analysis of the phrase "carrying on a business" as it appears in section 5 of the [Partnership Act 1958 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=507" \t "_default). The Victorian Court of Appeal approved the Full Court of the Supreme Court of Victoria's earlier reasoning in Pioneer Concrete Services Ltd v Galli [1985] VR 675 where a clear distinction was drawn between activities which are carried out as preparatory to the commencement or setting up of a business, as opposed to activities which constitute the actual carrying on of a business. In this case, the Court of Appeal unanimously found that while the parties had undertaken preliminary investigations to commence a business, including feasibility studies, demographic surveys and exploratory trips overseas, no business had come into existence and therefore "on no reasonable view" could the conduct of the parties constitute the carrying on of a business.**(b) Facts**Pursuant to the provisions of the [Fair Trading Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "_default) 1999 (Vic), the respondent in this case, Herniman Associates Pty Ltd ('Herniman'), brought an action in the Victorian Civil and Administrative Tribunal against one William Leslie Williams ('Williams'); three other companies of which Williams was a director; and the appellant, Goudberg, claiming more than $186,000 for unpaid fees, unbilled work and labour, loss of profit and interest. It was contended by Herniman, and subsequently held by the Tribunal, that in September 2000, Herniman and Williams had entered into an agreement for the provision of architectural services and that Goudberg was a party to that agreement by virtue of his being in partnership with Williams.Prior to Williams engaging the architectural services of Herniman, Williams had conceived the idea of converting the dining rooms of certain hotels, particularly in Sydney, into franchised eateries. Williams envisaged the American franchised chain of Applebee's as the preferred connection. Goudberg, a retired engineer, was a person known to Williams whom Williams sought to involve in the concept and together they travelled to the US to visit various restaurants. Subsequent to two of these visits, on 13 September 2000, Williams attended Herniman's offices and signed an agreement for the provision of architectural services to progress the concept. Goudberg was not present at the meeting, nor was his name mentioned in the agreement.In January 2001, Goudberg and Williams again travelled to the US and this time met with the management of Applebee's. Later in 2001, various discussions took place between Goudberg, Williams and Herniman. A corporate vehicle for the project was incorporated in early 2002, Industry Food Services Pty Ltd, and Goudberg was one of its directors (although he resigned soon after). Finance for the project was still being sought in late 2002 and Williams purported to terminate the agreement with Herniman in August 2003.The contentious fact as it relates to Goudberg is whether or not at the time Williams entered into the agreement with Herniman, in September 2000, Goudberg was in partnership with Williams. VCAT Vice President, Bowman J, found that he was and subsequently ordered that Williams and Goudberg were jointly liable to pay Herniman $55,065 for fees owed under the contract. Goudberg appealed to the Victorian Court of Appeal.**(c) Decision**The principal judgment was delivered by Maxwell P. Neave JA agreed and Kellam AJA delivered a short concurring judgment.Section 5(1) of the Partnership Act 1958 (Vic) defines partnership as being "the relation which subsists between persons carrying on a business in common with a view of profit." Maxwell P agreed that Goudberg and Williams were at all relevant times acting "in common" and "with a view of profit", however he decided that "it was not reasonably open to the Tribunal … to conclude that as at September 2000 Williams and Goudberg were carrying on a business".His Honour considered the earlier Full Court case of Pioneer Concrete Services Ltd v Galli [1985] VR 675 (Crockett, Murphy and Ormiston JJ) and the English Court of Appeal case of Keith Spicer Ltd v Mansell [1970] 1 All ER 462 (Harman, Edmund Davies and Widgery LJJ) where a clear distinction was drawn between activities which are carried out as preparatory to the commencement or setting up of a business, as opposed to activities which constitute the actual carrying on of a business. The Tribunal had thought that the argument for finding the existence of a partnership was stronger here than in Galli, however Maxwell P expressly disagreed with that analysis.While Maxwell P recognised that, by September 2000, Williams and Goudberg had developed a fully and clearly described business concept in order to establish a business, no business was in existence. This "simple" fact, in Maxwell P's view, was enough to negate the proposition that Goudberg and Williams were carrying on a business. Maxwell P further noted that Herniman's case was "conducted on the basis that the realisation of the project was some way into the future". In Maxwell P's opinion, these unchallenged facts supported the self-evident proposition that no business was in place by September 2000. As his Honour observed, in the event, no venture capital was ever obtained and no agreement was ever reached with Applebee's.Maxwell P conceded that Goudberg and Williams were acting in a commercial project but held that a partnership required more. In his Honour's view, the only evidence about the activities engaged in by Goudberg and Williams prior to September 2000 were market research, demographic surveys, two trips to the US and the decision that Applebee's would be the best franchise model for the project. None of these were sufficient to categorise the carrying on of a business.In addition, Maxwell P thought that, in finding that a partnership did exist between Goudberg and Williams in September 2000, the Tribunal may have incorrectly considered events subsequent to that date. The President also noted that, while a partnership could exist for the purpose of a single transaction (see, eg, National Insurance Company of New Zealand Ltd v Bray [1934] NZLR 67 (Smith J)), this was not the case here. For example, no commercial arrangement had been entered into with any particular hotel "such that the business was either up and running or about to be".Kellam AJA agreed with the President's analysis and found that the evidence was clear in supporting the view that Goudberg and Williams were acting in common with a view to profit. Unlike the Tribunal however, his Honour's view was that the exploratory and preparatory work undertaken by Williams and Goudberg was "insufficient to establish that Williams and Goudberg were carrying on a business". Therefore, as a matter of law, and "upon the most favourable view of the evidence" before the Tribunal, a partnership could not exist.As Kellam AJA observed, this case supports the contention of the authors Higgins and Fletcher, in 'The Law of Partnership in Australia and New Zealand' (1996), that the statutory definition of what constitutes a partnership is framed in "deceptively simple language that has given rise to many problems with interpretation". The court's judgment in this case may be helpful in providing greater clarity around what carrying on a business means in the context of the statutory definition of a partnership.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.12 Schemes of arrangement: Potential liabilities and insurance coverage are capable of transfer** (By Myles Tehan, Mallesons Stephen Jaques)Stork ICM Australia Pty Ltd v Stork Food Systems Australasia Pty Ltd [2006] FCA 1849, Federal Court of Australia, Lindgren J, 14 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/december/2006fca1849.htm%20](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/december/2006fca1849.htm%20%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20%22%20%5Ct%20%22_new) **(a) Summary**Lindgren J held that it is possible for a court, in making an order approving a scheme of arrangement between a company and its members, the effect of which is to transfer the company's assets and liabilities to another company ("transferee"), to include the transfer of the company's potential liability for personal injury claims. The benefit of insurance indemnity for such liabilities can also be vested in the transferee, even without the consent of the insurer (although in the present case this issue was ultimately resolved by an amendment to the scheme of arrangement).**(b) Facts**Stork ICM Australia Pty Ltd ("Stork ICM") and Stork Food Systems Australasia Pty Ltd ("Stork FSA") were Australian subsidiaries of a Dutch parent company, Stork NV.Stork ICM sought to convene a shareholder meeting to approve a scheme of arrangement ("Scheme") which would transfer its property and liabilities to Stork FSA, pursuant to section 411(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("the Act"). Additionally, it sought a court order approving the Scheme, pursuant to section 411(4)(b). The reason for the transfer was to enable the deregistration of Stork ICM, in order for Stork NV to obtain the benefit of tax losses under Netherlands tax law.Stork ICM had been named as a defendant in various legal proceedings concerning personal injury claims for asbestos-related diseases. Additionally, Stork ICM had potential liability for a number of claims not yet made: it held an indemnity from its parent company for $12.3 million in respect of those potential claims.Stork ICM held insurance in relation to asbestos-related liabilities with four insurers, covering different time periods. Three of those insurers consented that, in the event of the Scheme coming into effect, Stork FSA would be entitled to all rights and benefits under the policies to which Stork ICM would have been entitled. The fourth, Zurich, had no record of ever being an insurer of Stork ICM.The critical issues to be determined were:* whether the court could approve the Scheme and, in doing so, effectively make Stork FSA, rather than Stork ICM, liable to potential claimants; and
* whether the court could approve the Scheme and, in doing so, effectively vest a contractual right in Stork FSA to enforce an insurance indemnity.

**(c) Decision****(i) Preliminary issues**Lindgren J dealt first with preliminary issues concerning the Scheme: relying on established authority, he held that for the purposes of section 411 of the Act, the Scheme was one between Stork ICM and its members, and that it was a reconstruction for the purposes of section 413 of the Act.**(ii) First critical issue: could the court make Stork FSA liable to Stork ICM's potential claimants?**Section 413(1)(a) of the Act allows the court to provide for the transfer of the whole or part of a company's liabilities or property to another company. Liabilities are defined in section 413(4) as including 'duties of any description': however, Lindgren J held that Stork ICM's liability to potential claimants did not classify as a duty. Rather, the liability to potential claimants fell within the ordinary meaning of the term 'liability' and so could be the subject of an order under section 413(1).Lindgren J held that Stork ICM's 'inchoate, potential or contingent liabilities' were 'capable of being made the subject of an order under section 413(1), and therefore of becoming inchoate, potential or contingent liabilities of Stork FSA instead'.**(iii) Second critical issue: could the court vest in Stork FSA a contractual right to enforce an insurance indemnity where the insurer does not consent to the vesting?**Clause 1.1 of the Scheme defined 'property' as including 'a thing in action'. According to Lindgren J, the contractual right of indemnity fell within this definition. In any case, the right of indemnity was 'property' according to the ordinary meaning of that term, thus satisfying the definition in section 413(4) of the Act.Before the contractual right of indemnity could be transferred, however, the court considered two issues:* the existence of a clause in the Workers' Compensation Acts of both NSW and Victoria which provides that no assignment of interest can bind an insurer without the written consent of the insurer; and
* whether a court order would change the content of the insurer's obligation to Stork FSA as the insured party.

Ultimately Lindgren J amended the Scheme so as to exclude Zurich, the insurer which had not provided a written consent, thus nullifying the consent question as a live issue. Nonetheless, he expressed the opinion that the provision in the Workers' Compensation legislation applies only to assignments carried out by the insured party - an order made by a court under section 413 is no such assignment, and so is not captured by the 'no assignment of interest without consent' clause.Lindgren J relied on a line of authority, commencing with In re Riggs; ex parte Lovell [1901] 2 KB 16, concerning contractual promises not to assign property without consent. That line of authority provides that such promises are enforceable when the assignment is effected by a court order following an adjudication. This is the case even if the court order was applied for by the person who promised not to assign.On the second issue, Lindgren J held that 'the substitution of a different entity as the insured is itself immaterial'. As the insurer's liability had not changed as a result of the transfer (as the circumstances giving rise to liability had occurred prior to the transfer), an order under section 413 would have no effect on the insurer's obligation. Additionally, the 'no assignment without consent' clause shows that the insurers had 'contemplated that a different entity might become the insured as the result of a transfer'.**(iv) Final result**It was agreed amongst the parties that Zurich, the non-consenting insurer, could be excluded from the scheme. Stork ICM and Stork FSA would have the ability to apply to the court for Zurich's inclusion at a later date, if required.If a claimant wished to bring a claim against Stork ICM, and contended that Zurich was Stork ICM's insurer at the relevant time, the claimant would be able to apply under section 601AH(2) of the Act for Stork ICM's registration to be reinstated. It would then be the responsibility of Stork ICM to apply for Zurich to be included in the Scheme.The amended scheme was approved by the court.[top](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20115%20March%202007.htm#top) p**5.13 The power to forfeit shares** (By Tony Greenwood and Arthur Apos, Blake Dawson Waldron)Bundaberg Sugar Ltd v Isis Central Sugar Mill Co Ltd [2006] QSC 358, Supreme Court of Queensland, Chesterman J, 5 December 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/december/2006qsc358.htm%20](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/december/2006qsc358.htm%20%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**A company constitution may validly provide for share forfeitures for reasons other than non-payment of calls, subject to not contravening the principles of Gambotto's case relating to expropriation of shares for a proper purpose and not operating oppressively. Forfeiture of fully paid shares does not reduce the capital of a company. A company's constitution should be construed to give the document business efficacy.**(b) Facts** Isis Central Sugar Mill Co Ltd (Isis) is a co-operative company and operates a sugar mill that buys sugar cane from grower members. Branchville Pty Ltd is a member of Isis, and until 2003 was a sugar supplier to Isis. Bundaberg Sugar Ltd (Bundaberg) is an unlisted public company which operates sugar mills. In 2003, Bundaberg agreed to purchase Branchville's shares, but registration was refused as Isis contended that Branchville was not a shareholder because the shares had been forfeited on the ground that Branchville was no longer a supplier, in breach of Isis' constitution. The forfeiture was annulled by agreement and Isis was asked to undertake that it would not again forfeit Branchville's shares. Isis refused to give the undertaking. These proceedings were for declarations that the constitution did not allow forfeiture other than for non-payment of calls, that forfeiture would be an unlawful reduction of capital, and that forfeiture would be an unlawful expropriation.**(c) Decision** Held: Isis' constitution is invalid when the power of forfeiture is invoked for disposing of shares on ceasing to be a supplier, to the extent that the constitution permits Isis to dispose of the forfeited shares otherwise than by sale.**(i) Business efficacy, not literal, construction of corporate constitution**Isis' constitution allows Directors to issue a notice about unpaid calls and also a notice requiring disposal of shares on ceasing to be a supplier. The constitution then provides for forfeiture on non-compliance with a notice at any time afterwards "before payment of all calls". Generally a company constitution should be construed so as to give the document business efficacy (Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2006] FCAFC 144; Rayfield v Hands [1960] 1 Ch 1; Holmes v Keys [1959] 1 Ch 199. The rules of construction which apply to contracts generally should also apply to a constitution as it creates a contact between members and the company. Notwithstanding the literal meaning of the forfeiture power, the forfeiture power also applied to non-compliance with a disposal notice. **(ii) Validity of constitutional power to forfeit shares otherwise than for non-payment of calls**It is stated in a number of company law texts that a forfeiture power for reasons not involving non-payment of calls is void either because the company owns shares in itself or because it is an unlawful reduction of capital. The first reason is misconceived and the second is now without substance. There is no reason in principle why a forfeiture which does not in fact operate to reduce the capital of a company should be invalid. Chesterman J, reasoned that "under the present [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) a forfeiture of fully paid shares cannot reduce a company's nominal or issued capital. Secondly there is no clear authority for the proposition that the forfeiture of shares except for non-payment of calls or instalments is invalid, whether or not it effects a reduction of capital".In this case there is no reason in principle why the articles which permit forfeiture of shares should be held invalid as they did not operate to reduce Isis' capital.**(iii) Forfeiture of shares and the Gambotto principles**The court stated that the Gambotto principles about expropriation may apply squarely in this case since the articles do not affect all shareholders equally. The constitution allows the directors to act differently in respect of different classes of shareholders, namely suppliers and non-suppliers. This allowed the majority shareholders (those who supply sugar) to acquire the shares of the minority for the benefit of that majority.The constitutional power satisfies the first limb of the Gambotto principles, being for a proper purpose, since the power of forfeiture operates in order for Isis to receive preferential taxation treatment as a result of continued status as a co-operative. However expropriation of shares without obligation to pay compensation for the loss unless the forfeited shares are resold results in the member going completely without recompense. There would be oppression to the shareholder if the forfeited shares are disposed of other than by sale and the constitution is to this extent invalid. |

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