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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) NEW STUDY ON EXECUTIVE REMUNERATION

On 22 May 2003 a new study on executive remuneration was published. The Labor Council of NSW commissioned three academics to look behind the current debate on executive pay levels to gauge whether Australian executives are delivering value. In particular the authors were asked to consider the use of share options, ostensibly as a way of linking executive rewards more closely to growth in 'shareholder value'.

Key findings of the study are as follows:

(1) Executive remuneration levels in Australia grew over the decade 1992-2002 from 22 times average weekly earnings to 74 times average weekly earnings.

(2) At the same time, executive option packages, with 'long-term incentives' (share bonuses, share purchase plans and share option entitlements) for Australian CEOs increased from 6.3 per cent of total remuneration in 1987 to 35.2 per cent of total remuneration in 1998.

(3) The often-stated link between high executive pay and company performance does not exist. Indeed, the evidence is that as an executive's pay increases, the performance of the company deteriorates. Against three criteria: return on equity, share price change and change in earnings per share, statistical analysis shows that high excessive pay levels actually coincide with a lower bottom line.

(4) Applying this analysis, the authors identify a performance-optimal range for executive remuneration of between 17 and 24 times average wage and salary earnings, beyond which the performance of a company begins to deteriorate.

(5) The finance sector emerges as a case study in corporate excess according to the authors, with CEOs of the four major banks averaging 188 times the pay of their customer service staff. Substantial elements of executive packages are not disclosed to shareholders according to the authors, and not withstanding the growth in bank profits in recent years, the accompanying increase bank CEO cash and equity-based remuneration has not been matched by sustained improvements in shareholder-focussed measures of financial performance.

The study is available at [http://www.council.labor.net.au/](http://www.council.labor.net.au/%22%20%5Ct%20%22_new)

(B) AUDIT OF COMPANY ACCOUNTS: EUROPEAN COMMISSION SETS OUT TEN PRIORITIES TO IMPROVE QUALITY AND PROTECT INVESTORS

On 21 May 2003 the European Commission proposed ten priorities for improving and harmonising the quality of statutory audit throughout the EU. The objectives are to ensure that investors and other interested parties can rely fully on the accuracy of audited accounts, to prevent conflicts of interest for auditors and to enhance the EU's protection against Enron-type scandals. The plan announces forthcoming proposals for new EU laws to radically overhaul existing legislation and to extend it. Once adopted, these proposals will, for the first time, provide a comprehensive set of EU rules on how audits should be conducted and on the audit infrastructure needed to safeguard audit quality. The plan is divided into short and medium-term priorities. Among the short-term ones are strengthening public oversight of auditors at Member State and EU level, requiring ISAs (International Standards on Auditing) for all EU statutory audits from 2005 and the creation of an EU Regulatory Committee on Audit, to complement the revised legislation and allow the speedy adoption of more detailed binding measures. The priorities on audit complement the Commission's wider action plan on company law and corporate governance, published simultaneously (see IP/03/716 and Item 1(C) of this Bulletin).

Internal Market Commissioner Frits Bolkestein said: "I want European solutions tailored to our needs, respectful of our different cultures with the full support of the European profession. I do not accept the imposition of US standards on our firms and that is why the European Union strongly opposes registration of EU audit firms with the United States' Public Company Accounting Oversight Board. The EU will regulate its own businesses."

Once implemented, the steps set out in the Communication will significantly change the EU regulatory landscape. In particular, a forthcoming proposal for a new Directive on auditing would replace and extend the current EU legislation, the 8th Company Law Directive, covering the education, approval and registration of persons who can be approved by Member State authorities to perform audits.

The EU regulatory infrastructure would also be altered. The Commission is proposing that it would be able to adopt, on the basis of the new Directive and in accordance with comitology procedures, binding implementing measures. A new Audit Regulatory Committee will be established and the present EU Committee on Auditing, will be renamed the Audit Advisory Committee.

The main driver for this Communication is the development of the single European capital market with 7000 listed companies and continued efforts to harmonise and improve the approximately two million statutory audits conducted annually in the EU.

(1) Summary of the short-term priorities:

(a) Modernising the 8th Company Law Directive

The Commission will propose to modernise the 8th Company Law Directive (84/253/EEC) to ensure a comprehensive, principles-based Directive applicable to all statutory audits conducted in the EU. The modernised Directive would include principles on: public oversight, external quality assurance, auditor independence, code of ethics, auditing standards, disciplinary sanctions and the appointment and dismissal of statutory auditors.

(b) Reinforcing the EU's regulatory infrastructure

The proposals for a modernised 8th Directive will also include the creation of an Audit Regulatory Committee. The Commission will adopt, in accordance with comitology procedures, the implementing measures necessary to underpin the principles set out in the modernised 8th Directive. The present EU Committee on Auditing, renamed the Audit Advisory Committee, composed of representatives of Member States and of the profession, will continue its work as an advisory committee.

(c) Strengthening public oversight of the audit profession

The Commission, together with the Audit Advisory Committee, will analyse existing systems of public oversight and develop minimum requirements (principles) for public oversight. The Commission will define a co-ordination mechanism at EU level to link up national systems of public oversight into an efficient EU network.

(d) Requiring International Standards on Auditing (ISAs) for all EU statutory audits

The Commission and the Audit Advisory Committee will work to prepare the implementation of ISAs from 2005. These will include: an analysis of EU and Member State audit requirements not covered by ISAs; the development of an endorsement procedure; a common audit report and high-quality translations. The Commission will work towards further improvements to the IFAC/IAASB audit standard setting process, notably by ensuring that public interest is taken fully into account. Assuming satisfactory progress, the Commission will propose a binding legal instrument requiring the use of ISAs from 2005.

(2) Summary of the medium-term priorities

(a) Improving disciplinary sanctions

The Commission and the Audit Advisory Committee will assess national systems of disciplinary sanctions to determine common approaches and will introduce an obligation on Member States. to co-operate in cross border cases.

(b) Making audit firms and their networks more transparent

The Commission and the Audit Advisory Committee will develop disclosure requirements for audit firms, covering among other things their relationships with international networks.

(c) Corporate governance: strengthening audit committees and internal control

The Commission and the Audit Advisory Committee will work on the appointment, dismissal and remuneration of statutory auditors, and on communication between the statutory auditor and the company being audited. The Commission and the Committee will also examine statutory auditors' involvement in assessing and reporting on internal control systems.

(d) Reinforcing auditor independence and code of ethics

The Commission will carry out a study on the impact of a more restrictive approach on additional services provided to the audit client. The Commission will continue the EU-US regulatory dialogue on auditor independence, with the aim of obtaining US recognition of the equivalence of the EU approach. The Commission and the Audit Advisory Committee will analyse existing national codes of ethics and the IFAC code of ethics and consider further appropriate action.

(e) Deepening the internal market for audit services

The Commission will work on facilitating the establishment of audit firms by proposing to remove restrictions in the present 8th Directive on ownership and management. The Commission will exempt the provision of audit services from its proposal on the recognition of professional qualifications (see IP/02/393) by amending the 8th Directive to include the principle for mutual recognition subject to an aptitude test. The Commission will carry out a study on the EU audit market structure and on access to the EU audit market.

(f) Examining auditor liability

The Commission will also study the economic impact of auditor liability regimes.

The full text of the Communication is available at:
[http://europa.eu.int/comm/internal\_market/en/company/audit/index.htm](http://europa.eu.int/comm/internal_market/en/company/audit/index.htm%22%20%5Ct%20%22_new)

(C) COMPANY LAW AND CORPORATE GOVERNANCE: EUROPEAN COMMISSION PRESENTS ACTION PLAN

Strengthening shareholders rights, reinforcing protection for employees and creditors and increasing the efficiency and competitiveness of business are the main aims of an Action Plan on "Modernising Company Law and Enhancing Corporate Governance in the EU" published by the European Commission on 21 May 2003. It is based on a comprehensive and prioritised set of proposals for action, covering several years. The Action Plan devotes special attention to a series of corporate governance initiatives aiming at boosting confidence on capital markets. The Plan is open to public consultation for three months. The Commission will publish a synthesis of the comments received which will be given adequate consideration. The Commission intends to launch some initiatives this year or early next year.

The Action Plan is the Commission's response to the Final Report, presented in November 2002, of the High Level Group of Company Law Experts appointed by Frits Bolkestein and chaired by Jaap Winter (see IP/02/1600).

(1) Aims and objectives

The main objectives of the Action Plan are:

- to strengthen shareholders' rights and protection for employees, creditors and the other parties with which companies deal, while adapting company law and corporate governance rules appropriately for different categories of company; and
- to foster the efficiency and competitiveness of business, with special attention to some specific cross-border issues.

(2) Why the Plan is needed

The European regulatory framework for company law and corporate governance needs to be modernised for the following reasons: the growing trend for European companies to operate cross-border in the Internal Market, the continuing integration of European capital markets, the rapid development of new information and communication technologies, the forthcoming enlargement of the EU to 10 new Member States, and the damaging impact of recent financial scandals.

(3) Outline of the Plan

The Action Plan is prioritised over the short-term (2003-2005), medium-term (2006- 2008) and long-term (2009 onwards), and indicates which type of regulatory instrument should be used for each proposal, with approximate timescales.

The Action Plan is based on a comprehensive set of legislative and non-legislative proposals, under the following headings:

(a) Corporate governance

The Commission does not believe that a European Corporate Governance Code would offer significant added value but would simply add an additional layer between international principles and national codes. However, a self-regulatory market approach, based solely on non-binding recommendations, is not sufficient to guarantee sound corporate governance. In view of the growing integration of European capital markets, the European Union should adopt a common approach covering a few essential rules and should ensure adequate coordination of national corporate governance codes.

The Commission sees the following initiatives as the most urgent ones:

- introduction of an Annual Corporate Governance Statement. Listed companies should be required to include in their annual documents a coherent and descriptive statement covering the key elements of their corporate governance structures and practices;
- development of a legislative framework aiming at helping shareholders to exercise various rights (for example asking questions, tabling resolutions, voting in absentia, participating in general meetings via electronic means). These facilities should be offered to shareholders across the EU, and specific problems relating to cross-border voting should be solved urgently;
- adoption of a Recommendation aiming at promoting the role of (independent) non-executive or supervisory directors. Minimum standards on the creation, composition and role of the nomination, remuneration and audit committees should be defined at EU level and enforced by Member States, at least on a "comply or explain" basis;
- adoption of a Recommendation on Directors' Remuneration. Member States should be rapidly invited to put in place an appropriate regulatory regime giving shareholders more transparency and influence, which includes detailed disclosure of individual remuneration; and
- creation of a European Corporate Governance Forum to help encourage coordination and convergence of national codes and of the way they are enforced and monitored.

Other corporate governance initiatives proposed in the Action Plan cover: achieving better information on the role played by institutional investors in corporate governance; giving further effect to the principle of proportionality between capital and control; offering to listed companies the choice between the one-tier and two-tier board structures; and enhancing directors' responsibilities for financial and key non- financial statements. The Action Plan notes that there is a strong medium to long-term case for aiming to establish a real shareholder democracy and that the Commission intends to undertake a study on the consequences of such an approach.

(b) Capital maintenance and alteration

The Commission considers that a simplification of the 1976 Second Company Law Directive, on the formation of public limited liability companies and the maintenance and alteration of their capital, would promote business efficiency and competitiveness without reducing protection for shareholders and creditors.

A proposal to amend the Second Directive is therefore a priority for the short-term. Such a proposal may include a partial relaxation of certain rules (applicable inter alia to contributions in kind, acquisition of own shares, or limitation/withdrawal of pre- emption rights allowing a company's shareholders to have first refusal on new shares issued).

It could also include the introduction of "squeeze-out rights", meaning that the holder of a large majority of a company's securities could compel minority shareholders to sell their stock at a fair price, and of "sell-out rights" allowing minority shareholders to compel holders of a large majority of the capital to purchase their securities at a fair price. This would go further than the proposed Directive on Takeover Bids, which offers those rights only in listed companies and only when there has been a takeover bid.

Later on, an alternative regime not based on the concept of legal capital could be offered as an option to Member States. The Commission will, in the medium term, launch a study into the feasibility of an alternative based on a solvency test.

(c) Groups and pyramids

Groups of companies, which are common in most Member States, are a legitimate way of doing business, but they may present risks for shareholders and creditors. More transparency can help minimise those risks. Initiatives aiming at improving the financial and non-financial information disclosed by groups are priorities for the short-term. Such initiatives would aim to ensure better information on the group's structure and intra-group relations, as well as on the financial situation of the various parts of the group.

The Action Plan advocates a framework rule to allow those managing a company belonging to a group to implement a coordinated group policy. It underlines the need for action against abusive pyramids, defined by the High Level Group as chains of holding companies whose sole or main assets are their shareholding in another listed company.

(d) Corporate restructuring and mobility

European companies need to be able more easily to do business across national borders within the EU. The Commission intends to present in the short term a new proposal for a Tenth Company Law Directive facilitating mergers between companies from different Member States, as well as a proposal for a Fourteenth Company Law Directive on the transfer of "seat" (a company's centre of activities and/or registered office) from one Member State to another. The Action Plan also covers: simplifying some of the requirements under the Third Company Law Directive (national mergers) and the Sixth Directive (national divisions), and introducing squeeze-out and sell-out rights for all public limited liability companies (see above).

(4) Other matters

The Action Plan includes a number of other proposals, as follows:

- launching a feasibility study on the possible introduction of a European Private Company Statute, which would primarily serve the needs of SMEs active in more than one Member State;
- supporting in the short-term the ongoing process aimed at the introduction of several European legal forms (European Cooperative, European Association, European Mutual Society), and considering in the medium term the development of a European Foundation; and
- increasing the disclosure requirements applicable to a series of limited liability legal entities existing at national level.

Simultaneously with the Action Plan, the Commission has published ten priorities for improving and harmonising the quality of statutory audit throughout the EU, to ensure that investors and other interested parties can rely fully on the accuracy of audited accounts and to prevent conflicts of interest (see IP/03/715).

(5) Next steps

The Action Plan will be considered by the European Parliament and the Council.

The Competitiveness Council, which originally invited the Commission to produce the Action Plan - an invitation endorsed by the Council of Economic and Finance Ministers, and by Heads of State and Government at the European Council on 20-21 March 2003 - has declared its intention to deal with it as a priority.

Meanwhile, comments from all interested parties are invited by 31 August 2003 to MARKT-COMPLAW@cec.eu.int

The Commission will publish a synthesis of the comments received, and they will be taken into account in implementing the Action Plan. The full text of the Plan is available at:

[http://europa.eu.int/comm/internal\_market/en/company/company/news/index.htm](http://europa.eu.int/comm/internal_market/en/company/company/news/index.htm%22%20%5Ct%20%22_new)

(D) INQUIRY INTO AUSTRALIA'S CORPORATE INSOLVENCY LAWS

The Parliamentary Joint Committee on Corporations and Financial Services is currently conducting an inquiry into the operation of Australia's corporate insolvency laws.

On 16 May 2003 the Committee released an Issues Paper to assist the Committee's Inquiry. The Issues Paper provides background material and information on aspects of insolvency law that have been highlighted in submissions to date and/or in media and professional commentary on corporate insolvency law and practice. It seeks to assist interested parties in commenting on matters of concern about the operation of Australia's insolvency laws and focus discussion on issues that appear to offer good prospects for improving the operation of Australia's insolvency laws. At the same time it does not seek to limit the issues that commentators may wish to raise.

A copy of the Issues Paper and advice concerning the lodgment of submissions is available from the website at [http://www.aph.gov.au/senate/committee](http://www.aph.gov.au/senate/committee%22%20%5Ct%20%22_new) or the Secretariat (tel: 02 6277 3581).

(E) UK FINANCIAL REPORTING COUNCIL - CONSULTATION ON THE HIGGS REPORT

At its meeting on 14 May 2003, the UK Financial Reporting Council (FRC) decided to set up a working group of FRC members to produce a revised draft of the Combined Code in the light of points made in response to the FRC's recent consultation.

The group will be chaired by Sir Bryan Nicholson, Chairman of the FRC, and will comprise:

Sir John Egan, President CBI and Deputy Chairman FRC
Peter Wyman, President ICAEW and Deputy Chairman FRC
Charles Allen-Jones, Formerly Senior Partner, Linklaters and Alliance
David Clementi, Chairman, Prudential plc
Derek Higgs, Chairman, Partnerships UK plc and Senior Adviser in the UK to UBS Warburg
Paul Myners, Chairman, Guardian Media Group plc and former Chairman, Gartmore Investment Management plc
Colin Perry, Chairman, LTE Scientific Ltd and former chairman of the CBI SME Council
Sir Robert Smith, Chairman, The Weir Group PLC

Sir Bryan Nicholson said:

"The consultation exercise reinforced the wide welcome for the general thrust of the Higgs report and its recommendations to strengthen the role of non-executive directors and the transparency and accountability of boards to shareholders. Responses included a great deal of thoughtful comment and many good suggestions, but also identified some strong criticism about certain aspects of the proposed Code changes. The FRC will now work to produce a draft taking account of the consultation, with the intention of reaching a final draft of the Code that will build on Higgs' approach and command general support. I believe the new Code will make a substantial contribution to strengthening corporate governance in the UK."

In the discussion, the FRC strongly supported the incorporation of the substance of the Higgs and Smith reports into the Combined Code.

It was recognised that the 'comply or explain' principle was key to the successful working of the Code and that the dialogue between companies and institutional shareholders was not as well developed as it should be. Both needed to put more effort into making the system work; there would be occasions when a company would choose to use the 'explain' option, and institutional investors should consider such explanations carefully, giving reasons if they did not accept the explanation.

On the basis of the consultation responses, the FRC concluded that:

- the chairman should be allowed to chair the nomination committee (though the chairman should stand down when the committee was discussing recruitment of a new chairman);
- the chairman should chair regular meetings of the non-executive directors; but the senior independent director should chair at least annual meetings of the non-executive directors without the chairman present to appraise the chairman's performance;
- the chairman should ensure that shareholders' views are communicated to the board as a whole; the senior independent director should attend as an observer sufficient meetings of management with a range of major shareholders to help develop a balanced understanding of their concerns;
- re-election of non-executive directors beyond six years should not require special explanation but should be subject to rigorous review, with no automatic re-appointment;
- the provision that at least half the board, excluding the chairman, should comprise independent non-executive directors could be difficult for many smaller listed companies (below FTSE 350); for them, the Code should provide for boards of such companies to include at least two independent non-executive directors but should encourage them to move towards meeting the full provision;
- some of the 'provisions' in the draft (with which companies must 'comply or explain') were more akin to 'principles' (where companies must report how they are applying those principles); a new draft should take this into account.

The working group will aim to produce a revised text by July, with a view to bringing the new Code into effect as soon as possible consistent with a high quality output.

(F) CORPORATE LAW BUDGET INITIATIVES

On 13 May 2003 the Australian Treasurer, the Hon Peter Costello MP, handed down the 2003 Federal Budget. Following are four corporate law initiatives contained in the Budget:

(1) Corporate insolvency initiative

The corporate insolvency initiative is a program that will involve the corporate regulator, the Australian Securities and Investments Commission (ASIC), increasing its level of surveillance and enforcement, and winding-up actions, to prevent corporate abuse.

A particular focus will be phoenix company activity. The initiative will involve targeted surveillance of misconduct by officers of small/medium enterprises (SMEs) and high-risk industry sectors identified by ASIC, the Australian Taxation Office, insolvency practitioners and the Cole Royal Commission.

Additional resources of $12.3 million over four years will be provided.

(2) HIH Royal Commission - ASIC Taskforce

A taskforce has been established within the Australian Securities and Investment Commission (ASIC) to investigate the HIH Royal Commission's recommendations and prepare briefs for prosecution.

ASIC has been provided additional funding of $17.5 million in 2003-04 and $10.7 million in 2004-05 to undertake the investigations and civil prosecutions. Funding for criminal prosecutions has also been provided for in the budget. Those prosecutions may be undertaken by the Director of Public Prosecutions or by a Special Prosecutor. Funding for investigations and prosecutions will be reviewed before the end of 2003 to take into account actual cases and costs.

(3) Financial Reporting Council - Expanded role

Under CLERP 9, it is proposed that the FRC's role be expanded beyond its present oversight of accounting standard setting to include oversight of auditing standard setting and auditor independence issues. The Auditing and Assurance Standards Board (AuASB) will be moved under FRC oversight with auditing standards being given the force of law.

The Government will provide $4 million over four years to support this new role, in addition to existing Government and industry funding for the FRC's oversight of accounting standard setting. In addition, the Treasury will absorb significant salary costs for FRC secretariat support.

The FRC will work with the professional accounting bodies in their oversight of audit quality assurance and auditor discipline, but will also have the capacity for independent monitoring, including through use of consultants. The new funding will also cover one-third of the annual running costs of the AuASB, with the balance to be contributed by the accounting profession and business community. In addition, the FRC will work with the Australian Securities and Investments Commission which will enforce compliance with the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and auditing standards. A separate Budget measure provides additional funding for this purpose. Given the FRC's public oversight role, it is proposed that its members receive sitting fees.

(4) CLERP 9 - Corporate disclosure initiatives

CLERP 9 is the ninth phase of the Government's Corporate Law Economic Reform Program (CLERP). It is a package of measures to improve disclosure by Australian corporations. The legislative elements of CLERP 9 are expected to be introduced into Parliament later in 2003 following a period of public exposure.

To facilitate implementation of the CLERP 9 reforms, funding of $12.3 million over four years is being provided to the Australian Securities and Investments Commission, to conduct an enhanced program of surveillance, investigation and enforcement action in relation to alleged contraventions of the revised corporate disclosure requirements.

(G) STUDY FINDS FORCED TURNOVER OF CEOs HAS REACHED A RECORD HIGH

Companies are setting higher standards of performance for chief executive officers than ever before, and CEOs are falling short in record numbers, according to the second annual survey of CEO turnover at the world's 2,500 largest publicly traded corporations released on 12 May 2003 by management and technology consulting firm Booz Allen Hamilton. And despite the high-profile management flameouts in the US, CEO turnover is accelerating faster in Asia and Europe than in North America, the study found.

The study comprehensively examines the linkages between CEO tenure and corporate performance, comparing CEO turnover in major regions and in specific industry sectors. Among the findings:

- Involuntary successions in 2002 increased by more than 70% over 2001, even though the total number of CEO changes only increased by 10%. Of all CEO departures globally in 2002, 39% were forced, performance-based changes, compared to 25% in 2001.
- Regionally, the biggest change occurred in the Asia/Pacific region, which accounted for nearly one of every five (19%) global succession events, compared with 8% in 2001 and 6% in 2000. Forced turnover in Asia accounted for 45% of all transitions there, up from only 6% in 2001.
- North America accounted for 48% of all successions worldwide in 2002, significantly lower than the 64% it accounted for in 2001.
- In Europe, the rate of CEO changes has increased in each of the five years the study examined since 1995. In 2002, 28% of all CEO successions occurred in Europe.
- The mean age of chief executives leaving office in 2002 was 58.1, up slightly from 2000 (56.8) and 2001 (57.1).

These results underscore the growing influence of shareholders and their representatives, corporate directors, the Booz Allen study concludes. Boards of directors are now exercising their power on behalf of shareholders with a vigor unseen in modern times.

(1) Key study findings

- Boards are judging CEO underperformance more strictly. Chief executives who were dismissed in 2002 generated median regionally-adjusted shareholder returns 6.2 percentage points lower than CEOs who retired voluntarily. It took an 11.9% shortfall to prompt a firing in 2001; in 2000, fired CEOs underperformed retiring chiefs by 13.5%.
- CEO turnover in Europe and the Asia/Pacific region continues to rise. CEO succession is up 192% in Europe and 140% in the Asia/Pacific region since 1995, the study's benchmark year; in North America, succession events increased only 2% during the same period. In the Asia/Pacific region, which had been relatively immune to forced succession, involuntary departures accounted for nearly half of all turnovers last year.
- Merger-driven transitions declined considerably in 2002. Merger-related successions comprised 15% of all CEO turnover globally, down from 27% the previous year and 29% in 2000, as M&A activity declined generally.
- CEOs appointed from outside the company are a high-stakes gamble. Outsiders excel early, outperforming insiders by nearly 7 percentage points in the first half of their tenures. In the "second semester," when most CEOs endure a slump, outsiders underperform insiders by 5.5 percentage points.
- By failing to live up to their early promise, outsider CEOs are at greater risk of being fired than insiders. In 2002, more than half of all turnover of CEOs originally appointed from outside the company were forced changes; for inside appointments, only 44% of all changes were involuntary.

(2) Industry-specific findings

- Highest-Risk Industries: In 2002, the industries that saw the highest rates of CEO turnover were utilities (15.8%), telecommunications services (15.6%), materials (13.5%), and energy (12.6%). For the five years analysed between 1995 and 2002, telecommunications had the highest turnover rate (12.1%), followed by energy (11.3%), information technology (9.7%), and healthcare (9.4%).
- Forced Turnover: Telecommunications services had the highest rate of forced turnover in 2002 (9.4%), followed by utilities (5.7%), materials (5.2%), and information technology (4.7%). For the period between 1995 and 2002, information technology had the highest rate of CEO dismissals (4.3%), followed by telecommunications services (4.2%), consumer discretionary companies (3.1%), and healthcare (2.8%).
- The Safest Industries: Financial services was the safest industry for CEOs in this study - during the period between 1995 and 2002 the financial services industry had the least turnover overall (6.6%) and the fewest forced departures (1.5%). Other industries with relatively low turnover rates during this period were industrials (8.5%), utilities, and consumer discretionary (both 8.9%). In additional to financial services, other industries with low forced turnover in this period were energy (1.7%), materials (1.9%), and industrials (2.0%).

(3) Methodology

Booz Allen studied the 253 CEOs of the world's 2,500 publicly-traded corporations who left office in 2002, and evaluated both the performance of their companies and the events surrounding their departure. To provide historical context, Booz Allen evaluated and the compared this data to information on CEO departures for 1995, 1998, 2000 and 2001.

For purposes of the study, Booz Allen classified each CEO departure as either:

- Merger-driven, in which a CEO's job was eliminated when the CEO of the other company involved in the merger or acquisition assumed control of the enterprise.
- Performance-related, where the CEO was asked to leave by the Board of Directors or there was significant speculation in the business press that performance was the driver of the change, or where the CEO cited job stress as the reason for his or her resignation.
- Regular transition, in which the CEO retired on a long-planned schedule, died in office or left to become the CEO of another company.

(H) NEW ZEALAND STOCK EXCHANGE - PROPOSED ENFORCEMENT CHANGES

On 6 May 2003, after extensive consultation with industry participants, NZSE Limited ('NZSE') developed and released publicly its final recommendations for Corporate Governance. NZSE also released a detailed proposal for a modified legal and regulatory framework. Both proposals were sent to the Securities Commission for review in accordance with the agreed process under the Memorandum of Understanding, with the legal and regulatory framework open to public submissions until 6 June 2003.

(1) A new compliance and enforcement construct

NZSE is responsible by law to ensure market participants comply with NZSE's Conduct Rules. Under the current system this responsibility is largely discharged by various third parties. The existing structures do not promote consistency between the treatment of Listed Issuers and NZSE Stock Brokers, which has caused concerns for market participants in relation to understanding the underlying principles.

It is critical that NZSE is able to ensure market integrity, safety and confidence. For this reason NZSE recently made a decision to restructure the existing construct, and bring many of these previously external roles, in-house. NZSE has developed a simplified framework for the compliance, enforcement and discipline of all market participants. The new structure has been designed to heighten the Exchange's accountability so that it is better able to effectively discharge its regulatory responsibilities, and promote efficiency and cost effectiveness.

The new framework will consist of a simplified structure made up of three groups:

- NZSE Compliance and Enforcement - an in-house team of NZSE personnel to deal with both broker and issuer compliance. This team will be responsible for market surveillance, initial investigations and referrals of suspected non-compliance to NZSE Discipline, the Broker Audit Programme, risk assessment, applications for waivers and rulings, compilation of guidance notes and dealings with new listing applications, amongst other things;
- NZSE Discipline - a 20 person board comprised of both external (75%) and internal (25%) experts to investigate suspected cases of non-compliance, or hear charges brought before it, make findings, and impose sanctions or penalties where appropriate; and
- NZSE Special Division - a three person independent panel taken from NZSE Discipline, specifically designed to regulate NZSE Limited once listed. Provision for this panel was made at the time NZSE demutualised and this division, and the new construct, will ensure the integrity of the market is preserved.

The proposed new legal and regulatory framework can be downloaded from [http://www.nzse.co.nz](http://www.nzse.co.nz" \t "_new). All public submissions on the proposed changes should be directed to Elaine Campbell, General Counsel, NZSE Limited, at PO Box 2959, Wellington or elaine.campbell@nzse.co.nz Submissions must be received by 6 June 2003.

(I) CROSS BORDER PROXY VOTING, CASE STUDIES 2002

In May 2003 Institutional Design released its study on Cross Border Proxy Voting, Case Studies 2002. Following is the Executive Summary from the study.

(1) Summary

The study shows how cross border proxy voting works in practice today. The study audits the transmission of proxy materials and voting instructions between five issuers (one each from the US, UK, Germany, Japan and Italy) and six investment managers (three from the UK and three from the US). Commissioned by the International Corporate Governance Network, the first phase of the audit was conducted during the 2002 proxy voting season, the key findings from which are presented below.

(2) Key findings

- In the case studies involving the US and German issuers, all the investment managers were satisfied with the length of time between the receipt of proxy materials and the voting deadline. Only a few participants experienced the late receipt of proxy materials issued by the UK and Italian issuers. However, in the case studies involving the Japanese issuer, there were several complaints about the timing of its AGM and the late receipt of its proxy materials.
- Investment managers were well supplied with the annual reports published by the US, UK and German issuers but only one manager received the annual report from the Italian issuer and none received the annual report released by the Japanese issuer.
- Investment managers still found it hard to obtain the full text of meeting notices. In many cases, the distribution mediums that connect sub-custodians to global custodians did not cater for the transmission of complete (unabridged) resolutions and agendas.
- Although German banks usually allow deposited shares to be traded up to 24 hours before company meetings, investment managers and custodians still perceived of share-blocking as a 'major obstacle' to proxy voting in Germany.
- Despite the growing use of electronic instruction mediums, investment managers still found it difficult to verify whether their global custodians/voting agents had received and acted upon their vote instructions. Although confirmation of receipt was provided in most of the cases involving the US and UK issuers, such receipts were less common in the cases involving the German, Italian and Japanese issuers.
- Even when investment managers could verify the receipt of vote instructions by their global custodians/voting agents, they were rarely able to audit the onward transmission of these instructions to sub-custodians and company registrars.
- Bearing (or ascribing) individual responsibility for the successful receipt or dissemination of proxy voting materials is frustrated by: the length and complexity of the proxy voting chains; the multiplicity of persons involved in the process; and the wide variation in the content and format of the materials.
- The proxy chains linking investment managers to global custodians are being streamlined as a result of the consolidation of the global custody industry and the development of global proxy voting agents. The continuation of these processes - along with the introduction of new technologies and the use of proxy solicitors - will help to reduce some of the obstacles to cross-border proxy voting.
- However, notwithstanding the impact of market forces and new technologies, many of the problems encountered by the case study participants (eg voting on a show of hands in the UK, share-blocking in Italy, the concentration of meetings in Japan, or the hard copy delivery of proxy materials to registrars) may have to be resolved through: the reform of national laws, the development of: standards at the EU level, the evolution of stock exchange requirements and the adoption of voluntary standards by corporations.
- International bodies, such as the ICGN, will continue to monitor these problems and urge their swift resolution; but the requisite reforms will require the concerted efforts of policy makers and market participants.

(3) About the case studies

The case studies consist of 25 pairs of issuer-to-investor 'proxy chains'. The data contained in these studies is based on questionnaires administered to five global issuers, six cross-border investors, four global custodians, two proxy voting agents and one proxy solicitor. Each study tracks (a) the flow of proxy materials from the issuer down through each custodial layer until their receipt by the voting decision maker and (b) the return of voting instructions up through each custodial layer until their receipt by the issuer. Along each point in this process, the case studies audit transaction and message formatting as well as timing and completeness of transmittals. All the studies were conducted between June and October 2002.

The full report is available at [http://www.icgn.org/](http://www.icgn.org/%22%20%5Ct%20%22_new)

(J) ANNUAL SURVEY OF CORPORATE GOVERNANCE IN ASIA

CLSA Emerging Markets, in collaboration with the Asian Corporate Governance Association (ACGA), released its annual survey of corporate governance in Asia. Titled "Fakin' It: Board Games in Asia", the report covers 10 countries and 380 companies across the region. It is the fourth done by CLSA and the first in collaboration with ACGA. Major findings include:

- Companies with strong governance outperformed their markets by an average of 35 percentage points over 5 years (1998-2002), while those with poor governance underperformed by 25 percentage points over the same period.
- The average company score has risen by 4 percentage points--from 58% in last year's report to 62% this year--but the range in company scores remains extremely wide and a cause for concern. Much of the improvement in CG is in form rather than substance.
- Country ratings have gradually improved across the board, with Singapore holding its position at the top of the rankings and Malaysia and Korea the most improved. However, some countries (Hong Kong and Indonesia) have slipped backwards in the "political" category.

An executive summary of the report is available at [http://www.acga-asia.org](http://www.acga-asia.org" \t "_new). Go to the "ACGA Archive" section in the vertical menu bar (left side of the homepage) and look under "Reports".

(K) REFORM OF AUSTRALIA'S BANKRUPTCY SYSTEM

On 5 May 2003 the Australian Attorney-General, the Hon Daryl Williams announced important changes to the [Bankruptcy Act 1966 No. 33 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default) which will make it more difficult for people to abuse Australia's bankruptcy system.

From 5 May 2003, changes under the [Bankruptcy Legislation Amendment Act 2002 No. 131 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=67498" \t "default) will also encourage people in financial difficulty to consider alternatives to bankruptcy. The legislation was passed by the Federal Parliament in December last year and forms an important part of the Government's efforts to balance the interests of debtors and creditors. It also addresses concerns that bankruptcy has become 'too easy' an option for debtors trying to avoid their responsibilities to creditors.

The changes include:

- a new discretion for Official Receivers to reject a debtor's petition where it appears the debtor can afford to pay their debts and the petition is an abuse of the bankruptcy system;
- abolition of early discharge, which has permitted some people to be bankrupt for only six months;
- strengthening of the trustee's powers to object to the discharge from bankruptcy of uncooperative bankrupts after the standard three year bankruptcy period; and
- increasing the debt agreement income threshold by 50 per cent (to about $50,160 after tax) to encourage greater use of debt agreements as an alternative to bankruptcy.

The Inspector-General of Bankruptcy also has new powers to investigate the conduct of debt agreement administrators and to set out circumstances in which a person is ineligible to act as a debt agreement administrator.

The ineligibility criteria for debt agreement administrators are detailed in new Bankruptcy Regulations ([Bankruptcy Amendment Regulations (No. 1) 2003 No. 76 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=69538" \t "default)), which also commenced on 5 May. These regulations also introduce new rules about the way in which debt agreement administrators are able to obtain payment.

Further information about changes to the Bankruptcy Act and the new Bankruptcy Regulations are available at the Insolvency and Trustee Service Australia website at [http://www.itsa.gov.au](http://www.itsa.gov.au" \t "_new)

(L) FINANCIAL LITERACY SURVEY

On 2 May 2003 ANZ released Australia's first national survey of adult financial literacy providing an insight into the ability of Australians to make informed judgments and effective decisions about the use and management of their money.

The ANZ Financial Literacy Research was conducted by Roy Morgan Research and involved development of a framework for measuring financial literacy in Australia, a quantitative survey of 3,500 adults and in-depth qualitative research. It provides for the first time benchmarks for the ongoing measurement of financial literacy across the Australian population and formally identifies aspects of financial skills, products and services that are causing the greatest problems for consumers and those segments of the population that have low levels of financial literacy.

(1) Key findings

- A high level of banking inclusion in Australia, as compared with some other countries\*, with 97% of adults having an everyday banking account.
- All people knew how to use cash and around 90% knew how to use common payment methods such as ATMs, cheques, EFTPOS and credit cards.
- Reasonable levels of mathematical ability with 81-89% of people correctly performing basic addition, subtraction, division and percentage calculations - although for multiplication this dropped to 59%.
- While investment fundamentals are understood with 85% of people knowing that high returns equal high risk, investors were potentially susceptible to misleading claims with 47% indicating they would invest for "well above market rates and no risk".
- Planning for retirement was low with only 37% of people having worked out how much money they need to save for retirement. Many also had unrealistic expectations with 50% expecting to be living "at least as comfortable in retirement as they are today".
- Knowledge of fees and charges varied with 88% of credit card users and 78% of those with bank accounts knowing their fees well. However, only 60% of people with managed investments and 44% of those with superannuation knew their fees well.
- Most people understand their bank account and credit card statements however 21% of people could not understand their superannuation statements and further testing revealed that only 40% could identify key items on a superannuation statement correctly.
- A strong association between socio-economic status and financial literacy. The 20% of people with lowest financial literacy were over-represented by those with lower education levels, those not employed, people with lower incomes, low savings and people at both extremes of the age profile - 18-24 year olds and those aged 70 years and over.

\* this compares to 91-94% individuals in the United Kingdom and 90% of households in the United States.

Further details of the survey are available at [http://www.anz.com](http://www.anz.com" \t "_new)

(M) NEW GOVERNANCE PUBLICATIONS AIM TO HELP BOARDS OF DIRECTORS

Canada's Chartered Accountants are helping directors tackle such controversial areas as executive compensation, risk, and Management's Discussion and Analysis (MD&A) with the release on 30 April 2003 of five new titles in the '20 Questions' series of booklets.

The new books, co-sponsored by the Institute of Corporate Directors, arm directors with the thinking behind key questions they should be asking to meet their responsibilities to shareholders and management.

20 Questions Directors Should Ask about Executive Compensation examines how corporate governance impacts senior compensation; itemizes board responsibilities for overseeing compensation; looks at factors to be used in assessing fair levels of compensation, disclosure and developing a code of best practices.

Other new titles include 20 Questions Directors Should Ask About Risk, which examines the responsibilities directors have for the company's business risks; risks that may impact achieving the organization's strategy; tips for obtaining the right information to develop recommended practices; and monitoring and reporting risk.

20 Questions Directors Should Ask About Management's Discussion and Analysis explains how directors can improve their company's MD&A. The questions are designed to help directors, especially those serving on the audit committee, exercise due diligence in an area of reporting that is under increasing scrutiny from regulators and investors.

Other new titles help directors tackle the issues and ask the right questions about strategy and strategic planning. 20 Questions Directors Should Ask About Strategy and Strategic Planning: What Boards Should Expect from CFOs, include a task checklist for management and boards, and a comprehensive list of the critical elements in a strategic plan.

The five booklets are available on the CICA website at [http://www.cica.ca/](http://www.cica.ca/%22%20%5Ct%20%22_new)

(N) FPA LAUNCHES PROFESSIONAL PARTNER STRATEGY

On 30 April 2003 the Financial Planning Association launched a national strategy aimed at "raising the bar" in relation to professional standards in the Australian financial planning community.

Dubbed the Professional Partner campaign, it will be conducted in association with key stakeholders - including the broad FPA membership. The strategy will comprise five campaigns, which will target key disclosure, professionalism, advice, and FSRA transition and consumer issues. The campaigns will be launched over the next 12 months.

FPA Chief Executive, Ken Breakspear, says the campaign will focus on issues impacting on the standard of professional planning advice in Australia.

They include:

- the disclosure of fees and commissions;
- the professionalism of individual advisers;
- quality advice issues;
- the transition to the [Financial Services Reform Act 2001 No. 122 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default);
- consumer education programs; and
- a greater commitment to the FPA's standards.

In launching the first campaign on disclosure, Mr Breakspear said the FPA was pleased to announce that the former ASIC Deputy Chair - Jillian Segal - had agreed to head an industry taskforce into disclosure issues in the Australian financial planning industry, including remuneration and benefits.

The industry taskforce will make recommendations to the FPA Board of Directors on improvements to the principles and practices of disclosure of adviser remuneration and other benefits as well as factors likely to influence advisers in the provision of advice.

Issues to be addressed include:

- whether payment structures align the interests of the consumer with the adviser;
- how the market should determine payment structures;
- a review of the FPA's Practice Guideline No 3 - Disclosure of fees and commissions;
- the standardisation of disclosure documents; and
- seeking clarity, description and agreement on soft dollar and other incentives paid to dealers.

Mr Breakspear said the objective of the Professional Partner campaign was to give Australian consumers greater confidence in the quality of advice they received from financial planners.

(O) FUND MANAGERS LIFT INDUSTRY PRACTICE ON CORPORATE GOVERNANCE

On 29 April 2003 the Investment and Financial Services Association (IFSA) released the 2003 Standard Investment Management Agreement (SIMA) with a view to raising industry awareness of the importance of active corporate governance.

IFSA is a national not-for-profit organisation that represents the retail and wholesale funds management and life insurance industries. IFSA has over 100 members who are responsible for investing approximately $620 billion on behalf of over nine million Australians.

The SIMA is widely used in the industry as a standardised document detailing the agreement between trustees and fund managers for the investment of superannuation and managed investment funds.

The new SIMA will require fund managers to provide trustees with their proxy voting policies and report on their voting activities. IFSA has also encouraged its members to disclose their proxy voting policy on their websites in order to raise the level of awareness of corporate governance among retail investors.

The 2003 Standard Investment Management Agreement (SIMA) can be ordered from the IFSA website at [http://www.ifsa.com.au](http://www.ifsa.com.au" \t "_new)

(P) ABA CORPORATE RESPONSIBILITY TASK FORCE URGES NEW CORPORATE GOVERNANCE POLICIES AND LAWYER ETHICS RULES

On 29 April 2003 the American Bar Association Task Force on Corporate Responsibility released its final report urging changes in corporate governance policies to create a new culture of corporate responsibility stressing constructive scepticism and active independent oversight of corporate executives.

The proposals will be presented in the form of policy recommendations to the ABA House of Delegates in August when it convenes in San Francisco. Unless or until they are adopted, they represent only the views of the task force.

The task force's recommended corporate governance policies also are designed to enhance the role of corporate lawyers in the system of checks and balances needed to ensure corporate compliance with law. The report also makes recommendations for amendments to the ABA Model Rules of Professional Conduct to sharpen existing duties of the corporate lawyer to the corporate client and to act in the best interests of that client when faced with illegal conduct by executive officers.

Specifically addressing lawyers' responsibilities, the report urges routine opportunities for chief legal officers to communicate in executive sessions with corporate boards and for outside counsel to communicate with chief legal officers, to facilitate an internal flow of information about wrongdoing by the corporation or its executive officers.

Additionally, it urges amending the ABA Model Rules of Professional Conduct to:

- conform the Model Rules to the ethical rules of a majority of the states by permitting lawyers to reveal information to prevent criminal or fraudulent conduct that is reasonably certain to result in substantial injury to the financial interests of others when the lawyer's services are being used to further the fraud or crime;
- refine and clarify when corporate lawyers must disclose up the ladder of authority within a corporate client, and when corporate lawyers may disclose externally conduct by the corporation or its executive officers which a reasonable lawyer would conclude violates law or fiduciary duty and will result in substantial corporate injury; and
- add a requirement that lawyers who either are discharged because they report violations internally or withdraw from serving a corporation because it refuses to adequately address violations assure that the board is informed of the discharge or withdrawal.

While the task force reiterates recommendations from its preliminary report issued in July 2002 to foster independent oversight of corporate management by directors and other participants in the governance of public companies, it also recognizes that "(d)irect operational control of American public corporations is, and must remain, primarily in the hands of their senior executive officers."

Citing recent "spectacular failures of corporate responsibility," the task force reaffirms the core conclusion from its preliminary report:

"The exercise by independent participants of active and informed stewardship of the best interests of the corporation has in too many instances fallen short."

The final report said events of the last two years "compellingly call for significant reforms and 'consciousness raising' in our system of corporate governance." The task force recommendations are intended "to enhance the ability of corporate counsel and directors to discharge their corporate governance responsibilities more effectively."

The full report of the American Bar Association Task Force on Corporate Responsibility and other related materials are available on the ABA website at [http://www.abanet.org/media/corpresp.html](http://www.abanet.org/media/corpresp.html%22%20%5Ct%20%22_new)

(Q) INVESTMENT FIRMS SETTLE ENFORCEMENT ACTIONS INVOLVING CONFLICTS OF INTEREST BETWEEN RESEARCH AND INVESTMENT BANKING

On 28 April 2003 the United States Securities and Exchange Commission Chairman William H Donaldson, New York Attorney General Eliot Spitzer, North American Securities Administrators Association President Christine Bruenn, NASD Chairman and CEO Robert Glauber, New York Stock Exchange Chairman and CEO Dick Grasso, and state securities regulators announced that enforcement actions against ten of the United States top investment firms have been completed, thereby finalising the global settlement in principle reached and announced by regulators last December. That settlement followed joint investigations by the regulators of allegations of undue influence of investment banking interests on securities research at brokerage firms, and the enforcement actions track the provisions of the December global settlement in principle.

The ten firms against which enforcement actions were announced are:

- Bear, Stearns & Co Inc (Bear Stearns)
- Credit Suisse First Boston LLC (CSFB)
- Goldman, Sachs & Co (Goldman)
- Lehman Brothers Inc (Lehman)
- J P Morgan Securities Inc. (J P Morgan)
- Merrill Lynch, Pierce, Fenner & Smith, Incorporated (Merrill Lynch)
- Morgan Stanley & Co Incorporated (Morgan Stanley)
- Citigroup Global Markets Inc f/k/a Salomon Smith Barney Inc (SSB)
- UBS Warburg LLC (UBS)
- US Bancorp Piper Jaffray Inc (Piper Jaffray)

(1) Penalties, disgorgement and funds for independent research and investor education

Pursuant to the enforcement actions, the ten firms will pay a total of US$875 million in penalties and disgorgement, consisting of US$387.5 million in disgorgement and US$487.5 million in penalties (which includes Merrill Lynch's previous payment of US$100 million in connection with its prior settlement with the states relating to research analyst conflicts of interest). Under the settlement agreements, half of the US$775 million payment by the firms other than Merrill Lynch will be paid in resolution of actions brought by the SEC, NYSE and NASD, and will be put into a fund to benefit customers of the firms. The remainder of the funds will be paid to the states. In addition, the firms will make payments totaling US$432.5 million to fund independent research, and payments of US$80 million from seven of the firms will fund and promote investor education. The total of all payments is roughly US$1.4 billion.

Under the terms of the settlement, the firms will not seek reimbursement or indemnification for any penalties that they pay. In addition, the firms will not seek a tax deduction or tax credit with regard to any federal, state or local tax for any penalty amounts that they pay under the settlement.

Following is a list of how much each firm is paying pursuant to the settlement. The individual penalties include some of the highest ever imposed in civil enforcement actions under the securities laws.

(2) Summary of the enforcement actions

In addition to the monetary payments, the firms are also required to comply with significant requirements that dramatically reform their future practices, including separating the research and investment banking departments at the firms, how research is reviewed and supervised, and making independent research available to investors. The changes that the firms will be required to make are discussed below.

The enforcement actions allege that, from approximately mid-1999 through mid-2001 or later, all of the firms engaged in acts and practices that created or maintained inappropriate influence by investment banking over research analysts, thereby imposing conflicts of interest on research analysts that the firms failed to manage in an adequate or appropriate manner. In addition, the regulators found supervisory deficiencies at every firm. The enforcement actions, the allegations of which were neither admitted nor denied by the firms, also included additional charges:

- CSFB, Merrill Lynch and SSB issued fraudulent research reports in violation of Section 15(c) of the Securities Exchange Act of 1934 as well as various state statutes;
- Bear Stearns, CSFB, Goldman, Lehman, Merrill Lynch, Piper Jaffray, SSB and UBS Warburg issued research reports that were not based on principles of fair dealing and good faith and did not provide a sound basis for evaluating facts, contained exaggerated or unwarranted claims about the covered companies, and/or contained opinions for which there were no reasonable bases in violation of NYSE Rules 401, 472 and 476(a)(6), and NASD Rules 2110 and 2210 as well as state ethics statutes;
- UBS Warburg and Piper Jaffray received payments for research without disclosing such payments in violation of Section 17(b) of the Securities Act of 1933 as well as NYSE Rules 476(a)(6), 401 and 472 and NASD Rules 2210 and 2110. Those two firms, as well as Bear Stearns, J P Morgan and Morgan Stanley, made undisclosed payments for research in violation of NYSE Rules 476(a)(6), 401 and 472 and NASD Rules 2210 and 2110 and state statutes; and
- CSFB and SSB engaged in inappropriate spinning of "hot" Initial Public Offering (IPO) allocations in violation of SRO rules requiring adherence to high business standards and just and equitable principles of trade, and the firms' books and records relating to certain transactions violated the broker-dealer record-keeping provisions of Section 17(a) of the Securities Exchange Act of 1934 and SRO rules (NYSE Rule 440 and NASD Rule 3110).

Under the terms of the settlement, an injunction will be entered against each of the firms, enjoining it from violating the statutes and rules that it is alleged to have violated.

These enforcement actions will also reform industry practices regarding the relationship between investment banking and research and will bolster the integrity of equity research. Among other significant reforms included in these actions are the following:

(a) To ensure that stock recommendations are not tainted by efforts to obtain investment banking fees, research analysts will be insulated from investment banking pressure. The firms will be required to sever the links between research and investment banking, including prohibiting analysts from receiving compensation for investment banking activities, and prohibiting analysts' involvement in investment banking "pitches" and "roadshows." Among the more important reforms:

(i) The firms will physically separate their research and investment banking departments to prevent the flow of information between the two groups.

(ii) The firms' senior management will determine the research department's budget without input from investment banking and without regard to specific revenues derived from investment banking.

(iii) Research analysts' compensation may not be based, directly or indirectly, on investment banking revenues or input from investment banking personnel, and investment bankers will have no role in evaluating analysts' job performance.

(iv) Research management will make all company-specific decisions to terminate coverage, and investment bankers will have no role in company-specific coverage decisions.

(v) Research analysts will be prohibited from participating in efforts to solicit investment banking business, including pitches and roadshows. During the offering period for an investment banking transaction, research analysts may not participate in roadshows or other efforts to market the transaction.

(vi) The firms will create and enforce firewalls restricting interaction between investment banking and research except in specifically designated circumstances.

(b) To ensure that individual investors get access to objective investment advice, the firms will be obligated to furnish independent research. For a five-year period, each of the firms will be required to contract with no fewer than three independent research firms that will make available independent research to the firm's customers. An independent consultant for each firm will have final authority to procure independent research.

(c) To enable investors to evaluate and compare the performance of analysts, research analysts' historical ratings will be disclosed. Each firm will make its analysts' historical ratings and price target forecasts publicly available.

Further, seven of the firms will collectively pay US$80 million for investor education. The SEC, NYSE and NASD have authorized that US$52.5 million of these funds be put into an Investor Education Fund that will develop and support programs designed to equip investors with the knowledge and skills necessary to make informed decisions. The remaining US$27.5 million will be paid to state securities regulators and will be used by them for investor education purposes.

In addition to the other restrictions and requirements imposed by the enforcement actions, the ten firms have collectively entered into a voluntary agreement restricting allocations of securities in hot IPOs - offerings that begin trading in the aftermarket at a premium - to certain company executive officers and directors, a practice known as "spinning." This will promote fairness in the allocation of IPO shares and prevent firms from using these shares to attract investment banking business.

To implement this global settlement, the SEC filed separate actions against each of the firms in Federal District Court in New York City and, concurrently, the NYSE and NASD completed disciplinary proceedings pursuant to the disciplinary procedures of their respective organizations. At the state level, model settlement agreements have been finalized and the NASAA Board of Directors has recommended that all states accept the terms of the agreements. The proposed Final Judgments in the SEC actions are subject to Court approval.

(3) Payments in global settlement relating to firm research and investment banking conflicts of interest

Bear Stearns - US$80 million
CSFB - US$200 million
Goldman - US$110 million
J P Morgan - US$80 million
Lehman - US$80 million
Merrill Lynch - US$200 million\*
Morgan Stanley - US$125 million
Piper Jaffray - US$32.5 million
SSB - US$400 million
UBS - US$80 million

Total - US$1,387.5 million

\* Payment made in prior settlement of research analyst conflicts of interest with the states securities regulators.

(R) SEC VOTES TO MANDATE ELECTRONIC FILING OF OWNERSHIP REPORTS; PROHIBIT IMPROPER INFLUENCE OF AUDITORS

On 24 April 2003 the United States Securities and Exchange Commission voted to require that reports by insiders disclosing their securities holdings be filed electronically with the SEC. The Commission also voted to adopt rules prohibiting company officials from improperly influencing auditors of financial statements.

(1) The Commission voted to mandate the electronic filing of beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Securities Exchange Act of 1934, and to require issuers with corporate websites to post these reports. Electronic filing and website posting of these reports will result in earlier public notification of insiders' transactions and wider public availability of information about those transactions. The new rules and amendments implement the requirements of Section 16(a)(4), as amended by Section 403 of the Sarbanes-Oxley Act of 2002.

Under the new rules and amendments:

(a) Mandated electronic filing will apply to Forms 3, 4 and 5. To facilitate this, a new on-line filing system for these forms has been created.

(b) Forms 3, 4 and 5 submitted by direct transmission on or before 10 pm Eastern time will be deemed filed on the same business day. In light of these extended filing hours, temporary hardship exemptions will not be available for these forms.

(c) An issuer that maintains a corporate website will be required to post on that website all Forms 3, 4 and 5 filed with respect to its equity securities by the end of the business day after filing. An issuer will be able to satisfy this requirement by providing direct access, or by hyperlinking to a third-party website (such as EDGAR) if certain conditions are satisfied.

In addition, the new rule amendments will eliminate magnetic cartridges as a means of filing any form electronically.

These new rules and amendments will become effective on June 30, 2003.

(2) The Commission adopted amendments to Regulation 13B2 that implement Section 303 of the Sarbanes-Oxley Act of 2002. The new rules prohibit officers and directors of an issuer, and persons acting under the direction of an officer or director, from coercing, manipulating, misleading, or fraudulently influencing the auditor of the issuer's financial statements if that person knew or should have known that such action could render the financial statements materially misleading.

These amendments will be effective thirty days after their publication in the Federal Register.

The full text of the adopting release for the new rules and amendments is available on the SEC's website at [http://www.sec.gov](http://www.sec.gov" \t "_new)

(S) FSA ADVISES INDUSTRY ON DEFINITION OF "MIS-SELLING"

The United Kingdom Financial Services Authority (FSA) has issued a note aimed at clarifying what "mis-selling" is and is not under the FSA's regulatory regime.

The note has been issued in the light of continuing uncertainties in the market and at a time when some independent financial advisers are finding it difficult to obtain professional indemnity insurance because insurers are concerned about potential liabilities for the future.

The note sets out the statutory context within which the FSA has developed its risk-based approach to regulation and emphasises the responsibility this places on firms and their senior management for compliance with regulatory standards. It then explains the FSA's approach where there are claims of "mis-selling". The note acknowledges that firms are rightly concerned that they should not be subject to retrospective regulation coloured by hindsight.

The note is available on the FSA website at [http://www.fsa.gov.uk/pubs/press/2003/052.html](http://www.fsa.gov.uk/pubs/press/2003/052.html%22%20%5Ct%20%22_new)

(T) INSTITUTE OF CHARTERED ACCOUNTANTS TO PURSUE INDIVIDUALS MENTIONED IN HIH REPORT

The Institute of Chartered Accountants in Australia (ICAA) has advised their members referred to ASIC by Justice Owen, that the matters raised in the HIH Royal Commission Report are being investigated to determine what references should be made to the Institutes Disciplinary Committee. The Institute's independent taskforce will also review all other comments in the Report relating to the conduct of members to see whether similar action should be taken.

In anticipation of the release of the HIH Royal Commission Report, the ICAA established an independent taskforce in January 2003, to review the findings upon release. The taskforce is charged with identifying and recommending to the Institute's board action the ICAA should take in response to the findings. This will include examination of all referrals of ICAA members to ASIC or the DPP and reference to any activity of a member or event which might be regarded as having brought the profession into disrepute. The taskforce will provide early recommendations regarding these members named in the Report, and strategic advice to the ICAA Board on other issues arising from HIH.

On the macro level, the Institute has supported a number of initiatives aimed at restoring public trust in corporate governance and financial reporting, favouring the shared regulatory model approved and promoted by the Federal Government. These include the Ramsay Report on Auditor Independence, the CLERP 9 proposals for reform released by the Federal Government late last year, and the activities of the Corporate Governance Council established by the ASX.

In May last year the ICAA released a new internationally harmonised standard for professional independence. These measures introduced as part of the F1 Standard for Professional Independence not only strengthen existing guidelines to reflect Australian community expectations and reflect international best practice, they also implemented a number of key recommendations outlined in the Ramsay Report as acknowledged in CLERP 9. Further enhancements have been recommended by Justice Owen.

ICAA CEO Stephen Harrison said these measures will never prevent corporate failures but taken all together should make a major contribution to the integrity and reputation of Australias capital markets.

In particular they reinforce the importance of quality, objective and informed audits conducted by independent auditors working with company boards and their Audit Committees. They also reinforce the importance of oversight and review of the accounting profession, and the disciplinary responsibilities of ASIC, the Company Auditors and Liquidators Disciplinary Board (CALDB) and the professional bodies responsible for accountants and directors.

It should be noted that even before the HIH Royal Commission's report was tabled, the ICAA had acted in the case of two of its named members. Following the Supreme Court decision in the Pacific Eagle Equities matter handed down in relation to Rodney Adler, the Institute wrote to Mr Adler advising him that the matters raised were being investigated to determine whether there should be a reference to the ICAA Disciplinary Committee once his appeal against the Supreme Court decision had been finalised. Rodney Adler offered his resignation, which was accepted by the board of the ICAA.

Following the Supreme Court's decision also regarding the Pacific Eagle Equities matter handed down in relation to Dominic Fodera, Mr Fodera appeared before the ICAA 's Disciplinary Committee. The Committees determination was that his membership was suspended for three years.

2. RECENT ASIC DEVELOPMENTS

(A) DRAFT GUIDELINES ON VALUE OF OPTIONS IN DIRECTORS' REPORTS

On 7 May 2003 ASIC released draft guidelines aimed to assist listed Australian companies when including values of options in the disclosure of emoluments for directors and executive officers, in their annual directors' reports for years ending on or after 30 June 2003.

ASIC expects listed companies to include amounts relating to granted options when disclosing the emoluments of each director, and each of the five highest paid executive officers, pursuant to section 300A(1)(c) of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

The proposed guidelines cover the valuation methods to be applied, as well as directions for allocating values between financial years, for the purposes of section 300A(1)(c).

In developing these guidelines ASIC has drawn on the International Accounting Standard Board's Exposure Draft ED 2 'Share Bared Payment' (ED2), which provides an appropriate basis for valuing options and allocating the value over time.

The guidelines do not deal with the expensing of options of other share-based payments in the financial statements.

Comments on the guidelines should be sent to Greg Pound, ASIC Chief Accountant by email to greg.pound@asic.gov.au or by fax on 03 9280 3325, no later than Friday 23 May.

Copies of the draft guidelines can be downloaded from [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

(1) Details of the draft guidelines

(a) Directors' report disclosure

Paragraph 60 in Practice Note 68 'New financial reporting and procedural requirements' issued in 1998 states that listed companies must include options issued to directors and executive officers in the disclosure of emoluments of each director and each of the 5 executive officers receiving the highest emoluments under section 300A(1)(c) of the Corporations Act 2001 (the Act).

ASIC expects all listed companies to comply with their obligations under section 300A(1)(c) by disclosing the value of emoluments relating to options in their directors' reports. This will ensure that shareholders are properly informed as to the full value of the remuneration of individual directors and executive officers.

In 1998 there was no Australian accounting standard or exposure draft dealing with the accounting or valuation methods for options. Paragraph 60 of Practice Note 68 indicated that ASIC did not intend to prescribe these methods.

ASIC believes that the International Accounting Standards Board's Exposure Draft ED 2 'Share-Based Payment' (ED 2) now provides a basis for valuing options and allocating those values over time that it is appropriate to draw on for the purposes of the disclosure of emoluments of directors and executive officers.

The Australian Accounting Standards Board (AASB) is committed to adopting International Financial Reporting Standards (IFRSs) and has issued ED 2 as Exposure Draft ED 108.

The AASB proposes that a standard be operative for years beginning on or after 1 January 2004, the same time as proposed for the corresponding IFRS. The AASB has also recently announced it proposes that its forthcoming Accounting Standard 'Director and Executive Disclosures by Disclosing Entities' require the disclosure of an individual's remuneration for a reporting period include the amount recognised as an expense for that year in accordance with the accounting standard based on ED 108.

(b) Value of options

ED 2/ED 108 provide clear guidelines on the types of option valuation models that can be applied and ASIC considers that these models can be applied to value all types of options granted to directors and executive officers.

For the purposes of section 300A(1)(c), listed companies should now value exchange-traded options at their market price at grant date, consistent with ED 2/ED 108. Other options should be valued as at grant date using an option pricing model that takes into account all of the 6 factors specified in ED 2/ED 108 and the other guidance on valuing options contained in ED 2/ED 108.

The six factors are:
(i) the exercise price of the option;
(ii) the life of the option;
(iii) the current price of the underlying securities;
(iv) the expected volatility of the share price;
(v) the dividends expected on the shares; and
(vi) the risk-free interest rate for the life of the option.

ED 108 says that the expected life rather than the contracted life shall be used for non-transferable options.

In determining the amount to be recognised as remuneration over time, where appropriate, allowance should be made for amounts payable by the director or officer for the option.

(c) When to disclose amounts as remuneration

ED 2/ED 108 propose that an expense be recognised in relation to options over the period from grant date to the vesting date. For options that vest immediately, the value is recognised as an expense at grant date.

ED 2/ED 108 recognise that some employees in a group of employees participating in an option scheme may not be expected to complete the full period of service required for options to vest. They also recognise that actual service may differ from that originally expected.

As a result, certain adjustments are required to the amounts allocated to each financial year from grant date to vesting date. That approach may be appropriate in the context of a group of employees where differences in the expected service lengths of individual employees may not materially affect the amount expensed in any period.

However, it is usually difficult to estimate when a single individual will cease to be a director or executive officer with any accuracy. Hence, for the purposes of measuring the remuneration of an individual for disclosure in the directors' report, it should be assumed that the individual directors and executive officers will continue to provide service until the vesting date, unless it is probable that the particular individual will cease at an earlier date.

Consistent with ED 2/ED 108, changes in the value of options after grant date are only required to be included as emoluments when they result from changes to the terms and conditions of the options made by the issuing entity. In that case, emoluments should include the change in the value of the options.

Remuneration should not be reversed if the options are forfeited before vesting, or not exercised after vesting.

(d) Other disclosures

Subsection 300(1)(d) of the Act requires directors' reports of all entities reporting under Chapter 2M of the Act to disclose details of options granted to directors and executive officers as a part of their remuneration. It also specifies the details to be disclosed.

In addition, listed companies are encouraged to disclose information as to how option values have been determined (including the model used, inputs to the model, historical and expected volatility, the risk-free interest rate, assumptions on vesting, and other significant assumptions affecting the value), a description of the basis of recognising the options over time, and the grant and vesting dates of the options.

(e) Transitional arrangements

The guidelines in this release apply to all options, whether granted before or after the date of the release, that had not vested prior to the commencement of the first financial year to which these guidelines apply.

In adopting the guidelines, companies may include option values as emoluments at different amounts or in different financial years compared to their previous approach.

To ensure that emoluments are reported on a consistent basis across listed companies, no adjustment should be made to emoluments reported in the first financial year that the guidelines in this release apply to:

(i) exclude amounts reported as emoluments in prior financial years that are required by the guidelines to be reported as emoluments in the current year; or
(ii) include amounts that would have been reported as emoluments in prior financial years had these guidelines been applied in those prior years but which were not previously reported.

This approach may result in some amounts being reported as emoluments in more than one year or some amounts not being reported as emoluments at all. In these circumstances, companies should briefly explain the change in basis and are encouraged to disclose the financial effect on the amounts of emoluments shown in the directors' report.

(f) Further guidance on applying section 300A(1)(c)

Directors of listed companies should refer to ASIC Practice Note 68 'New financial reporting and procedural requirements' for further guidance on the application of section 300A(1)(c).

(g) Disclosures in financial report

All entities preparing financial reports under the Act are encouraged to apply the guidelines in the release in relation to options granted in disclosing the remuneration of directors and executive officers in their annual financial reports for the purposes of AASB 1017 'Related Party Disclosures' and AASB 1034 'Financial Report Presentation and Disclosures'.

(h) Surveillance of reports

ASIC will review compliance with the guidelines in its surveillance of financial reports and directors' reports of listed companies for the year ending 30 June 2003. Enforcement action may be considered where companies fail to disclose the value of emoluments relating to options granted.

(i) Interim guidelines

It is ASIC's intention to withdraw the guidelines in the release should the Act be amended to specify a method of valuing and accounting for options issued as remuneration of directors and executive officers.

(j) Expensing of options granted as remuneration

The guidelines do not deal with the expensing of options or other share-based payments in the financial statements.

(B) COURT FINDS AGAINST WATER WHEEL DIRECTORS

On 5 May 2003 Mr David Knott, Chairman of ASIC, welcomed the decision handed down by Justice Mandie of the Supreme Court of Victoria, in ASIC's civil penalty action against Messrs Bernard Plymin, John Elliott and William Harrison.

The court has found that Messrs Plymin and Elliott failed to prevent Water Wheel Holdings Limited and its subsidiary, Water Wheel Mills Pty Ltd (Water Wheel), from incurring debts after the companies became insolvent on 14 September 1999.

During the course of the proceedings, Mr Harrison reached a settlement with ASIC under which he made full admissions relating to the contraventions.

'[The] finding by the court that the directors of Water Wheel breached the insolvent trading provisions of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) is a significant win for ASIC in this important area of the law', Mr Knott said. 'Insolvent trading cases involve complex evidentiary issues that make them challenging for ASIC and liquidators to pursue. I am aware that the insolvency profession has been keenly awaiting the outcome of this case.

'Insolvent trading contraventions deserve to be treated seriously. Suppliers of goods and services have a right to expect that they will be paid in the ordinary course of business. Failure to honour payment obligations can have a devastating effect on small business suppliers and their families. That is why the law prevents trading in circumstances where there are reasonable grounds for suspecting that the company is insolvent. This decision will be warmly welcomed by the many small businesses throughout Victoria and southern New South Wales, including primary producers, who lost money in the collapse of Water Wheel', Mr Knott said.

Justice Mandie will now hear submissions from the parties on penalties.

'We are submitting that the directors be banned from managing companies for as long as the court sees fit, as well as pecuniary penalties against each director. We have also sought an order that they pay compensation for the benefit of the companies' unsecured creditors. The court has ordered that the total net amount which might become the subject of compensation orders is approximately $2.619 million', Mr Knott said.

(1) Background to the civil proceedings

ASIC commenced civil penalty proceedings in the Supreme Court of Victoria on 27 November 2000, against Messrs Bernard Plymin, John Elliott and William Harrison, in relation to their conduct as directors of Water Wheel Holdings Ltd and its subsidiary Water Wheel Mills Pty Ltd (the companies).

ASIC alleged that between 14 September 1999 and 17 February 2000 the defendants allowed the companies to incur further debts after the companies became insolvent, contrary to section 588G(2) of the then Corporations Law.

In the week before the Supreme Court trial was due to begin, Mr John Elliott applied to the Federal Court for an order restraining the trial's commencement, and sought to quash the decision made by ASIC to institute the Supreme Court action. This application was dismissed and the trial commenced accordingly, on 19 August 2002.

Once the trial had begun, Mr Elliott further applied to the Supreme Court trial judge for orders staying the trial, but those orders were not granted. In October 2002, Mr Elliott then made application for the High Court to hear certain constitutional law issues that he wished to raise against ASIC. The High Court declined the transfer of those issues from the Supreme Court to the High Court.

The Supreme Court trial concluded on 14 November 2002.

(2) Water Wheel Holdings Limited

Water Wheel Holdings Limited is a company listed on the Australian Stock Exchange Limited. Trading in its shares has been suspended since 16 February 2000 at the directors' request. The directors placed the companies into voluntary administration on 17 February 2000, after announcing a loss of $6.7 million for the year to December 1999.

When the companies were placed in administration, they owed in excess of $18 million to more than 220 unsecured creditors. The unsecured creditors include wheat and rice farmers in New South Wales and near the former Water Wheel mill at Bridgewater, near Bendigo Victoria, as well as suppliers of agricultural products, transport and other business services.

The Water Wheel judgment is further discussed in Item 4(A) of this Bulletin.

(C) POLICY STATEMENT 49: EMPLOYEE SHARE SCHEMES

On 1 May 2003 ASIC released an update of Policy Statement 49: Employee Share Schemes [PS 49]. The amendments aim to assist employers offering share schemes, while maintaining investor protection.

The amendments to the policy are consistent with ASIC's policy rationale to allow employee share schemes where:

- the aim of the offer is not fundraising but rather to enable employees to participate in the ownership of a corporation;
- the offer sufficiently supports the long term mutual interdependence between employers and employees; and
- adequate disclosure is provided to investors.

(1) Summary of amendments

(a) The extension of class order relief from the disclosure requirements of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) for employee share schemes to include relief for some stapled securities;

(b) Consequential relief from the requirement to hold an Australian Financial Services license (AFSL) and the Chapter 7 hawking provisions. An employee share scheme offer that complies with disclosure relief contained in the updated class order will automatically qualify for additional licensing and hawking relief on conditions set out in the class order;

(c) Relief for offers of options offered for nominal consideration by companies not listed on the Australian Stock Exchange (ASX) or an approved foreign exchange at the time of the offer, provided that the issuer will have been listed for 12 months by the time the options are exercised;

(d) Reduction of the required listing period for foreign issuers of employee share schemes offers to Australian employees from 36 months to 12 months;

(e) Additional guidance in PS 49 on case-by-case relief for employee share scheme offers; and

(f) Relief to permit employee share scheme offers to be disregarded for the purposes of calculation of the number or value of offers made under section 708(1) of the Act dealing with small-scale offerings.

(2) Background

PS 49 was first issued in March 1993 and substantially reviewed in 1995. ASIC also issued an information release in December 2000 noting changes to its policy in this area (Information Release [IR 00/39]).

ASIC has updated PS49 to reflect legislative changes to the Act arising from the [Corporate Law Economic Reform Program Act 1999 No. 156 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) and the [Financial Services Reform Act 2001 No. 122 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default). The updated PS49 also incorporates ASIC operational experience in employee share schemes, including information contained in Information Release [IR 00/39].

Class order relief for employee share schemes has been updated to reflect the amendments to PS 49. This relief is contained in a new class order Class Order [CO 03/184] which incorporates relief for offers of shares, options over shares and offers involving a contribution plan or through a trust previously contained in class orders [CO 00/220], [CO 00/221], [CO 00/223] and [CO 02/264]. It also gives relief for some stapled securities.

The new class order which gives effect to the updated employee share scheme policy is Class Order [CO 03/184], which provides conditional relief from the disclosure provisions of the Act for offers of stapled securities, listed shares, units of shares or options over shares and consequential relief from licensing and hawking provisions.

3. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL MAKES ORDERS IN COBRA RESOURCES LIMITED PROCEEDINGS

On 23 May 2003 the Takeovers Panel advised that it had made orders in the proceedings in relation to Cobra Resources Limited.

Mr Terry Stephens agreed to consent orders from the Panel that he not proceed with the takeover which he announced on 28 April 2003 and 5 May 2003. The orders result from an application from the Australian Securities and Investments Commission on 16 May 2003.

The Panel considered that the confusion which Mr Stephens' announcements had caused in the market for Cobra shares, which was largely due to his failure to seek qualified advice prior to making his announcements, and then subsequently when ASIC advised him of deficiencies in his announcements, caused unacceptable circumstances in relation to the affairs of Cobra.

The Panel said that in the interest of efficient, competitive and informed markets, persons announcing or commencing public takeovers will normally require proper, experienced advice.

The Panel made the following orders.

(1) On 28 April 2003 Mr Terry Stephens gave a notice (Notice) to Cobra Resources Limited (Cobra) of his intention to make a takeover bid for all of the shares in Cobra (Bid).

(2) The Notice was released by Cobra to Australian Stock Exchange Limited (ASX).

(3) On or about 7 May 2003 a document from Mr. Stephens entitled 'Bidder's Statement,' setting out the Bid referred to in the Notice, was given to Cobra. Cobra then released that document to ASX.

(4) It is likely that the Notice and Bidder's Statement contravened various sections of Chapter 6 of the [Corporations Act 2001 No. 50](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act).

(5) In particular the Bidder's Statement did not address the issues required by section 636 of the Act.

(6) The Notice and Bidder's Statement created a degree of confusion in the market for Cobra shares and frustrated the principle set out in section 602(a) of the Act that the acquisition of control over the voting shares in a listed company take place in an efficient, competitive and informed market.

Therefore, the Takeovers Panel:

(a)`declares that the circumstances set out above are unacceptable circumstances in relation to the affairs of Cobra; and

(b) orders that Mr Stephens not proceed with the Bid, and not make or announce any other bid for Cobra, before he has lodged a fresh bidder's statement with the Australian Securities and Investments Commission (ASIC), and been informed in writing by an officer of ASIC occupying the position of Assistant Director of Corporate Finance or Corporate Finance Counsel that he or she has accepted the document for lodgment.

(B) PANEL DECLINES APPLICATION IN RELATION TO SIRTEX MEDICAL

On 14 May 2003 the Takeovers Panel declined to make a declaration of unacceptable circumstances in relation to the affairs of Sirtex Medical Limited in response to an application by Hunter Hall Investment Management Limited (in its capacity as responsible entity for the Australian Value Trust, the Value Growth Trust and the International Ethical Fund) dated 17 April 2003.

The application related to an off-market takeover bid by Cephalon Australia Pty Ltd, a subsidiary of US-based biopharmaceutical Cephalon, Inc for all the shares in Sirtex.

Hunter Hall alleged that unacceptable circumstances existed because Sirtex shareholders did not have sufficient information to assess whether or not to accept the bid. Hunter Hall asserted that there was deficient information regarding the possibility raised by Cephalon in its first and second supplementary Bidder's Statements that if it achieved between 50% and 90% acceptance levels under the bid:

(a) Cephalon would consider Sirtex entering into an agreement under which Sirtex licensed (non-exclusively) its only significant asset to Cephalon; and

(b) Cephalon may consider underwriting a capital raising by Sirtex that could have a dilutive effect on other shareholders.

Hunter Hall was also concerned about the relationship between Cephalon, on the one hand, and Sirtex and its principal shareholder, on the other.

The Panel declined the application although it acknowledged some of the applicant's concerns regarding disclosure. However, the Panel believed that most of those concerns were no longer relevant following a binding statement in Cephalon's third supplementary Bidder's Statement dated 8 May that it would not waive the minimum 90% condition in its bid.

The Panel did not believe that an Independent Expert's Report was necessary or desirable in the circumstances.

The Panel considered that Cephalon's description in its third supplementary Bidder's Statement of Sirtex shareholders' withdrawal rights (caused by its bid extension) could inform shareholders more clearly of their rights.

The Panel also noted that it was provided with no evidence that any aspect of Cephalon's bid prevents a rival bid from emerging.

The sitting Panel comprised Alison Lansley (sitting President), Scott Reid and Luise Elsing.

(C) PANEL DECLARATION OF UNACCEPTABLE CIRCUMSTANCES IN RELATION TO AFFAIRS OF AMP SHOPPING CENTRE TRUST

On 13 May 2003 the Takeovers Panel advised that it had made a declaration of unacceptable circumstances in relation to the affairs of the AMP Shopping Centre Trust (ART). ART is a listed managed investment scheme which has investment interests in a number of shopping centres. The Panel has made orders preventing ART's interests in five major shopping centres being bought out solely because AMP Henderson Global Investors Ltd. (AMPH) is removed as Responsible Entity of ART following a successful takeover bid for ART.

On 15 May 2003 AMP applied for a review of the orders. On 26 May 2003 the Review Panel announced that it declined to vary the orders announced by the Panel on 13 May 2003.

CPT Manager Limited (as responsible entity for Centro Property Trust) (Centro) announced a takeover bid for ART on 18 March 2003.

On 26 March 2003 AMPH announced that a change of Responsible Entity of ART as a result of a takeover bid under Chapter 6 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act) (Change of Responsible Entity) would be likely to breach provisions contained in agreements (Co-Owners' Agreements) in relation to five of the largest and most important shopping centres in which ART owned interests (the Shopping Centres). AMPH said that those breaches may activate pre-emptive rights (Pre-Emptive Rights) in the Co-Owners Agreements which may lead to the Co-Owners being entitled to require ART to sell its interests in the shopping centres to the other Co-Owners at market value.

The interests are worth over $1 billion and comprise around 63% of ART's assets. AMPH's announcement in relation to the Pre-Emptive Rights was in response to the announcement by Centro of its takeover bid.

The Co-Owners to the Co-Owners Agreements are essentially all subsidiaries of, or insurance or investment funds within, AMP Life Limited (AMP Life) or the AMP Ltd. group.

Centro applied to the Panel for a declaration of unacceptable circumstances and orders under sections 657C & D of the Act on 10 April 2003.

The Panel accepted Centro's submissions that the commercial effect of the Pre-Emptive Rights are such that they would effectively deter any takeover bid by any person who wasn't acceptable to the AMP group.

The Panel was concerned that the effect of the Pre-Emptive Rights which is now being contended by AMP Life and AMPH ie the Pre-Emptive Rights being activated by a Change of Responsible Entity, had not been disclosed to ART unitholders or the market prior to AMPH's announcement to ASX on 26 March and the subsequent publication by AMPH of the terms of the Co-Owners Agreements and has not been consented to by ART unitholders. The Panel considered that this had impaired the efficient, competitive and informed market for control of ART units.

(1) Orders

The Panel ordered AMPH (as Responsible Entity of ART and AMP Wholesale 2), AMP Life and the other parties to the relevant Co-Owners' Agreements, not to exercise any Pre-Emptive Rights in relation to shopping centres in which ART owns interests, solely because of a Change of Responsible Entity (as defined).

In arriving at these orders the Panel had taken into account: past disclosure; market participants assessments of the Pre-Emptive Rights; the interests of ART unitholders and their knowledge and consent; whether they would cause any person unfair prejudice; and other potential remedies advanced by the parties to the application.

The Panel offered the Co-Owners an opportunity to resolve the Panel's concerns by giving the Panel undertakings that they would not seek to exercise any Pre-Emptive Rights if they were activated due to a Change of Responsible Entity. The Co-Owners declined the Panel's offer.

(2) AMP Life

AMP Life is essentially the other Co-Owner in the Shopping Centres. The Panel asked AMP Life to advise ART unitholders of its position in the event of a Change of Responsible Entity. AMP Life has declined to do so. AMP Life has consistently suggested that the Panel should not be conducting these proceedings unless to order some form of disclosure by Centro as to whether Centro would waive the defeating condition in its offer. AMP Life has also advised the Panel that it reserved the right to appeal, after the close of Centro's bid, any Court decision unfavourable to it if the Panel referred any question of law to the Court under section 659A of the Act.

The Panel accepted AMP Life's right to make choices concerning participation in Panel proceedings in light of its own commercial interests and fiduciary duties. However, AMP Life chose to join the proceedings on 28 April well after proceedings had commenced and as a participant in the proceedings declined to provide information that the Panel considered may have been relevant for its consideration. Where a person or party chooses not to provide information to the Panel or not to participate in proceedings, the Panel will proceed with its proceedings and make its decision on the information which it has before it.

AMP Life, and to a lesser extent AMPH, had asserted that it had not made any contentions as to how the Pre-Emptive Rights might operate in the event of a Change of Responsible Entity. However, the Panel considered that the statements made by AMP Life and AMPH through the course of these proceedings made it reasonable for the Panel to infer, and to proceed in its decision on the basis, that AMP Life and AMPH can reasonably be taken to have contended to the Panel that the Pre-Emptive Rights would, or would likely, be activated by a Change of Responsible Entity.

(3) Past disclosure

The Panel considered it highly unlikely that prospective purchasers of ART units would reasonably have understood from reading the ART 1997 Prospectus that a change of trustee under the prescribed interest regime would have activated the Pre-Emptive Rights. The Panel considered that they would likely have understood that an attempt by any of the Co-Owners to sell the assets out of the group would have activated the Pre-Emptive Rights. But that is different to the Pre-Emptive Rights being activated merely by a change of trustee with no change in beneficial ownership of the interests in the Shopping Centres (ie still beneficially owned by the unitholders of ART).

Based on the facts presented to the Panel there appeared to have been a series of points since 1997 at which circumstances changed, or AMPH or AMP Life had received advice or information, which might have triggered a decision by AMPH, as Responsible Entity for ART, to make disclosures to the market and to ART unitholders concerning the effect of the Pre-Emptive Rights in relation either to the change of a trustee or a change of the Responsible Entity.

(4) Market participants' knowledge

Centro and Westfield Management Limited (Westfield) had each recently spent over $200 million acquiring units in ART. Their evidence to the Panel was that they did not know, after diligent enquiries prior to acquiring their current stakes in ART in March 2003, that the Pre-Emptive Rights in the Co-Owners' Agreements might be activated by a change of trustee under the prescribed interests regime, or by a Change Of Responsible Entity under the MIA regime. The Panel takes this as supportive evidence that the activation of the Pre-Emptive Rights contended by AMPH and AMP Life had not been adequately or effectively disclosed.

(5) Interests of ART unitholders - disclosure and consent

The Panel notes that:

(a) although the main elements of the Pre-Emptive Rights (ie concerning sale of interests in the Shopping Centres) were disclosed in the 1997 Prospectus, the fact that merely a change of trustee of ART may activate the Pre-Emptive Rights in the Co-Owners' Agreements was not disclosed; and

(b) on or around 12 April 1999, ART offered its unitholders the opportunity to vote on whether unitholders wanted self-custody by AMPH, a related party custodian or an independent custodian when ART moved from the prescribed interests regime to the MIA regime. It would have been appropriate for AMPH to have conducted a thorough review of the effects of the transition, especially in relation to the Pre-Emptive Rights, and disclosed to ART unitholders what the various consequences of those alternatives might have been. It may also have been appropriate for AMPH to seek unitholder consent to those specific effects, or to have proposed alternative arrangements to avoid the entrenching effect of the Co-Owners' Agreements under the MIA regime. Whatever AMPH's conclusion about the impact of appointing an external custodian, this analysis would have revealed the issue whether a Change of Responsible Entity would have triggered the Pre-Emptive Rights;

(c) unitholders did not consent to the effect of the Pre-Emptive Rights proposed by AMP Life and AMPH; and

(d) subsequent disclosures by AMPH to the Panel (after AMPH had reviewed its earlier files on the issues) suggest that persons within AMPH, and likely AMP Life, had turned their minds to the exact, or very similar, issues in relation to a Change of Responsible Entity in ART, as those raised by the Centro bid.

(6) Uncertainty

If the Pre-Emptive Rights would not be activated, but that fact had not been determined with finality by a court, the existence of the uncertainty (initiated for Centro, rival bidders, the market and ART unitholders by the announcement of AMPH on 26 March 2003):

(a) makes it impossible for unitholders to assess the value of their units; and

(b) threatens the prospects of the current takeover bid for ART, or any other takeover offer not supported by the Co-Owners.

Either of these circumstances means that the competitive, efficient and informed market for units in ART has been impaired.

(7) Entrenching

The Panel considered that there was a "non-entrenchment" principle in the Managed Investment Scheme provisions of the Act and in the purposes of Chapter 6 of the Act and that it should apply that principle in its consideration of this application.

It appeared clear to the Panel that the introduction of the [CLERP Act 1999 No. 156 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) in 2000, which brought takeovers of listed managed investment schemes under Chapter 6 of the Act, was intended to expose the responsible entity of listed managed investment schemes to similar scrutiny and discipline by an efficient, competitive and informed market as managers of public companies.

To impose the sort of commercial burden on unitholders as exercise of the Pre-Emptive Rights would impose on ART unitholders, in the event of a Change of Responsible Entity, would frustrate the express purpose of bringing listed managed investment schemes under Chapter 6 of the Act.

It appeared to the Panel that the activation of the Pre-Emptive Rights that AMP Life and AMPH contended would very strongly tend to entrench AMPH as Responsible Entity of ART and would therefore constitute unacceptable circumstances. A possible exception to this legislative policy would be where the unitholders had given their informed consent to such entrenchment.

(8) Orders - no unfair prejudice

The Panel is of the view that it would not unfairly prejudice any person to make the orders it had made because it appears from the evidence before the Panel that, amongst other things:

(a) parties had agreed that the Pre-Emptive Rights would not have been activated by a change of management company under the prescribed interests regime prior to the commencement of the MIA. Under AMPH and AMP Life's contentions, that would in effect now occur;

(b) the parties had provided the Panel with no evidence of, or any rational commercial basis for, any intention of the Co-Owners that the Pre-Emptive Rights in the Co-Owners' Agreements, when they were entered into, would be activated merely because of a change of trustee of ART under the prescribed interests regime. The Panel infers that this was likely to be an issue of negligible value under the prescribed interests regime;

(c) the orders affect only a very small portion of the Pre-Emptive Rights compared to the commercial and other value of the aspects of the Pre-Emptive Rights that would be untouched by the Panel's order (ie all the parts which were clearly disclosed in the Prospectus); and

(d) any activation of the Pre-Emptive Rights on a Change of Responsible Entity would be a windfall benefit to the Co-Owners, to the detriment of ART unitholders, that the Co-Owners neither intended or knew about, and which the ART unitholders had not been informed of and to which they had not consented. To deprive the Co-Owners of the windfall and return it to the ART unitholders would not be unfair.

(9) Other potential remedies

(a) Uncertainty

The Panel does not accept AMPH's submissions that the Panel cannot or should not seek to determine these proceedings until the uncertainty (or the proper construction of the Pre-Emptive Rights) has been resolved by referral to a court. That would cause additional delay, in proceedings which have already extended for a long period, and it may well not give the certainty which AMPH said would be a pre-requisite for a court referral being appropriate.

(10) Request for the Panel to refer a question of law to the Court

The Panel considered that the decision and orders above obviate the need to refer the issue to the Court. The Panel considered that its decision was likely to be materially more timely and efficient, while still being fair and reasonable, than referring the question to court (and potentially being faced with the same issue for determination after receiving the Court's advisory opinion). On that basis, the Panel does not intend to refer the requested question of law to the Court.

AMP Life has declined to undertake to be bound by any advice to the Panel by a court on a question of law referred to the Court. It also put forward the possibility of it "advocating and successfully establishing a contrary view to that decided by the Court after the close of the takeover bid." Without an undertaking that AMP Life and the other Co-Owners would be bound by the Court's decision, a decision by a Court of a question of law would have materially reduced certainty and utility for these proceedings.

(11) Disclosure as a remedy

AMP Life had submitted that the proper remedy for any unacceptable circumstances that exist in relation to the affairs of ART (but AMP Life contended that none do) was to ensure that:

(a) AMPH fully disclose to ART unitholders and to the market the terms of the Co-Owners' Agreements;

(b) AMPH and Centro fully disclose their different contentions as to the operation and existence of the Co-Owners' Agreements and Pre-Emptive Rights; and

(c) CPT discloses, in light of that information, whether it intends to seek to rely upon any relevant bid condition.

AMP Life suggested to the Panel that unitholders would then be in a position to determine for themselves what the risk is of the Pre-Emptive Rights existing and being activated by a Change of Responsible Entity.

Disclosure is an inadequate remedy in these proceedings, and cannot be made to become an adequate remedy, because of the potential effect on those ART unitholders who would prefer to stay as unitholders of ART. If Centro proceeds with its bid, acquires more than 50% of the units in ART, replaces AMPH as Responsible Entity of ART, and AMP Life or another Co-Owner exercise their Pre-Emptive Rights, the remaining ART unitholders would have their investment changed from a valuable, diversified, shopping centre fund to essentially a cash box. In addition, any ART unitholders who accepted the offer would receive Centro units and the value and composition of Centro's assets would be materially changed, in similar ways to those of ART, if the Pre-Emptive Rights were exercised.

As noted above, AMP Life, for its part, has declined to disclose to the Panel, ART unitholders or the market, whether or not it would seek to exercise any Pre-Emptive Rights in the event of a Change of Responsible Entity.

(12) Centro's conditions

When and if it is settled that the Pre-Emptive Rights will not be exercised, when and if Centro replaces AMPH as responsible entity of ART, and any reviews of this decision are complete, the Panel expects Centro to waive any conditions of its bid to the extent that they may have been triggered by the existence or disclosure of the Co-Owners' Agreements.

(13) Costs

The Panel considered that parties to the proceedings were likely to have incurred additional costs because of the late time in the proceedings that AMP Life sought to become a party, despite the Panel's repeated invitations for it to become a party. On that basis, the Panel made an order that each party pay their own costs incurred up until 28 April 2003, and that AMP Life pay all parties' costs incurred after that date, in the manner set out in the Panel's Guidance Note on Costs.

(14) Issues for other managed investment scheme and responsible entities

The Panel considered that all listed managed investment schemes and their responsible entities should urgently review their constitutions and other material contracts to assess whether they are parties to contracts with rights similar to the Pre-Emptive Rights in the Co-Owners' Agreements. If they find rights which have similar effects to those that AMP Life and AMPH contend for the ART Pre-Emptive Rights, they will have been put squarely on notice by this decision that the ongoing existence of such pre-emptive rights, in the absence of clear and full disclosure and informed consent by unitholders, risks the Panel declaring the circumstances to be unacceptable circumstances in the event it received an application in relation to those rights.

The President of the Panel appointed Les Taylor, Jenny Seabrook and Robyn Ahern to constitute the Panel for the application.

The Panel's reasons for its decision will be posted on the Panel's website when they are settled.

(D) REVIEW PANEL AFFIRMS ANACONDA 15 DECISION IN RELATION TO ANACONDA NICKEL LIMITED AND, IN ADDITION, REQUIRES DISPOSAL OF ON-MARKET ACQUISITIONS BY SHERRITT

On 12 May 2003 the Takeovers Panel advised that the Panel reviewing the decision in the Anaconda 15 proceedings (Anaconda 19 proceedings) had affirmed the majority of the decision made by the Anaconda 15 Panel to decline the application received from Matlin Patterson Global Opportunities Partners LP (MP Global) on 20 February 2003 in relation to the affairs of Anaconda Nickel Limited (Anaconda). The Anaconda 19 application to the Panel was made on 11 April 2003.

In addition, the Panel decided to make a declaration that the on-market acquisition of 4,000,000 shares in Anaconda (Old Shares) by Sherritt International Corporation (Sherritt) on 13 February 2003 constitutes unacceptable circumstances and, in relation to Anaconda 18, to make orders that:

(a) The 4,000,000 shares should be vested in ASIC for sale by a book build, with other Anaconda shares vested in ASIC by the Anaconda 16-17 Panel and the Anaconda 18 Panel; and

(b) MP Global be allowed to retain 60,000,000 of the Excess Shares which the Anaconda 16-17 and Anaconda 18 Panels had ordered be vested in ASIC for disposal.

In both the Anaconda 15 application and in the Anaconda 19 application, MP Global:

(a) alleged that acquisitions of Old Shares in Anaconda by Glencore International AG (Glencore) and Sherritt on 12 and 13 February towards the close of MP Global's offer (Rights Offer) to acquire rights (Rights) in Anaconda constituted unacceptable circumstances; and

(b) raised concerns about the fact that Sherritt neither sold nor exercised its Rights (which were worth approximately $5.1 million under the Rights Issue and related to 8.4% of the shares and Rights in Anaconda), instead allowing them to lapse.

MP Global sought a declaration of unacceptable circumstances, and remedial orders, in relation to the above.

60,000,000 is fifteen times 4,000,000. If MP Global had been able to acquire 4,000,000 shares on-market on 13 February, it would have been entitled to exercise fourteen times that number of Rights under Anaconda's Rights Issue. The Panel considers that such an order is the closest it can approximate to ensure that MP Global's offers give the result they would have without the acquisitions on-market by Sherritt on 13 February 2003.

MP Global submitted that the Panel should consider that many more shares than the 4 million that Sherritt acquired would have been available to it on 13 February, when it had declared its Share Offer and Rights Offer free from conditions and was free to acquire Old Shares on-market at 12 cents per share. Glencore has submitted that it is unlikely that MP Global would have acquired any shares in the market on that day.

It is clear to the Panel that it is not possible (whether in Panel proceedings or in a Court) to determine with absolute certainty what the course of trading would have been if Sherritt had not entered the market on 13 February in the way it did.

The Panel ordered that MP Global may retain 60 million of the Excess Shares which it would otherwise be required to divest. 60 million shares is, necessarily, an subjectively derived figure. However, it is a figure which:

(a) has a grounding in the specific aspects of these proceedings;

(b) appears to remedy an amount of harm to MP Global's interests which the Panel believes is reasonably open to it to consider is likely to have occurred;

(c) causes no unfair prejudice to any person; and

(d) is most likely to ensure that the MP Global Share Offer proceeded (as far as possible) in a way, or with a result, that it would have proceeded if the circumstances of Sherritt's buying had not occurred.

(1) Specific issues

(a) Glencore's acquisition of Old Shares on 12 and 13 February

(i) Glencore acquired almost 3% of the total number of Old Shares on 12 and 13 February. It acquired them at prices ranging from $0.11 to $0.145 per share. MP Global's takeover offer for all Old Shares (Share Offer) was set at $0.12 per share, and MP Global did not increase it. MP Global was therefore unable to acquire Old Shares on-market for more than $0.12. Glencore's acquisitions made up approximately thirty percent of the total acquisitions of Old Shares on the two days. The Panel considers it highly likely that the acquisitions by Glencore did affect the market in Old Shares and did move the market price of Old Shares on those days and did contribute to the rise from approximately $0.11 to $0.15 per share on those two days.

(ii) Glencore's buying, and the resultant price rise, may have affected the ability of MP Global to acquire Old Shares on those days, which were crucial days in terms of the success or failure of MP Global's Share Offer and Rights Offer. However, the Panel was not given evidence which would convince it that Glencore's purchases were not primarily directed at acquiring more Old Shares for itself.

(iii) MP Global should have been aware, at the time that it commenced its offers, and at the time it declared its offers to be free of its earlier defeating conditions, that Glencore was entitled, under the "Creep" exception set out in item 9 of section 611 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act), to acquire up to 3% of the voting power in Anaconda.

(iv) MP Global's offers, and its overall strategy for seeking control of Anaconda, were particularly sensitive, or susceptible, to another person acquiring Old Shares during MP Global's offers.

(v) The Panel reviewed the course of trading on the relevant days. >From that and from the other evidence provided by parties, the Panel did not see evidence that Glencore's acquisitions were made in manipulative ways, or indeed in any other way other than seeking to acquire its desired 3% as cheaply as possible, and as Glencore appeared perfectly entitled to acquire such shares, the Panel considered that Glencore's acquisitions of Old Shares on 12 and 13 February 2003 did not constitute unacceptable circumstances. The acquisitions were within the terms of Item 9 of section 611 of the Act, and the Panel did not accept arguments from MP Global as to why the Creep exemption should not have been available to Glencore in these circumstances.

(b) Glencore's acquisition of New Shares between 17 and 19 February

(i) The Panel agreed with the Anaconda 15 Panel that the acquisition by Glencore, on a deferred delivery basis, of Anaconda shares (New Shares) to be issued under the Rights Issue (which amounted to approximately 0.2% of the fully diluted shares in Anaconda following the Rights Issue) was not material in the context of control of Anaconda and did not appear to have contributed to any unacceptable circumstances. The Panel was not satisfied that this acquisition contravened section 606 of the Act. Consequently, the Panel declined the part of MP Global's application that related to these purchases.

(c) Sherritt's failure to sell or exercise its Rights, or accept the Rights Offer

(i) The Panel considered Sherritt's evidence for its reasons in allowing its Rights to lapse, for no value, in light of the existence of the Rights Offer. Although Sherritt's explanations in some areas did not appear credible, on balance, the Panel accepted that Sherritt's decision was an exercise of the business judgment of its executives, without agreement with any other parties, based on commercial imperatives that the Panel accepted were plausible. The Anaconda 15 Panel has set out some of the explanations and concerns put forward by Sherritt for its conduct.

(ii) Sherritt asserted, and the Panel did not receive evidence which adequately rebutted Sherritt's claims, that the potential financial impact on Sherritt associated with these concerns outweighed the value that Sherritt could have received from MP Global for selling its Rights under the Rights Offer.

(iii) The Panel decided that Sherritt's actions in relation to its Rights did not constitute unacceptable circumstances.

(d) Sherritt's failure to accept the Share Offer

(i) The issues in relation to Sherritt's decision to allow its Rights to lapse were also raised in relation to the failure of Sherritt to sell its Old Shares to MP Global under its Share Offer. The Panel decided that Sherritt's decision not to accept the Share Offer was not unacceptable for similar reasons to those relevant to its decision in relation to the Rights lapsing.

(e) Sherritt's acquisition of Old Shares on 13 February

(i) The Panel considered that there was sufficient evidence that Sherritt, in acquiring Old Shares on 13 February 2003 (at the same time as Glencore was also purchasing Old Shares), was seeking to create a false market in Old Shares. The Panel bases this on Sherritt's statements in the submissions that Sherritt gave to the Panel. They include statements that its intention was to "support the market appearance of there being an impending bid with a view to encouraging Glencore to make a bid".

Sherritt was seeking to create an impression in the market of buying pressure from a rival takeover bidder, to reduce the chances of success of the MP Global offers, and to make a higher return on its Anaconda shares.

(ii) Sherritt's acquisitions were made at a very significant time for the MP Global offers and for the market in general. It appears to have been a volatile market, with significant professional investor involvement, and the market was interested in the buying or selling activities of the major players. Sherritt entered the market with significant acquisitions, using an institutional/corporate broker that had not previously been a material acquirer in the market, and buying above $0.12 per share. Glencore made detailed submissions on the trading at the time and its analysis and inferences about why MP Global would not have acquired any Old Shares on market if the Sherritt acquisitions had not been made. The Panel also received detailed submissions from MP Global on the days' trading. The Panel considered that Glencore's and MP Global's views were simply that, the views of two of the parties in circumstances where there are a range of views as to what might have happened on that day.

(iii) The Panel considered that Sherritt's buying, and the way that it was undertaken, was highly likely to have influenced the market. The Panel considered that it was not open to contend that the Sherritt acquisitions, at the time they were made and in the manner they were made, will not have affected the price at which Old Shares traded. As it has said above, it is impossible to determine precisely what the quantum of that effect was. The Panel also accepts MP Global's submissions that it is well possible that Sherritt's actions would have enticed other buyers into the market, making it more difficult for MP Global to acquire Old Shares at its Share Offer price of $0.12 per share.

(iv) The Panel considered that Sherritt's intention and actions were likely to have adversely affected the efficient, competitive and informed market for control of Anaconda shares at a critical point in the MP Global Rights Offer and Share Offer. The Panel considers that such actions constituted unacceptable circumstances.

(f) Association between Glencore and Sherritt

(i) The Panel considered that there was a reasonable inference that Sherritt intended that its actions might generate favour with Glencore.

However, no evidence was presented to the Panel that convinced it that Sherritt's actions were reciprocated and that Sherritt and Glencore became associates in relation to the MP Global offers in general or the on-market buying specifically. As there had been no breach of section 606 of the Act, and the Panel did not otherwise believe that unacceptable circumstances had arisen, the Panel also declined that part of MP Global's application.

(g) Misleading of MP Global

(i) MP Global asserted that it had been mislead by Sherritt in MP Global's telephone conversations with Sherritt in the period leading up to MP Global's decision to declare its Share Offer (and therefore its Rights Offer) free of conditions. The evidence which MP Global presented was not strong enough to overcome Sherritt's firm statements that it had not mislead MP Global but had always made it clear that it was keeping its options open and that MP Global should not rely on Sherritt acting in any particular way, especially not on Sherritt selling to MP Global.

(ii) MP Global's lack of firm evidence concerning its recollections of robust commercial discussions between sophisticated commercial participants in a hotly contested takeover meant the Panel could not prefer MP Global's version over those of the other parties which denied MP Global's version of the couple of critical telephone conversations. The Panel declined that part of MP Global's application.

(2) Decision

The Panel decided that there had not been evidence presented to it which indicated that the on-market buying of shares in Anaconda by Glencore constituted unacceptable circumstances. The Panel reached a similar decision in response to Sherritt's decisions in relation to the Rights Offer and the Share Offer. These decisions affirm the majority of the decision by the Anaconda 15 Panel in declining the application by MP Global.

However, the Panel considered that the actions of Sherritt, in acquiring 0.8% of the Old Shares on-market, at a price well above the MP Global Share Offer price, at a critical point in the offers and Anaconda shareholders' decisions, for reasons which according to Sherritt's own evidence, were intended to create a false market, constituted unacceptable circumstances. The Panel has made a declaration to that effect.

The Panel ordered that those shares be vested in ASIC and disposed of in a bookbuild with the shares to be sold under the Anaconda 16-17 and 18 proceedings.

The Panel ordered that the number of Excess Shares that MP Global was ordered to dispose of in the Anaconda 16-17 and 18 proceedings be reduced by sixty million shares (ie fifteen times the shares ordered to be divested by Sherritt).

The President of the Panel appointed the same members who constituted the Review Panel in the Anaconda 18 and earlier Anaconda applications (Simon McKeon, David Gonski and Ian Ramsay) to consider the review application.

The Panel's reasons for its decision in the Anaconda 19 proceedings will be posted on the Panel's website when finalised.

4. RECENT CORPORATE LAW DECISIONS

(A) INSOLVENT TRADING BY DIRECTORS - THE WATER WHEEL CASE
(By Polat Siva, Clayton Utz)

Australian Securities and Investments Commission v Plymin, Elliott and Harrison [2003] VSC 123, Supreme Court of Victoria, Mandie J, 5 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/may/2003vsc123.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/may/2003vsc123.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Introduction

This case was a civil penalty proceeding brought by ASIC under section 588G of the Corporations Law. The action related to insolvent trading by two companies, Water Wheel Mills Pty Ltd ("Mills") and Water Wheel Holdings Limited ("Holdings") (collectively, "Water Wheel"). Water Wheel was in the business of the purchase and milling of wheat and paddy rice and the distribution of the resulting product. Mills was the operating company of the group, and Holdings was the holding company. The directors put the company into voluntary administration on 17 February 2000. The companies entered into deeds of company arrangement on 30 June 2000.

The defendants to the proceeding were Bernard Plymin, John Elliott and William Harrison. During the relevant period (14 September 1999 to 17 February 2000), Mr Plymin was the managing director of the companies, Mr Harrison was the chairman of the Board of directors and Mr Elliott was a non-executive director. The case concerned insolvent trading alleged to have commenced on or about 14 September 1999. ASIC was seeking relief in the form of declarations of contravention, compensation orders, management banning orders and pecuniary penalties.

Mr Harrison admitted "liability" in the course of the trial and took no further part in it. Mr Plymin defended the proceeding in person but did not give evidence. Mr Elliott was represented by Counsel, gave sworn evidence and conducted a defence.

(2) The facts

Mandie J described the "large volume of evidence" involved in the case and his Honour's judgment contained a detailed analysis of the facts.

Water Wheel entered the rice industry in 1997 by purchasing a rice mill and drying and storage facilities. Water Wheel's purchases of wheat and rice were financed by "off-balance sheet" arrangements with financiers.

Water Wheel's problems with outstanding debts began in around October 1998. At a Board meeting on 12 October 1998, it was resolved that various types of financial information would be required for future Board meetings. This information was still not forthcoming in mid-1999.

Management accounts suggested that for the 11 months to 31 October 1998, there would be a profit of approximately $1 million. In February 1999, Water Wheel's auditors informed Mr Harrison that the results for the financial year to 3 December 1998 were likely to be a large loss of about $1.5 million rather than the expected profit of $1 million. Deloittes were engaged to assist Water Wheel ascertain the cause of the loss. The Board did not accept the auditors' explanations that increased expenditure on overheads was a major reason for the loss. The directors believed the discrepancies could be explained by either uninvoiced sales due to technical problems, or stolen flour (the amount of flour concerned was about 200,000 tonnes). Continuing investigations failed to verify this. Water Wheel delayed the lodgment of the 1998 accounts and the holding of the annual general meeting several times, citing the uninvoiced sales as the reason. The issue of "uninvoiced sales" featured prominently throughout Mandie J's judgment. His Honour described the explanations given by the Board as "puzzling", as having no basis, and stated that Mr "Harrison inexplicably persisted with the ...explanation...". The market was finally informed on 4 November 1999 that there were no uninvoiced sales.

There was a Board meeting on 12 March 1999. At the meeting, the financial controller of the Group (Nankervis) informed the Board of the difficulties in relation to the payment of debts and raised concerns about insolvency. Also in March 1999, a transportation and distribution services provider complained about the late payment of invoices. Mandie J stated that it was rare that this creditor's invoices would be paid within 75 days and it was not unusual for the debt outstanding to it to be $500,000 or more. Nankervis testified that during March and April 1999, many creditors were demanding immediate action and he would speak to Mr Plymin regularly about which creditors were to be paid. Water Wheel's electricity supplier had threatened to stop supply unless a large debt was paid within two hours.

A memorandum considered by the Board at the 12 April 1999 meeting stated that Water Wheel needed $5.7 million in working capital. At that meeting, a director raised concerns about insolvency, and he resigned two days later. Nankervis also described problems with creditors, stating that nine legal demands had been made in recent weeks. Nankervis resigned on 19 April 1999 (effective 30 April) and another director resigned in late July without giving reasons.

At the meeting of 19 April 1999, balance sheets and profit and loss statements showed a trading loss for the four months to 3 April 1999 of approximately $2 million. Nankervis expressed the view that although debtors exceeded creditors, the debtors were zero to 30 days old, whereas the creditors were up to 120 days old, creating cash flow problems. Mr Harrison then arranged for an insolvency expert to attend the meeting and address the Board on the general concept of solvency and the operation of the voluntary administration provisions of the Corporations Law. Mr Elliott gave evidence that he was not at this stage concerned about the solvency of Water Wheel, a proposition which Mandie J found "very hard to accept".

Water Wheel continued to be pressured by creditors and several requests for additional finance were rejected. On 9 June 1999, Water Wheel's banker (ANZ) informed Mr Plymin that it had decided to appoint an investigative accountant (Daly) to review the operations of the Group. By the end of July, ANZ had given Water Wheel a "high risk" classification. The Board decided to sell the flour business and the stock feed business. Despite efforts for a number of months, this never materialised.

Mandie J stated that in early August 1999, "there were a number of other aggrieved creditors...requiring urgent payment of overdue amounts". Half year results to 3 June 1999 disclosed a loss of $2.135 million and showed that creditors were $10.4 million, the ANZ debt was $5.7 million, and current assets were $12.3 million. In a meeting that followed with the auditors, Mr Harrison stated that "it may be appropriate for an administrator to be appointed". In late August 1999, problems with creditors had become so common that procedures were implemented for dealing with creditors. As of 31 August 1999, Water Wheel had total creditors of almost $4.7 million, $4.3 million of which was overdue for more than 30 days, and over $2 million was overdue for 91 days and over. These figures did not include major finance debts owing to grain suppliers.

On 16 August 1999, ANZ placed the facilities "on demand". The bank agreed to withhold its demand for repayment subject to several conditions, including weekly monitoring and the establishment of designated wages accounts. On 14 September 1999, Mr Plymin was informed in a meeting with ANZ that Water Wheel's account had been transferred to Group Credit Management because the bank had decided to end its relationship with Water Wheel. This event was viewed by Mandie J as being critical.

His Honour went on to consider further events that occurred between September 1999 and February 2000.

A trial balance produced on 15 February 2000 showed a trading loss to 3 December 1999 of over $6.7 million. A Board meeting was held on 16 February 2000 and a decision was made to appoint a voluntary administrator. This occurred the following day. The companies entered into deeds of company arrangement on 30 June 2000.

(3) Findings

(a) Insolvency

Mandie J found that Water Wheel was insolvent within the meaning of the Corporations Law from 14 September 1999 onwards. His Honour stated that it was unnecessary to decide whether the Group was insolvent prior to that date, although he stated that "it is quite possible that it was".

His Honour stated that throughout 1999, Water Wheel was not paying its debts as and when they fell due. His Honour considered some of the action taken by creditors in order to ensure payment of outstanding debts, including retaining debt collectors, threatening and instituting legal proceedings, placing Water Wheel on a cash with order basis, threatening to cut supply unless debts were paid in a short period of time and accepting post-dated cheques. His Honour stated that in addition to the debts referred to in the judgment, there were about 140 other overdue debts.

His Honour stated that the non-payment of debts by a company does not necessarily indicate an inability to pay debts, but that the size of some of the debts, and the delay in their payment (or their permanent non-payment) was sufficient in this case to justify the inference that Water Wheel was unable to pay its debts. There were also other circumstances; the stock feed business was losing money, the flour and rice businesses were suffering and other sources of finance could not be obtained. This meant that the trading losses throughout 1999 were being financed by the non-payment of debts.

Mandie J described the meeting between Water Wheel and ANZ on 14 September 1999 as "an important event". At this meeting, the bank advised that any funds obtained from the proposed sale of the flour business would be required to reduce the bank's debt and that the bank had decided to end its relationship with Water Wheel. His Honour reached the view that Water wheel was insolvent from this date.

Given the finding that there was actual insolvency, His Honour found it unnecessary to determine ASIC's alternative submission in relation to deemed insolvency under section 588E(4) of the Corporations Law.

(b) Directors' duty to prevent insolvent trading

His Honour found that neither Mr Plymin nor Mr Elliott took any steps to prevent Water Wheel from continuing to trade, and thus held that they failed to prevent Water Wheel from incurring each of the relevant debts within the meaning of section 588G(2).

(c) Awareness of reasonable grounds for suspecting insolvency

Mandie J found that Mr Elliott knew of various facts and matters before 14 September 1999 which, when taken together, gave rise to reasonable grounds for suspecting insolvency as at that date. His Honour also noted that the reasonable grounds grew in strength in September 1999 and the following months.

His Honour went through an analysis of matters of which Mr Elliott was aware and found that it was apparent to Mr Elliott and would have been to any reasonable director, "that Water Wheel was in a state of continuing financial crisis and no solution was in sight". His Honour stated that the matters of which Mr Elliott was aware "would cause a director of reasonable competence and diligence to have an actual apprehension or fear concerning, or a mistrust of, Water Wheel's ability to pay all of its debts as and when they become due and payable". Mandie J did not make a positive finding on this issue as the legislation does not require a finding of suspicion of insolvency, but rather only reasonable grounds for suspecting insolvency.

In relation to Mr Plymin, Mandie J found that as managing director, Mr Plymin was aware of all the matters of which Mr Elliott was aware and also of numerous other matters, and of considerable more detail than Mr Elliott. His Honour held that ASIC had made out the requirements of section 588G(2)(a) and also accepted ASIC's submission in relation to section 588G(2)(b).

(d) Debts incurred

Mandie J went on to consider a number of issues in relation to the debts incurred by Water Wheel. His Honour rejected an argument by Mr Elliott that in relation to a number of debts, there was insufficient evidence to prove delivery. His Honour stated that the plaintiff had provided sufficient relevant documents proving the amount and nature of the debts, and that it was not incumbent upon the plaintiff to also produce contemporaneous evidence of delivery.

His Honour dealt individually with each of the debts in relation to which specific issues were raised, and resolved each of those. His Honour then considered whether debts were incurred at the date of entry into a contract or at the date of delivery of goods or provision of services. Mandie J considered the law in relation to the topic and stated that "I think that it will often be the case...that under a contract for the sale of goods where delivery times are left for future orders or instructions that...a debt will be incurred on each occasion when a delivery is ordered." His Honour stated that it was unnecessary to decide for the purposes of this case whether a director could be exposed to liability at an earlier point in time in relation to a contingent debt, and then dealt with specific debts.

Mandie J stated that in respect of each of the creditors, there was at least one contravention committed and, in some cases where a number of debts were incurred with one creditor, there will have been more than one contravention.

(e) Loss and damage suffered

In relation to loss and damage, his Honour found that the loss and damage suffered by the relevant creditors of Mills was 14.5% less than the size of the debts incurred, as a 10% interim dividend had been paid, and the administrator was of the view that there would be a further distribution to creditors "in the order of 4.5 cents in the dollar". In relation to the debts incurred by Holdings, the loss and damage was 32% less than the debts incurred.

His Honour rejected an argument by the defendants that due to a release contained in the deed of company arrangement, the creditors could not suffer any loss and damage. His Honour stated that for the purposes of section 588J(1)(c), the creditors suffered loss and damage due to the company's insolvency to the extent that the dividends did not fully repay the debt, even if the debt is extinguished and the company has the benefit of a release. His Honour rejected the submission by Mr Elliott that section 588J only applies to liquidations, stating that there was no basis for a conclusion that it did not apply to a company in administration or to such a company where a deed of company arrangement had been executed.

His Honour stated that the total loss and damage suffered by creditors of Mills was approximately $1.695 million (less an estimated future dividend of approximately $76,275) and the creditors of Holdings approximately $1.48 million (less $473,600). Thus, the net amount which might become the subject of compensation orders is approximately $2.619 million.

(f) Defences

His Honour stated that although neither of the defendants pleaded the defence under section 588H(2), it was not made out because neither Mr Plymin nor Mr Elliott had reasonable grounds during the relevant period to expect that Water Wheel was solvent.

In relation to the 588H(3) defence based on a reliance on information provided by management, his Honour stated that Mr Elliott did not have reasonable grounds to believe that management was fulfilling the responsibility of providing adequate information to him. His Honour described Mr Elliott as an "experienced businessman and company director, who showed himself in the witness box to be a very intelligent and astute individual" and that Mr Elliott had "turned a blind eye to the details of Water Wheel's liquidity crisis in the hope that 'something would turn up'". Mandie J found that there were no reasonable grounds for Mr Elliott to believe that Mr Plymin was a competent and reliable person within the meaning of section 588H(3). His Honour also rejected that, as required under section 588H(3), Mr Elliott "expected" that the company was solvent.

In relation to Mr Plymin, Mandie J stated that there was no direct evidence of his beliefs or state of mind, and that he was not satisfied that Mr Plymin expected solvency.

(4) Conclusions

His Honour found that Mr Plymin and Mr Elliott had contravened section 588G on each occasion when each of the debts were incurred. The substantive matters remaining to be considered in a later hearing are whether the Court should relieve Mr Plymin or Mr Elliott under section 1317JA(2), whether compensation orders should be made under section 588J(1), whether declarations as to contravention should be made pursuant to section 1317EA(2), and whether management banning orders or pecuniary penalties should be imposed under section 1317EA(3).

(B) RUNNING AWAY WITH THE ACCOUNTS: PREFERENTIAL PAYMENTS IN INSOLVENCY IN THE BUILDING INDUSTRY
(By Annie Mould, Freehills)

Wily v Eastern Elevators Pty Limited [2003] NSWSC 377, New South Wales Supreme Court, Dunford J, 6 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswsc377.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswsc377.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Background

The New South Wales Supreme Court was required to consider whether payments made to Eastern Elevators (Eastern) by Goltep Constructions (NSW) Pty Ltd (Goltep) were preferential payments under section 588FA of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), and could therefore be reclaimed by the liquidator, Wily. The Court also considered the issue of "running accounts" in the context of the building industry and further whether the statutory defence in section 588FG(2) applied.

(2) Facts

The second plaintiff, Goltep, contracted with Oceanview Apartments Pty Ltd to construct apartments. Eastern was sub-contracted to construct and install a passenger lift and carried out significant works between June and September 1997. The agreement between Eastern and Goltep provided for a deposit and subsequent monthly payments. Eastern received a series of various 'progress payments'. The particular payments in question in this case amounted to $39,000, being the fourth and fifth payment in a series of eight payments.

In August 1997, Goltep went into administration and subsequently into liquidation on the basis that it was unable to pay debts from its own funds as and when they fell due.

The liquidator attempted to recoup money paid to Eastern on the basis of being preferential payments under the regime in sections 588FA-588FG. Eastern argued that the payments were not preferential, that the relationship between the parties was a continuing relationship where a running account was operated. Further, Eastern argued that the statutory defence applied as they did not suspect that Goltep was or may become insolvent in the relevant period.

As to the issue of whether Eastern has reason to suspect that Goltep may become insolvent in the relevant period, Eastern gave evidence that it had never received any information from Goltep suggesting financial difficulties. Further, Goltep invited Eastern to tender for a future project. The fact that Goltep had made the 'progress payments' also tended to support this conclusion. Indeed, had these payments not been made, Eastern would not have completed works on the lift. Late payment of accounts by Goltep did not foretell insolvency as this practice is rife in the industry.

(3) Main issues in dispute

At first instance, the payments to Eastern were held to constitute part of a continuing business relationship but not an unfair preference within section 588FA. Further, the statutory defence contained in section 588FG was held to apply in the event that an unfair preference did exist.

The issues on appeal were whether the Magistrate had erred in finding that at the time the relevant payments were made they were made as part of a running account in a continuing business relationship and, if so, the effect of this. Secondly, on appeal, the court considered whether the statutory defence in section 588FG(2) had been established.

(4) Overview of applicable legislation

Section 588FF(1) enables the court to order repayment of money paid under a transaction on the basis that it was an insolvent transaction. Only transactions occurring within six months of the winding up of the company can be impugned in this manner (section 588FE(2)).

The concept of an unfair preference to the creditor is central to this case. Section 588FA defines an unfair preference as the situation where the creditor to whom the payment was made (in respect of an unsecured debt) would receive more from this transaction than if the transaction was set aside and the creditor was to prove for the debt in the winding up of the company.

Section 588FA(3) deals with the situation that the creditor claimed to exist; that of a 'continuing business relationship' which essentially involves a 'running account' where the level of indebtedness to the creditor fluctuates from time to time as a result of a series of transactions. These transactions are deemed to form a single transaction for the purposes of section 588FA(1).

The statutory defence (section 588FG(2)) requires good faith transacting for valuable consideration and an absence of a suspicion that the debtor is or would become insolvent.

(5) Running accounts

(a) What is a "running account"?

In broad terms, the basis of a running account is a continuing relationship between the debtor and the creditor with an expectation that further debts and credits will be so incurred (Sutherland (as liquidator of Sydney Appliances Pty Ltd (in liq) v Eurolinx Pty Ltd [2001] NSWSC 230).

To determine whether a particular account is part of a wider transaction or a "running account", a two-fold test is applied. The first limb looks at the purpose of the payment and the second limb looks to the ultimate effect of the payment.

(i) Purpose test

"If the sole purpose of the payment is to discharge an existing debt, then the effect is to give this creditor preference over the other creditors..." thereby invoking section 588FA. However, "if the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the valid of the goods or services acquired" (Airservices Australia v Ferrier (1996) 185 CLR 483).

(ii) Ultimate effect test

The second limb considers the effect that the payment ultimately produced in fact, as opposed to the immediate effect. Since the immediate effect would clearly be a reduction in indebtedness, the ultimate effect is examined.

If the creditor has provided goods or services to a greater value than payments made in the given period, then it will not be considered a preferential payment. However, if the effect of the payment is to reduce the initial debt, then it will be considered a preferential payment.

In Sutherland v Eurolinx, Santow J restated the Purpose and Ultimate Effect tests in three key points:

- no cessation of the mutual assumption of payment and reciprocal supply throughout the relevant period;
- payments must continue to induce further supply of goods or services, as an operative and mutual purpose; and
- the purpose of continuing supply must not be subordinated to a predominant purpose of recovering past indebtedness.

(b) Running accounts in building contract cases

In an analogous case (Re Thomson Land Ltd; Walsh as liquidator of Thompson Land Ltd v Salzer Construction Pty Ltd (2001) 3 VR 305) it was held that, as the price for the work was a fixed sum payable by instalments, the payments were not a series of transactions forming a running account. Further, in that case, citing Airservices Australia v Ferrier, it was held that a running account does not fit the concept of a building contract where progress claims are made separately and in isolation from each other...". Barwick CJ in Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266 held that where a building contract "predicates progress payments from time to time for work done" these payments cannot be categorised as "relevantly connected with the future supply of services so as to indicate that there is a mutual assumption by the parties ... that there will be a continuance of the relationship". Unless it can be shown that the payment is to induce the continuance of the debtor-creditor relationship, the fact that the payment was made partly, in a general sense, for the purpose of inducing further work, is irrelevant.

(c) Concluding comments on running accounts

There must be a contract, of some kind, requiring the supply and payment for goods or services (Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation (Cth) [1999] 1 VR 489). Further, there must be an exchange of payment and supply, as opposed to payment of sales tax (Sands) or a levy even where a continuing relationship also exists between the parties (Olifent v Workcover Corporation of South Australia (1996) 135 FLR 423).

(6) Outcome in this case regarding the running account

The payments were not regarded as payments made in the course of a running account in a continuing business relationship. Dunford J set out four reasons for this finding.

Despite the claim by Goltep that the payments were made to secure the provision of future services, the future services were not of greater value than the amount of the claimed "preferential payments".

The transactions did not result in a fluctuating balance, rather, each payment was a progress payment for past work specifically invoiced.

Progress payments under a building contract were rightly decided in Victoria to be inconsistent with the concept of a running account (Walsh v Salzer).

If the payments were part of a running account, Goltep has miscalculated the preference. The true preference being the difference between the highest amount owing during the six-month period before winding up and the amount owing on the last day.

(7) Statutory defence of suspecting company would not be solvent

The main issue for the court to decide was whether at the time of the payments in dispute, Eastern subjectively had no reasonable grounds for suspecting that Goltep was insolvent or would become insolvent and objectively whether this subjective belief was reasonable. As defendant, Eastern carried the onus of proof (Sutherland).

The generally accepted definition of "a suspicion" in this context is expounded by Kitto J in Queensland Bacon Pty Ltd v Rees being "something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust" amounting to "a slight opinion, but without sufficient evidence".

The existence of a suspicion must also be examined through "contemporary eyes of the parties" by looking at the "commercial circumstances then prevailing between them", as opposed to looking at the issue in hindsight. It is necessary to ascertain the factors that were apparent to the payee, and the cumulative impact that knowledge of these factors had or should have had (in an objective sense) upon the payee (Sutherland).

Barwick CJ in Sandell v Porter (1966) 115 CLR 666 highlighted factors that do not necessarily lead to a conclusion of a suspicion of (impending) insolvency including: use of instalment payments, post-dated cheques (where this is general industry practice) and late payment.

(8) Outcome in the case regarding the statutory defence

As it was not uncommon industry practice for periodic and late payments to be made, furthered by a lack of warning by Goltep of their financial difficulties and the Hurstville tender offer, Eastern did not suspect insolvency, nor on reasonable grounds should they have so suspected impeding insolvency. Therefore, the defence applied.

(9) Other issues

This case also dealt with the fact that appeals to the New South Wales Supreme Court from the Local Court can only deal with errors of law and cannot review the Magistrate's findings of fact. Therefore, the error in finding that a running account did exist in fact could not impact on the outcome of the appeal. There were no errors of law made by the Magistrate.

(C) IMPUTED WAIVER OF LEGAL PROFESSIONAL PRIVILEGE BY PLEADING STATE OF MIND
(By Guy Gaudion and Brian Maddigan, Freehills)

Liquorland (Australia) Pty Ltd v Anghie [2003] VSC 73, Supreme Court of Victoria, Byrne J, 4 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/april/2003vsc73.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/april/2003vsc73.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Introduction

A party to litigation who, by its pleading, puts in issue legal advice received by it, runs the risk that there will be an imputed waiver of any privilege attaching to that legal advice. For example, a party alleging that its solicitors were negligent in the giving of advice to it, opens up the issue of the content of the legal advice given. An imputed waiver of privilege in that advice is likely to follow. The potential for an imputed waiver is less obvious, however, where a party's pleading introduces an issue, such as that party's state of mind, on which legal advice could have had a bearing. A waiver of this kind was found to have occurred in Liquorland (Australia) Pty Ltd v Anghie.

(2) Background

This litigation arose out of the takeover by Liquorland of Australian Liquor Group Ltd (ALG) in 2001. In an action against those who were the directors of ALG at the time of the takeover, Liquorland alleged (among other things) that the target's statement lodged by ALG contained misleading and deceptive statements and omissions in breach of section 670A(1) of the Corporations Law (as it then was).

To establish its entitlement to damages, Liquorland was required to show that its loss was caused by the defendants' misleading and deceptive statements and omissions in the target's statement. In summary, Liquorland claimed that it relied on the target's statement in proceeding with the takeover of ALG. More precisely, Liquorland pleaded that if the target's statement had not contained misleading and deceptive statements and omissions, Liquorland would have taken certain steps which would have resulted in it not proceeding with the takeover offer, or declining to declare the offer unconditional. Specifically, Liquorland alleged that, had the required disclosures been made in the target's statement, Liquorland would have relied upon a material adverse change clause contained in the takeover offer.

It was contended by two of the defendants, in an interlocutory application, that this aspect of Liquorland's pleading put in issue Liquorland's state of mind, with effect that privilege was waived in legal advice which related to the formation of that state of mind.

The question confronting Justice Byrne was whether Liquorland, by asserting that it acted in reliance upon a matter, had put in issue its state of mind in a manner which resulted in an imputed waiver of legal professional privilege with respect to legal communications which might have had a bearing on its arriving at that state of mind.

(3) Liquorland's state of mind in issue

An interesting aspect of this case is that Byrne J's finding that Liquorland's state of mind was in issue, was based upon an implied assertion that his Honour held was contained in the pleading, rather than an express assertion. His Honour held that Liquorland, by expressly pleading what it would have done if the defendants had made the required disclosures, made an implied assertion as to whether the facts known to it before declaring the offer unconditional amounted to a material adverse change entitling it to withdraw the offer. Whereas Liquorland's pleading contained no express allegation about whether or not, on the information disclosed to Liquorland prior to the takeover, Liquorland had formed a view about whether the material adverse change clause could be invoked.

(4) Nexus between Liquorland's state of mind and privileged legal advice

Having found that Liquorland's state of mind was in issue, Byrne J next had to consider whether this had the effect of waiving privilege over any legal advice. Byrne J observed that Liquorland's pleading did not refer to legal advice being given in respect of the matters impliedly asserted by the pleading. However, the defendants argued that, since the takeover was carried out in close consultation with lawyers, it is likely that these matters were discussed in communications between Liquorland and its lawyers.

The authorities on imputed waiver were comprehensively reviewed by Byrne J in his consideration of the required nexus between the state of mind put in issue, and any legal advice, before a waiver will be held to have occurred.

His Honour noted an apparent divergence between the Federal Court judgments and the judgments of the Supreme Courts of South Australia, New South Wales and Tasmania in relation to this question.

Byrne J preferred the narrower approach of the Supreme Courts, and rejected the proposition that a plea of reliance ipso facto waives privilege in respect of privileged communications which occurred about the time of the reliance. Further, Byrne J held that the question of waiver was not determined by the chronological coincidence of the privileged communication and the formation of the state of mind in issue. The additional factor his Honour held to be present in this case, was that the particular state of mind found to be in issue related to a legal question, namely, whether Liquorland had a legal right to withdraw its offer in reliance on a material adverse change clause.

(5) Unfairness

The next issue considered by Byrne J was whether Liquorland, by putting in issue its state of mind and continuing to assert a claim of privilege over associated documents, had adopted a position which was inconsistent and unfair (in the sense explained by the High Court authorities on waiver of privilege). His Honour noted that any waiver of privilege would be limited to the extent necessary to avoid unfairness.

In the result, Byrne J held that it would be relevantly unfair for Liquorland to make the implied assertions which he identified, and at the same time to assert privilege over legal communications likely to have had a bearing on the relevant state of mind. Consequently, his Honour held that privilege had been waived in any such communications. (The order made by his Honour defining the limits of the waiver does not appear in the judgment.)

(6) Implications for solicitors undertaking discovery

Byrne J usefully considered the task facing a solicitor undertaking discovery for a client who has waived privilege by expressly or impliedly putting in issue its state of mind. His Honour indicated that the question to be asked by such a solicitor was not whether a given privileged communication did in fact have an impact on the client's relevant state of mind. Rather, the question is whether the communication could have had an impact on that state of mind. In his Honour's view, the expression 'could have had' should be taken as indicating not mere possibility, but probability or likelihood.

(D) MAREVA INJUNCTIONS AND THE ACCC
(By Veronica Holloway, Clayton Utz)

In the matter of Australian Competition and Consumer Commission v Chaste Corporation [2003] FCA 180, Federal Court of Australia, Spender J, 12 March 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fca180.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fca180.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Brief background to principal proceedings

In 2002, the ACCC commenced proceedings against Chaste Corporation Pty Limited ("Chaste") alleging that, from about December 1999 to December 2001, Chaste carried on the business of selling distributorships in a purported weight loss product known as TRIMit. The ACCC alleged that written agreements Chaste entered into with area managers set floor prices in contravention of the resale price maintenance provisions in section 48 of the [Trade Practices Act 1974 No. 51 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) ("TPA").

The ACCC also alleged that as Mr Foster, who managed Chaste, was knowingly concerned in Chaste maintaining the wholesale and retail price of the TRIMit product, he was knowingly concerned in the contravention by Chaste of section 48 of the TPA.

The ACCC sought pecuniary penalties against Mr Foster. The consequence of a breach of section 48 of the TPA can be the imposition of pecuniary penalties under section 76 of the TPA of up to $10 million (corporations) or $500,000 (individuals).

(2) Orders sought by the ACCC against Mr Foster

By a notice of motion, the ACCC sought several orders against Mr Foster, being:

(a) a mareva injunction that Mr Foster be restrained from removing from the jurisdiction, or from disposing of or otherwise dealing with assets in which he had an interest, except to pay money or transfer or assign assets to the Official Liquidator of Chaste; and

(b) an order restraining Mr Foster from leaving Australia.

The ACCC sought these orders in aid of the pecuniary penalty order on the grounds that, given the evidence, there was:

(a) a prima facie case against Mr Foster for a civil penalty for resale price maintenance. Spender J accepted that there was evidence to support this prima facie case; and

(b) a real risk that Mr Foster would avoid the payment of a penalty and not remain in Australia. Spender J also accepted the ACCC's evidence of this risk.

(3) Did Court have power to oblige the ACCC?

The Court needed to consider whether it had power under section 23 of the [Federal Court of Australia Act 1976 No. 156 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default) to grant this mareva injunction and restraining order in circumstances where it was being sought by the ACCC to support the pecuniary penalty orders. Section 23 of the Federal Court of Australia Act provides that the Court has powers to:

"... make orders of such kinds, including interlocutory orders, and to issue, or to direct the issue of, writs of such kind, as the court thinks appropriate."

(4) Mareva injunction

Spender J held that the Federal Court did not have such power. He applied the following reasoning:

The test of whether a mareva injunction should be granted was stated by Lord Denning MR in Rahman (Prince Abdul) v Abu-Taha [1980] 3 All ER 409 at 412 as being:

"if the circumstances are such that there is a danger of [the defendant's] absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

The mareva injunction was sought by the ACCC to preserve assets which might be applied to meet any penalties that the Court might be minded to impose for breaches of the retail price maintenance provisions of the TPA.

A claim for civil penalties by the ACCC for contravention of the TPA dealing with retail price maintenance does not involve any legal or equitable right in the ACCC. When an interlocutory injunction is sought, it is necessary to have the legal or equitable rights in respect of which final relief is sought.

A mareva injunction applies to judgments, not to penalties or fines, which is what the ACCC was seeking. That is, Spender J held that penalties were not judgments.

A mareva injunction may be granted in favour of persons whose status as a creditor is in dispute so as to preserve the status quo:

(a) however it is not the purpose of a mareva injunction to provide security in advance; and

(b) the ACCC is not a creditor - it is the applicant for imposition of civil penalties.

In summary, there is no power under section 23 of the Federal Court of Australia Act as, in essence, the consequence of a breach of the principal proceedings for resale price maintenance are punitive and not compensatory or restitutionary.

(5) Restraint orders

Despite Spender J accepting that there was strong evidence that Mr Foster would abscond, the restraint orders were not granted in essence for the same reasons set out above, namely that there was no power under section 23 TPA for the Court to make those orders.

(E) THE EFFECT OF A DEED OF COMPANY ARRANGEMENT ON PERSONAL GUARANTEES
(By Karen O'Flynn and Andrew Dienhoff, Clayton Utz)

Helou v P D Mulligan Pty Limited [2003] NSWCA 92, New South Wales Court of Appeal, Mason P, Sheller JA, Davies AJA, 24 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswca92.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswca92.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

This decision considers whether a creditor can pursue proceedings against a guarantor despite the existence of a deed of company arrangement entered into by the principal debtor.

(1) Facts

The creditor, PD Mulligan Pty Ltd ("Mulligan"), was due to be paid the sum of $107,304.98 by 22 June 2001 by the debtor, Belmore Meats Prestons Pty Limited ("Belmore"). The debt was not disputed.

On 9 July 2001 Belmore ceased trading and an administrator was appointed. On 30 August 2001, at a meeting convened by the administrator pursuant to section 439A of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), Belmore's creditors resolved that the company enter into a deed of company arrangement. Mulligan was one of the creditors voting in favour of that resolution.

A deed of company arrangement was entered into on 13 September 2001 (the "Deed"). The Deed expressly bound Mulligan as a creditor of Belmore as at 3 August 2001. As at the date of the trial, no dividend had yet been paid under the Deed. The Deed provided that Belmore would be released from all claims when the final instalment of any dividend was paid.

The appellant, Mr Helou, was a director and shareholder of Belmore. He had provided a written guarantee to Mulligan on 21 July 1999 in consideration of credit terms being provided to Belmore. Under the guarantee, Mr Helou guaranteed payment of "all and any monies due and payable by the Customer to the Supplier in respect of the goods sold".

On 9 October 2001 Mulligan demanded payment under the guarantee from Mr Helou. Mulligan then commenced proceedings against him on 1 November 2001.

(2) Decision

The question for the Court of Appeal was whether the existence of the Deed prevented the creditor from being able to sue the guarantor. It was held, unanimously, that it did not.

In the appeal it was not argued that the guarantee was discharged by virtue of the scheme effected as between Mulligan and Belmore. Instead it was submitted that the guarantee had ceased to engage the principal debt because that debt was no longer "payable" when the proceedings were commenced. It was contended that Belmore's debt was only due and payable between the date it was due, on 22 June 2001, and the date the Deed was entered into. Thereafter, it was said, the debt ceased to be payable within the language of the guarantee.

Importantly, the Court noted that the guarantee in this case did not require the debt to remain due and payable or due and owing. The Court held that the Deed did not make the debt cease to be payable in the sense that Belmore was no longer obliged to discharge it "immediately" or "presently". The debt remained both due and payable and was provable accordingly. The Deed, it was held, merely suspended certain types of enforcement proceedings as specified in the Deed (which did not include a claim against a guarantor).

The Court also held:

"The function of a guarantee is to give the creditor the right to go against the third party in the event of the principal debtor's inability to pay. It would therefore have frustrated its very purpose if it ceased to operate according to its terms, merely because the debtor has become bankrupt, or gone into liquidation or entered into a scheme of arrangement."

Accordingly the Court dismissed the appeal.

(3) Comment

Whilst the terms of the guarantee (and perhaps the deed of company arrangement if it is expressly referred to the guarantee) could affect the position, the case establishes that entering into a deed of arrangement will not prevent proceedings against a guarantor to recover a debt of the principal debtor that is otherwise due and payable.

One issue the Court was not required required to consider fully, however, is the effect of the creditor receiving a final dividend instalment pursuant to the deed of arrangement. In this case a dividend had not yet been paid. However the Court noted that "if and when a final dividend instalment is paid the debt will be discharged and released (clause 11 and section 444H), but that time has not yet arrived". It is long established that an absolute release of a debtor extinguishes the debt and accordingly the creditor also loses his or her right against the guarantor (Commercial Bank of Tasmania v Jones [1893] AC 313, recently applied in Herskope v Perpetual Trustees (WA) Ltd (2002) 41 ACSR 707). Whether an absolute release has been given is matter for interpretation of the terms of any release.

Section 444H of the Corporations Act provides:

"A deed of company arrangement releases a company from a debt only in so far as:

(a) the deed provides for the release; and

(b) the creditor concerned is bound by the deed."

In this case clause 11 of the Deed provided that Belmore would be released from all claims when the final instalment of any dividend was paid.

In Hill v Anderson Meat Industries Ltd [1972] 2 NSWLR 704 it was held that, pursuant to section 181 of the Companies Act 1961, the extinguishment of the debt under a scheme of arrangement occurred by law, not the agreement of the parties, and therefore the guarantee was unaffected by the scheme. This decision infers that any release of the company pursuant to the scheme (even upon payment of a dividend) does not amount to a release of the guarantor.

However, it was noted by the trial judge in Helou that the wording of section 181 of the Companies Act 1961 and section 444H of the Corporations Act differ. Section 444H appears to contemplate that the terms of the release are determinative of the nature of that release. As a dividend payment had not been made in Helou, this issue was not directly considered on appeal.

For the avoidance of doubt it is accordingly suggested that proceedings against the guarantor be commenced prior to the payment of any dividend by the company in order to fall within the ambit of the decision.

(F) CORPORATE SUCCESSION: DISPUTED SHARE ENTITLEMENTS AND OPPRESSIVE CONDUCT
(By Sam Cottell and Marcus Marchant, Clayton Utz)

Cooke v Fairbairn; Fairbairn v Cooke [2003] NSWSC 232, Supreme Court of New South Wales, Bryson J, 14 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswsc232.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswsc232.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Background

Mr W P Cooke ("WP") was the registered holder of 50% of the shares in Aluminium Louvers and Ceilings Pty Ltd ("ALC"). ALC was established by WP's father, Mr W N Cooke ("WN"), who died on 26 December 2000. At that time, WN was the registered holder of 30% of the shares in ALC. WN was also the beneficial owner of a further 20%. WN's estate was represented in the proceedings by Mr Fairbairn ("Fairbairn"), who was the sole executor of WN's estate.

Pursuant to WN's last will, all of WN's shares in ALC were left to his second wife, Mrs Dorothy Cooke, not WP. WP was a son of WN's first wife. WP was also the general manager and a director of ALC. According to WP, during the period of approximately 10 years prior to WN's death, WN had in effect handed over the reigns of control of ALC to WP.

WP claimed a declaration that he had an absolute entitlement to the shares which formed part of WN's estate. WP's claim was based upon an oral agreement alleged to have been made between WP and WN during 1989 to the effect that WP would become the beneficial owner of all of WN's shares upon WN's death. Fairbairn, as executor, counterclaimed by seeking a declaration that the shares properly formed part of WN's estate. Additionally, Fairbairn sought a declaration that the affairs of ALC had been and were being conducted oppressively by WP. Fairbairn sought related orders under sections 233 and 461 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) that ALC be wound-up or, alternatively, that WP be ordered to buy-out the shares owned by WN's estate.

(2) Who was entitled to the shares?

Bryson J examined the evidence that WP presented in relation to the existence of the alleged oral agreement. This evidence was principally contained in an affidavit deposed by WP in relation to a 1989 conversation between WP and WN regarding plans for the succession of ownership of ALC in the event of WN's death. According to WP, during that conversation WN said words to the effect that "You will get my shares. I had a will drawn up by the ANZ bank at Liverpool. You are getting my shares". The consideration for the alleged oral agreement was said to comprise a promise by WP that WN would continued to be employed and paid a full wage by ALC for as long as WN lived. There were no written records of the alleged agreement.

Given that the claim made by WP depended upon WP's own evidence of an oral arrangement made with a deceased person, Bryson J considered that WP's claim needed to be scrutinised very carefully (Plunkett v Bull (1915) 19 CLR 544 per Isaacs J at 548-549). Given the lack of significant (if any) corroborating evidence and the existence of other evidence relating to the affairs of ALC, which showed that WP was not a scrupulously honest person (this evidence was a "considerable disadvantage" to WP's claim), Bryson concluded, on the balance of probabilities, that there was no such oral arrangement. Furthermore, Bryson considered that the alleged agreement was indefinite in character and that the family context made it difficult to discern contractual intention. Accordingly, Bryson dismissed WP's claim that he was entitled to any of the shares in ALC which formed part of WN's estate.

In reaching this conclusion, Bryson had regard to evidence which suggested that the alleged agreement did not exist. This primarily related to the behaviour of WN after the alleged agreement had been reached. In particular, WN made wills on several occasions (including his last will) which were inconsistent with the alleged agreement. WN also conducted himself at board meetings relating to other share transfers which indicated that he considered himself under no obligation to WP with respect to WN's shareholding. Additionally, there was no evidence of any claim having been made or any other measures having been taken by WP during WN's lifetime to support a conclusion that the alleged oral agreement existed. WP never sought to have the alleged agreement recorded in writing; nor did he assert his claim in contexts where the shareholdings of the company were discussed, such as during board meetings of ALC.

Despite the foregoing, Bryson J actually found that "it could well be true" that WN did at some time promise to WP that WP would inherit ALC. Nevertheless, the Court considered that even if a promise had been made, that did not of itself support the conclusion that WP had an enforceable contractual right to the relevant shares.

(3) Was there oppression?

Fairbairn contended that there had been oppression in several respects. In particular, Fairbairn alleged that WP had, by reason of various self-interested dealings with ALC, breached his fiduciary duties as a director of ALC. Fairbairn also claimed that the dividend policy (moreover the lack thereof) of ALC amounted to oppression. These two main grounds of oppression were examined by the Court in more detail.

In relation to the breach of fiduciary duty claim, the Court noted that there had been breaches by WP insofar as he had self-interestedly dealt with the money of ALC in circumstances which could not possibly have been intended to be dealings in good faith with the company's resources for the benefit of the company as a whole. Rather, the relevant dealings were wholly directed to WP's special interests and the interests of persons related to him e.g. his wife. The dealings included the payment of an above market salary to WP, the ongoing payment of a salary to his wife (even though she performed no work for ALC), drawing excessive travel expenses (including expenses for personal journeys unrelated to the affairs of ALC), participation in the proceeds of unrecorded cash sales of scrap metal (certain proceeds were received directly by WP, rather than ALC) and the use of petrol cards for private use by WP and his relatives.

In ALC's context, being a relatively small family company where some members (i.e. Fairbairn) did not participate in or benefit from self-interested distributions, the Court considered that WP's self-interested distributions operated oppressively on Mr Fairbairn and the shareholding to which he, as executor of WN's estate, was entitled. In reaching this conclusion, Bryson J referred to various authorities (including Martin v Australian Squash Club (1996) 14 ACLC 452 and Sandford v Sandford Courier Service Pty Ltd (1986) 10 ACLR 549) for the proposition that oppression can be constituted by breaches of fiduciary duties, such as mixing personal and company affairs, inadequate record keeping (so as to cause difficulty in ascertaining a company's true financial position) and opposing attempts by members to have access to company records and to participate in meetings. In particular, Bryson noted the observation of Hodgson J in Martin v Australian Squash Club that some relatively small-scale matters may support an overall conclusion that there had been oppression. Importantly, the Court considered that WP's self-interested distributions only became oppressive after WN died. Prior to that time, the Court observed that WN had in fact been involved in similar self-interested distributions. Nevertheless, the Court concluded that WN's tolerance of or participation in such behavior was only an applicable consideration to events during WN's lifetime, not afterwards. In other words, WP's continuation after WN's death of practices which WN may not have been able to complain of during his lifetime, nevertheless constituted oppression.

In relation to the dividend policy claim, the Court concluded that there was "no reasonable prospect" of dividends being paid (historically, none had been paid). In fact, the Court considered it "very probable" that WP would use his 50% shareholding to deadlock or impede changes to ALC's dividend practices. Bryson J referred to Reid v Bagot Well Pastoral Co (1993) 12 ACSR 197 as an example of oppression based upon a lack of dividends. Furthermore, WP's own evidence demonstrated that he had never actually turned his mind to whether ALC should pay a dividend, rather than distribute profits in the form of wages to himself, his wife and, until his death, WN. This evidence clearly placed ALC's dividend policy in the oppressive category of being "commercially unfair", as described by Debelle J in Reid v Bagot.

Overall, the Court held that Fairbairn was entitled to a remedy on the basis of oppression.

(4) The oppression remedy: winding-up or buy-out?

The Court was inclined to order that WP buy-out all of the shares held by Fairbairn. However, before making an order to that effect, Bryson J considered it appropriate to give the parties an opportunity to consider the Court's reasons (including its conclusion that $650,000 was the appropriate price to be paid in a compulsory buy-out) and whether a compulsory purchase would be practicable or whether ALC should be wound-up.

(G) CONSENT OF A SOLE SHAREHOLDER TO FRAUDULENT CONDUCT BY A DIRECTOR
(By Sarah d'Oliveyra, Phillips Fox)

Macleod v The Queen [2003] HCA 24, High Court of Australia, Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ, 7 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/high/2003/may/2003hca24.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2003/may/2003hca24.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Background

Between 1989 and 1994, three companies, Trainex Pty Ltd ('Trainex'), Starlight Film Studios Ltd and Communications Entertainment Network Ltd offered investment opportunities to the public in a film production scheme. Several thousand investors contributed over $6 million to the scheme, on the understanding that they would acquire copyright in the primary works and a share of the profits derived from the production and marketing of the films.

Under the Investor's Deed, Trainex was required to hold the invested funds on trust until sufficient funds were raised to meet the budgeted film production costs. The appellant, Robert James Macleod ('Macleod'), who was at all relevant times a director of the three companies and the sole shareholder of Trainex, used only $718,000 of the invested funds to produce films and applied more than $2 million for his own purposes. Notably, he used some of the invested funds to purchase a home unit in Queensland and used the remainder in payment of a loan account held by him with Starlight Film Studios Ltd, on which he subsequently drew. Additionally, Macleod issued 'income statements' to investors, falsely representing that income had been derived from the making of films.

On 10 March 1999, Macleod was found guilty of breaching, inter alia, section 173 of the [Crimes Act 1900 No. 40 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3907" \t "default) ('the Crimes Act'), which prohibits directors, officers and members of a company from fraudulently taking or applying any property of the company, for their own use or benefit, or any use or purpose other than the use or purpose of the company.

The Court of Criminal Appeal dismissed Macleod's appeal against his conviction under section 173 of the Crimes Act. By special leave, Macleod appealed against that decision to the High Court of Australia.

(2) The appellant's submissions

The appellant's primary submission to the High Court of Australia was that his use of the invested funds was 'contemplated' by Trainex by virtue of him being the sole shareholder of the company. Given the prosecution's purported failure to establish the absence of the company's consent to his activities, the appellant submitted that the convictions under section 173 of the Crimes Act ought to be quashed.

Further and in the alternative, the appellant submitted that a new trial ought to be ordered on the basis that the trial judge misdirected the jury as to the meaning of the word 'fraudulently' as it is used in section 173 of the Crimes Act, or that the trial judge at least gave inadequate directions as to the facts from which dishonesty was to be inferred.

Finally, it was submitted that inadequate directions were given in respect of the claim of right made by the appellant, notably that the trial judge failed to make specific reference to the appellant's actual beliefs in relation to the impugned conduct.

(3) The High Court's judgments

In their joint judgment, Gleeson CJ, Gummow and Hayne JJ dismissed the appeal. McHugh and Callinan JJ concurred, although they provided their opinions in separate judgments.

In response to the appellant's first submission, Gleeson CJ, Gummow and Hayne JJ held that the self-interested 'consent' of a single shareholder, given in furtherance of a crime committed against the company, does not represent the consent of the company and cure what would otherwise constitute a breach of section 173 of the Crimes Act.

McHugh J reached a similar conclusion, making reference to the House of Lords' decision in Salomon v Salomon [1897] AC 22 and reasoning that a corporation is a separate legal entity from its shareholders and persons who are otherwise associated with it. Accordingly, even where the shares of a company are closely held, the purposes of the company are not necessarily synonymous with the intentions of the person or persons in control. Therefore, the appellant's purported 'consent' was no defence to the charge of fraud.

In reaching this conclusion, McHugh J expressly rejected the Full Court of the Supreme Court of Victoria's decision in R v Roffel [1985] VR 511, where it was held that the sole shareholders of a company did not 'appropriate' their company's funds because the company had consented to the appropriation, the consent being evidenced by the acquiescence of both shareholders. Callinan J similarly rejected the decision of the Full Court of the Supreme Court of Victoria.

In response to the appellant's second submission, regarding the trial judge's purported misdirection as to the meaning of the word 'fraudulently', their Honours unanimously agreed that the word 'fraudulently' merely means 'dishonestly' in the context of section 173 of the Crimes Act. The trial judge was accordingly correct in directing the jury (1) that to act fraudulently is to act dishonestly, and (2) in deciding whether the acts of the accused were dishonest, the jury ought to apply the current standards of ordinary decent people. Contrary to the appellant's submission, the word 'fraudulently' imports an objective standard and does not require some additional element of trickery or deceptiveness of conduct. The trial judge's directions in this regard were therefore found to have been correct.

In relation to the appellant's submission that the trial judge gave inadequate directions as to the facts from which dishonesty was to be inferred, Gleeson CJ, Gummow and Hayne JJ held that the trial judge adequately identified the relevant facts by (1) specifying the particular applications which were the subject of each count and (2) contrasting the prosecution case with what the appellant had claimed was his genuine belief in his entitlement to act as he did.

McHugh J made more specific reference to the trial judge's directions, and found that it was open to the jury to conclude, on the basis of an objective standard, that the appellant knew he was not entitled to apply the company's property in the manner in which he did. Callinan J agreed.

In response to the appellant's final submission, Gleeson CJ, Gummow and Hayne JJ clarified that the claim of right raised by the appellant was to be assessed objectively rather than on the basis of what the appellant actually knew or intended in relation to the impugned conduct. The trial judge was therefore correct in directing the jury to assess the appellant's claim of right by the standards of ordinary decent people.

(H) UNFAIR PREFERENCE PAYMENT NOT AVOIDED WHERE DELAY IN PAYMENTS HAD BEEN ROUTINE BUSINESS PRACTICE
(By Renai Vercoe, Corrs Chambers Westgarth)

Sellers v Offset Alpine Printing Pty Ltd; Sellers v Trigra Pty Ltd (in liq) [2003] VSCA 37, Supreme Court of Victoria, Court of Appeal, Winneke P, Ormiston and Charles JJA, 17 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/april/2003vsca37.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/april/2003vsca37.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Introduction

The Court of Appeal was asked to reverse a decision of the County Court of Victoria dismissing the appellant's application for orders pursuant to section 588FF of the Corporations Law ("Law") which would have allowed them to avoid payments made to the two respondents on grounds that those payments were "unfair preferences" (within the meaning of section 588FA of the Law) and, therefore, "voidable transactions" (within the meaning of section 588FE).

(2) Issue

Section 588FG of the Law precludes a court from making an order under section 588FF in circumstances where a party enters a transaction in good faith and, at the time the transaction is entered into, both that person, and a reasonable person in that person's circumstances, had, or would have had, no grounds for suspecting that the company was, or would as a result of that transaction, become insolvent.

In upholding the decisions of the County Court judge, the Court of Appeal confirmed the importance of the circumstances surrounding the making of unfair preferences and a recipient's understanding of those circumstances (including the nature of their relationship with the offending company) in determining whether that recipient had made out a defence under section 588FG of the Law.

(3) Background

Both Trigra Pty Ltd ("Trigra") and Offset Alpine Printing Pty Ltd ("Offset Alpine") provided printing services to Eric Clarke & Associates Pty Ltd (in liquidation) ("Company") and, during the relevant relation-back period (which period was not contested), received a number of payments from the Company on account of these services. At the time of the impugned payments, the Company had been a long-term customer of both Trigra (12 years) and Offset Alpine (6 years) and had established a habit of making late payments (in the case of Trigra, of between 6-8 months, and in the case of Offset Alpine, of 2 to 9 months).

(a) Circumstances peculiar to Trigra

In February 1998, two meetings were held between the Company and Trigra for the purpose of discussing the debt owed by the Company to Trigra and various options for payment. During these meetings the Company conceded that there were difficulties, but stated that it looked forward to improvements as a result of new contracts that had been secured. The Company proposed, and Trigra rejected, two separate payment schedules. The matter was referred to Trigra's solicitors who sent the Company a letter seeking an alternate payment schedule (with payments to be made by bank cheque), a guarantee from the Company's managing director in respect of the debt and a statement by the Company's accountant that it was solvent. Shortly after the letter was sent, Trigra accepted a new payment schedule, without a personal guarantee nor a statement as to the Company's solvency. Trigra continued accepting work from the Company and, by the end of May 1998, all payments owing under the schedule had been made.

The County Court judge held that the seeking by the solicitor of assurances of solvency and a personal guarantee was not done on the instructions of Trigra and accepted evidence by Trigra that it had accepted the Company's assurances and did not think it necessary to ask for an assurance of solvency. He found further that, if there had been any real concern as to the solvency of the Company, Trigra would not have continued to accept contracts from the Company.

(b) Circumstances peculiar to Offset Alpine

On 8 January 1998, the Company sought extra time to make payment under an invoice from Offset Alpine dated 8 December 1997. The Company put forward a payment proposal to Offset Alpine, proposing to make full payment by the end of June 1998. The Finance Manager of Offset Alpine responded to the proposal by seeking the Company's latest financial accounts, a first refusal on the Company's future print work, interest and confirmation that, if Offset Alpine agreed to the proposal, the Company "will not be trading while insolvent", that "no significant creditor will be paid on a more favourable basis" and that, if any instalment was not paid, then all would fall due and payable. The Company rejected Offset Alpine's requirements and stated that it intended "to be here for the long haul." Offset Alpine did not reply to the Company's rejection, but instead accepted the payment proposal put forward by the Company. The first two payments, plus an amount on account of interest were received by Offset Alpine prior to the Company going into administration.

The County Court judge accepted an explanation that the Finance Manager's forceful letter to the Company did not reflect any specific concerns held by him as to the solvency of the Company, but was rather designed to indicate to Offset Alpine's board that he was trying to obtain the best repayment proposal possible.

(4) Decision

The Court of Appeal unanimously affirmed the decision of the County Court judge, accepting the judge's findings of fact and noting the difficulties faced by appellants seeking to impugn on appeal findings of fact based on the primary judge's assessment of the witnesses and their credibility.

In delivering his judgment, Ormiston JA noted that "Acceptance of a recipient's evidence...may be important in reaching a conclusion as to what in fact were the actual circumstances known to that recipient" (at paragraph 11 of his judgment). Ormiston JA placed emphasis on the fact that, in respect of both Trigra and Offset Alpine, the Company had had a long pattern over many years of making late payments and that, in the absence of anything new, there was nothing to raise a reasonable suspicion of insolvency in either of the respondents.

(I) PREVIOUS YEAR TAX LOSSES TRANSFERRED TO A SUBSIDIARY ARE DEDUCTIBLE DESPITE WINDING UP ORDERS
(By Niti Gupta, Blake Dawson Waldron)

Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation) [2003] FCAFC 63, Federal Court of Australia Full Court, Hill, Goldberg and Conti JJ, 14 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/april/2003fcafc63.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/april/2003fcafc63.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Summary

The Commissioner of Taxation appealed to the Full Court of the Federal Court from the judgment of Hely J, upholding an objection of Linter Textiles Australia Ltd (in liquidation) ("LTAL") against an assessment of income tax for the 1992 income year. The Commissioner alleged that previous year losses transferred from LTAL's parent company, Linter Group Ltd (in liquidation) ("LGL"), were not deductible as the two companies were subject to winding up orders and LGL no longer had "beneficial ownership" of the shares it otherwise held in LTAL as that phrase is used in section 80A(1) of the [Income Tax Assessment Act 1936 No. 27 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "default) ("the Act"). If LGL was, however, seen as retaining beneficial ownership of the shares, the Commissioner argued that the shares held by LGL would no longer carry the rights referred to in paragraphs (c), (d) and (e) of section 80A(1), as there could be no scope to exercise those rights after a winding up order had been made.

The Full Federal Court confirmed Hely J's decision, stating that "beneficial ownership" had to be given its normal meaning of equitable ownership. The fact that the company in liquidation, LGL, was bound through its liquidator to deal with its assets in accordance with the statutory scheme of liquidation did not deprive the company of "beneficial ownership" of the shares it held in LTAL as there had been no relevant change in equitable ownership. In addition, the LTAL shares held by LGL continued to carry rights to votes, dividends and distributions of capital in the year of income, as the wording of section 80A(1) deals with the "capacity" to exercise those rights. Thus, the losses were allowable deductions to LTAL in the 1992 year of income, and the appeal was dismissed.

(2) Facts and decision

LTAL, the taxpayer, was at all material times a wholly-owned subsidiary of LGL. LGL was ordered to be wound up under the Companies (New South Wales) Code by the Supreme Court of NSW on 12 April 1991, and LTAL was ordered to be wound up on 24 February 1992 under the Corporations Law. Liquidators were appointed to both companies.

In the year of income, 1992, LTAL claimed a deduction for losses incurred by LGL in 1990 and transferred to LTAL under section 80G of the Act. It was established that, but for the winding up orders, the losses would have been available to LTAL to offset against assessable income derived during that year. The Commissioner denied the taxpayer the deduction and LTAL subsequently objected to the assessment in the Federal Court. The Court upheld the taxpayer's objection at first instance.

Section 80A(1) of the Act provides that a prior loss is deductible only if it can be established that, during the year of income, shares carrying rights to more than 50% of votes, dividends and distribution of capital, were beneficially owned by persons, who at all times during the year in which the loss was incurred, beneficially owned shares in the company carrying those rights.

The relevant questions in this appeal by the Commissioner of Taxation were:

- Did LGL, after the two liquidations, retain "beneficial ownership" of the shares it otherwise held in LTAL, as required under section 80A(1)?
- If the first question is answered in the affirmative, did the shares carry the rights referred to in section 80A(1) after the two liquidations?

(a) Issue 1: "Beneficial ownership" of the shares held in LTAL

The Commissioner argued that, on the basis of a number of English authorities on revenue law, most notably Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1976] AC 167, "beneficial ownership" had a special meaning in this context. This meaning was described as the ability to enjoy the property for the shareholder's own benefit as opposed to the benefit of others, as the shareholder saw fit. The Commissioner argued that because LGL was in liquidation, it had lost the ability to enjoy and dispose of its assets as it saw fit. The assets of the company now constituted a "fund held by the liquidator for the benefit of those entitled to prove in the liquidation or, in the event of a surplus, for the benefit of the shareholders", depriving LGL of beneficial ownership of its assets.

The Court rejected this notion on the basis of the history of the term "beneficial ownership" in the Act. It noted that the term had been adopted by Parliament to replace the existing formula of "beneficially held" and to thus rectify the anomaly that losses might cease to be available to a company where a person who was otherwise the owner of the shares, was not entered on the register of members and did not thus, "hold" the shares in both the year of income and year of loss. The new requirement of "beneficial ownership" looked to who was the real owner of the shares, and in cases where legal and equitable ownership were divided, to who owned the shares in equity. The Court also noted the provisions in the Act denying a bankrupt the right to deduct losses arising in a prior year, stating that it was relevant that Parliament had not seen fit to incorporate similar provisions with respect to companies in liquidation.

The Court then went on to consider the policy considerations underlying sections 80A to 80C of the Act, and found that the sections aimed to ensure that losses would not be available to a company where there had been a discontinuity of ownership of shares during the year of income and the year of loss. Thus, the emphasis is on change of real ownership, and the expression "beneficially owned" turns on equitable ownership. It was held to not encompass a situation where, as a result of statute, the owner of shares would be subject to the control of another and thus unable to dispose of the shares as it saw fit. It would be difficult to see why Parliament would seek to disallow a deduction to companies which have losses capable of being carried forward where there has been no change in ownership of the shares, simply because the shares are now held by a company in liquidation.

In conclusion, the Court agreed with the primary judge that there had been no relevant change in beneficial ownership of the shares held by LGL in LTAL by virtue of the winding up orders.

(b) Issue 2: The continuity of share rights

The Commissioner argued in the alternative that, following a winding up order, there could be no scope for a meeting of shareholders, no scope for the payment of dividends and no scope for distribution of capital, making it incorrect to say that the shares held by LGL in LTAL carried rights to votes, dividends or distributions of capital in the year of income.

The Court held that the relevant issue under section 80A(1) was not whether there "can" be general meetings, dividends or capital distributions, but rather whether there would be a "capacity" to vote, receive dividends or distributions of capital in a hypothetical situation, as a result of the wording of section 80A(3). Using this analysis, the Court held that there had been no relevant change in the rights attaching to the shares as a result of the winding up orders and that the necessary continuity of rights existed in both the year of income and year of loss.

In conclusion, the Court held that the tests in section 80A(1) did not disqualify the losses otherwise available to LTAL from being an allowable deduction to it in 1992, the year of income.

(J) REDUNDANCY PAYMENTS IN THE CONTEXT OF TRANSMISSION OF BUSINESS
(By Robyn Sweet, Blake Dawson Waldron)

Amcor Ltd v Construction, Forestry, Mining and Energy Union [2003] FCAFC 57, Federal Court of Australia Full Court, Moore, Marshall and Merkel JJ, 28 March 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fcafc57.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fcafc57.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) The appeal

Amcor Ltd (Amcor) appealed an order made in the Federal Court which ordered that Amcor pay a former employee the sum of $88,677.30 pursuant to section 178(6) of the [Workplace Relations Act (1996) 1988 No. 86 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6125" \t "default). The order was made on the basis that Amcor was bound by a certified agreement to award Mr Anderson severance payments upon retrenchment of his position with Amcor.

The Commonwealth Minister for Employment and Workplace Relations intervened in the appeal pursuant to section 471 of the Workplace Relations Act 1996 (Cth) ("the Act").

The appeal was heard by Merkel, Marshall and Moore JJ who unanimously dismissed the appeal.

(2) The facts

This case was originally brought by the Construction, Forestry, Mining and Energy Union (the Union). One of its members was Mr Anderson, whose employment at Amcor was governed by a certified agreement called the Australian Paper/Amcor Fibre Packaging Agreement 1997 (the Agreement).

In the process of separating its packaging business from its paper manufacturing business, Amcor terminated the employment of its mill workers (including Mr Anderson) and arranged for Paper Australia Pty Ltd (Paper Australia), a wholly owned subsidiary of Amcor, to offer the workers employment in identical positions, subject to the same terms and conditions as their employment at Amcor.

(3) The issue

The dispute centred around whether, under the Agreement and in the context of a transmission of business, Amcor was obliged to make severance payments to employees upon termination of their employment.

The Union argued that when the Amcor employees were given notice that their employment with Amcor was terminated, they had been made redundant and accrued the right to severance payments. The fact that most employees took up identical employment with Paper Australia did not negate the fact that they had been made redundant. Amcor, on the other hand, contended that, given that the employees continued to work as usual under exactly the same terms and conditions, there had been no redundancy.

(4) Definition of "redundant"

The primary judge, relying on the Full Court of the Supreme Court of South Australia in R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited (1977) 16 SASR 6 to support his approach held that "in the context of employment law it is generally accepted that becoming redundant means that the employee is no longer required by his (or her) employer because the employer no longer has a need for the work that the employee was performing" (at [9]).

He added that it was beside the point that Amcor had arranged for Paper Australia to engage the employees on identical terms.

His Honour acknowledged the decision in Termination, Change and Redundancy Case (1984) 8 IR 34 in which the Australian Conciliation and Arbitration Commission decided that awards containing the test case redundancy provision should include a proviso that severance payments would not accrue in situations of succession, assignment or transmission of a business. However, his Honour concluded that these payments did accrue to Amcor employees despite their subsequent employment with Paper Australia. His reasoning was that redundancy involved loss of the employee's position with his or her employer, rather than the loss of employment per se. He held this view because:

- none of the authorities he referred to suggested that there would be no redundancy if the employee's position is carried over with a different employer;
- according to Clause 55 of the Agreement, if an employer no longer had work for an employee in his position and dismisses him for that reason, the conditions for severance payments have been satisfied. The question of redundancy is therefore clearly determined on dismissal and subsequent employment is therefore irrelevant to the accrual of severance payments; and
- clause 55 assumes that the dismissal will be made by the employer who is bound by the agreement and the dismissal will be from the position held under that employer. It does not contemplate or make allowances for transferral of positions to another employer.

(5) Does redundancy relate to the employee's position or the employee's position with the employer?

Clause 55 refers to when "a position becomes redundant". Amcor argued that the positions of the employees did not become redundant, but rather were preserved by Paper Australia. The court agreed with the primary judge that "position" should be construed as meaning a position performed for a particular employer.

Clause 55 provides that severance payments become payable when an employee is dismissed by an employer for the reason that the employer no longer requires the employee to perform the work which the employee had been doing for that employer. The dismissal for the reason of being no longer required to perform the tasks of their position is the trigger for accrual of severance payments. Any subsequent employment, even if it is in the form of an identical position and takes effect immediately after the redundancy (through the transmission of business in this case) does not affect the employee's right to those payments.

(6) Section 170MB of the Act

Section 170MB of the Act has the effect of transferring obligations under a certified agreement to a new employer. As such, in April 2000 the Agreement became binding on Paper Australia, as a result of the transmission of the business of the mills from Amcor to Paper Australia.

Amcor attempted to persuade the court that section 170MB was relevant to the proper construction of Clause 55. The court confirmed the primary judge's view that the effect of section 170MB did not need to be considered in this case, primarily because the obligation to make severance payments crystallises at the point of dismissal, necessarily before Paper Australia became the new employer. Further, section 170MB(3) clearly states that obligations of former employers are not affected by the transmission of business.

(7) Election

Amcor also contended that upon accepting employment with Paper Australia, the employees elected not to pursue any claim against Amcor in respect of accrued entitlements. In response, the court noted the recent Federal Court decision in Metropolitan Health Service Board v Australian Nursing Federation (2000) 99 FCR 95 which confirmed that it is not possible to contract out of obligations imposed by certified agreements. Merkel and Marshall JJ agreed with the primary judge that no question of estoppel arose, particularly because the employment agreement with Paper Australia was silent on the issue of claiming statutory entitlements under the Agreement.

(8) Considerations of fairness

The court emphasised that, under section 170MD of the Act, Amcor and the relevant unions were permitted to go to the Commission prior to 31 March 2000 for approval to vary the agreement and hence remove the need to make severance payments upon transmission of business. This, however, was not done.

(9) Conclusion

The court concluded that Mr Anderson had been made redundant and was entitled to severance payments from Amcor. The appeal was dismissed. There was no dispute as to the quantum of the award ordered and the payment of $88,677.30 stood.

(K) DEED CREDITORS ENTITLED TO ADMINISTRATION FUND COLLECTED BUT NOT PAID BEFORE LIQUIDATION
(By Lisa Bonifant, Mallesons Stephen Jaques)

Ronald John Dean-Willcocks v ACG Engineering [2003] NSWSC 353, New South Wales Supreme Court, Austin J, 29 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswsc353.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswsc353.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Summary

On its proper construction, the terms of a deed of company arrangement ("DCA") created an express trust, for the benefit of specified deed creditors, over specified monies deposited into the deed administrator's account for application in accordance with the DCA ("administration fund").

Consequently, the administration fund was not an asset of the company available for distribution in the liquidation of the company even though, before the fund was distributed, the DCA was terminated (in accordance with its terms) upon the directors resolving the company to be insolvent. Rather, the fund was held by the deed administrator in trust under the terms of the DCA for the specified deed creditors and to be applied accordingly.

(2) Facts

Relevant terms of the DCA included:

- "creditors" were defined as unsecured creditors whose claims arose prior to 26 November 2001;
- a process for the deed administrator to invite proofs of debt and to adjudicate upon those claims to settle upon a list of "Participating Creditors";
- a requirement for the company and directors to procure the payment of a specified sum to the deed administrator on account of ordinary unsecured creditors and other identified deed creditors;
- automatic termination of the DCA upon the directors resolving the company was insolvent and a provision requiring the company to be wound up in those circumstances, with the deed administrator to be appointed as liquidator; and
- provisions that, upon payment of the specified sum, control of the company reverted to the directors who would continue to trade and incur new debts, and payments out of the administration fund would extinguish the company's debts and claims against it in respect of anything done before 26 November 2001.

Critically, it also included a requirement that the deed administrator hold the fund in accordance with the terms of the DCA and an agreement by the company and the directors that any monies paid to the deed administrator were not refundable.

Participating Creditors were identified in accordance with the process set out in the DCA and the deed administrator advertised and circulated an announcement of his intention to pay a final dividend. However, before the final dividend was paid, the director of the company resolved the company was insolvent, causing the DCA to be automatically terminated, the company wound up and the deed administrator to become the liquidator of the company.

The liquidator sought either directions (pursuant to either or both of sections 447D(2) and section 511 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)) or a declaration that he should make rateable distributions in accordance with the DCA.

(3) The decision

The decision turned on the construction of the DCA, Austin J noting, with particular reference to sections 444D and 444G, that there was very little in the Corporations Act 2001 (Cth) to assist in that construction.

Austin J held that:

- as a matter of the plain and natural meaning of the DCA, the obligation imposed upon the deed administrator to "hold" the administration fund in accordance with the terms of the DCA created a trust of the fund, as it vested the fund in him subject to a legally enforceable obligation to hold it to make a distribution to someone else; and
- the trust arose upon receipt of the monies (by the deed administrator) and survived the termination of the DCA.

As a result, the administration fund was not available to post-deed creditors and was to be distributed to the Participating Creditors in accordance with the DCA. Austin J did comment, however, that:

"the question of whether a trust of any fund has arisen under the terms of a deed of company arrangement depends, principally, on the construction of the particular deed in question...In yet other cases, the relevant fund might, on a proper construction of the deed, be the property of the company, that would become available for the creditors generally in the company's liquidation if not distributed pursuant to the deed before liquidation intervenes."

In this case, because no submissions had been received by the liquidator from creditors in response to his notice of intention to seek directions, Austin J was prepared to make a declaratory order binding the creditors of the company.

(L) COURT CONFIRMS TOUGH STANCE AGAINST SLEEPING DIRECTORS
(By Swee Tan and Belinda Bradberry, Telstra Corporation Limited)

Deputy Commissioner of Taxation v Clark [2003] NSWCA 91, Supreme Court of New South Wales, Spigelman CJ, Handley JA, Hodgson JA; 1 May 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswca91.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/may/2003nswca91.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Summary

The Deputy Commissioner of Taxation ("DCT") sought an order of indemnity under section 588FGA of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Corporations Act") from the directors of a company which had been placed into liquidation, after the company's liquidator recovered payments made by the company to the DCT on the grounds that they constituted an unfair preference. The female director, who had completely relinquished the management of the company to her husband, attempted to raise a defence under section 588FGB(5) that she had not been involved in the management of the company at the time of the payments to the DCT, and that this lack of involvement was due to a "good reason". Although the female director was successful at first instance, on appeal the court held that complete reliance on another director due to a sense of marital duty and trust does not constitute a "good reason" for failing to participate in the management of the company and therefore the defence under section 588FGB(5) was not available to her.

(2) Facts

Mrs Clark (the respondent) was a director of Southern Cross Interiors ("SCI") along with her husband. In agreeing to become a director, Mrs Clark relied on Mr Clark's implied assurance that he would manage the affairs of the company and that her appointment was a formality because the company needed two directors. Mrs Clark's evidence was that she accepted the appointment out of a sense of marital duty. She did not have any business experience and was a full-time housewife and mother. From the time of her appointment, Mrs Clark left the management of SCI entirely to Mr Clark. On 30 September 1997, an administrator was appointed to SCI and on 27 October 1997, the company was wound up. SCI's liquidator obtained an order against the DCT (the appellant) for the recovery of $208,737.44 paid by SCI to the DCT for group tax and under the prescribed payments scheme on the grounds that the payments constituted an unfair preference. The DCT then sought orders pursuant to section 588FGA of the Corporations Act that Mr and Mrs Clark indemnify the DCT for any loss or damage resulting from the order to set aside the payments made to the DCT.

At first instance, Palmer J ordered Mr Clark to indemnify the Deputy Commissioner, but Mrs Clark succeeded in establishing the defence pursuant to section 588FGB(5) that for "good reason" she had not been involved in the management of the company at the times the payments were made to the DCT. The DCT appealed against this decision. On appeal, the issue before the Court was whether Mrs Clark had good reason not to take part in the management of the company at the times when the payments were made to the DCT.

(3) Meaning of "other good reason" for failing to participate in the management of the company

At first instance, Palmer J had held that a wife's failure to appreciate her duties as a director due to her complete reliance on and deferral to her spouse may constitute a "good reason" for her failure to participate in the management of the company for the purposes of a defence under section 588FGB(5).

However, on appeal, the court found that the defence set out in section 588FGB(5) operates on the presumption that every director will be involved in the management of the company unless "illness or other good reason" excuses their involvement at a specific point in time.

Although section 588FGB(5) contemplates that a director might fail to participate in the management of a company at a particular point in time, for example, by reason of illness, this must be read subject to the overriding obligation on the part of directors to participate in the management of the company. Therefore, section 588FGB(5) is not available to excuse directors who decide, for whatever reason, not to participate in the management of the company at all.

The court noted that in 1992 the law changed to permit single director companies, whereas previously a minimum of two directors was required. As Mr Clark had been unaware of the change he assumed that it was necessary to appoint a second director, and therefore chose to appoint his wife.

Whilst accepting that the law has changed to remove the need for small businesses to appoint a second director in circumstances where, like Mrs Clark, the second director would have no involvement in the affairs of the company, the court held that this did not alter the basic requirement that those people who accept appointment as a company director must participate in the company's management.

(4) Conclusion

Consequently, the court found that Mrs Clark's total reliance on her husband did not constitute a "good reason" within the meaning of section 588FGB(5) for failing to participate in the management of the company. She was therefore unable to resist the indemnity claimed by the DCT under section 588FGA.

This case serves as a timely reminder that it will be extremely difficult for sleeping directors to satisfy a court that their reason for failing to participate in the management of the company is sufficient to excuse them from liability as directors. It further clarifies that although wives who repose complete trust in their husbands in relation to business affairs may in certain circumstances be excused from liability in other contexts, for example in relation to guarantees, it is extremely unlikely that they will be excused from liabilities incurred as a company director.

(M) WHAT IS GOOD SERVICE? - SETTING ASIDE A CREDITOR'S STATUTORY DEMAND
(By Elizabeth O'Donovan, Deacons)

Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd [2003] QSC 098, Supreme Court of Queensland, Helman J, 11 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/april/2003qsc098.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/april/2003qsc098.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Summary

A creditors' statutory demand was served on the respondent's company and the applicant applied to the court under section 459G of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act") to have the creditor's statutory demand set aside.

An issue arose as to when the statutory demand had been served on the applicant.
The applicant had been served with the statutory demand by facsimile on 31 January 2003 and by post on 3 February 2003. An application under section 459G of the Act must be made within 21 days after the date on which the statutory demand is served.

The application was within time for the purposes of section 459G if the earlier service by facsimile was not effective but it was out of time if service was taken to be by post on 3 February 2003.

The applicant submitted that service of the statutory demand was only effective when received by post on 3 February 2003, although the applicant had previously acknowledged receipt of the statutory demand received by facsimile on 31 January 2003 in a letter to the respondent.

Helman J held that there had been effective service by facsimile of the statutory demand on 31 January 2003 as that was the date when the applicant received the statutory demand. Consequently, time began to run from 31 January 2003 and the applicant had not filed the application pursuant to section 459G within 21 days of that date. Helman J noted that time cannot be extended under section 459G of the Act and the application was dismissed.

(2) The Law

Section 459E(1) of the Act provides that a person may serve a demand on a company but does not prescribe the manner of service.

The applicant submitted that section 601CX of the Act set out the relevant mode of service on companies such as the applicant. Helman J preferred the view that section 109X of the Act was the relevant provision since it concerns the mode of service on bodies registered under Part 5B.2 (Registrable Bodies) whereas section 109X is a general provision relating to service on companies.

Section 109X of the Act does not provide for service by facsimile but it provides that a document may be served on a company by leaving it at, or posting it to, the company's registered office. It was conceded by the respondent that the [Acts Interpretation Act 1901 No. 2 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "default) does not provide for service by facsimile.

Helman J accepted Young J's interpretation of section 109X in Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542 who held that section 109X of the Act was not a code governing service and the mere fact that a document has not been served under section 109X does not disqualify it from service if the document came into the possession of the addressee.

(3) The decision

Helman J cited Young J in Howship Holdings who held that the ordinary meaning of 'service' is personal service and personal service merely means that the document in question must come to the notice of the person for whom it is intended. Young J had referred to the decision of McInerney J in Pino v Prosser [1967] VR 835 at 838 who held that unless this was so, the conclusion would be one which is:

"...remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ ... should be held not to have been served."

Helman J therefore accepted the respondent's submission that the fact that the appellant had admitted receipt of the facsimile transmission of the statutory demand and accompanying affidavit proved that there had been effective service of those documents.

(N) UNION REPRESENTATION AT A CREDITOR'S MEETING - SECTION 447A OF THE CORPORATIONS ACT
(By Elizabeth O'Donovan, Deacons)

In the matter of Pasminco Limited (subject to deed of company arrangement) [2003] FCA 265, Federal Court of Australia, Goldberg J, 26 March 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fca265.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/march/2003fca265.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Summary

Administrators were appointed to Pasminco Limited and a number of its wholly owned subsidiaries ("Pasminco Group") pursuant to the provisions of Part 5.3A of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act"). The applicants sought an order pursuant to section 447A of the Act to enable two unions, whose members included employees of companies in the Pasminco Group, to have their nominated representatives appointed as attorneys for their members pursuant to regulation 5.6.31A of the Act.

The members of the unions who were also creditors representatives of the unions did not have sufficient time to obtain proxies or powers of attorney from all their members who were also creditors of the companies of the Pasminco Group.

Goldberg J held that the policy behind Part 5.3A of the Act and the execution of deeds of company arrangement is to ensure creditors of the company have a significant and substantial role in that administration. Goldberg J considered that there were unavoidable difficulties for members of the unions to have their vote recorded at the meeting and granted the order sought under section 447A of the Act.

(2) Background

On 26 September 2001 the first meeting of creditors of companies in the Pasminco Group was held pursuant to section 436E of the Act. A committee of creditors was appointed in accordance with section 436E(1) of the Act which included nominated representatives of the Australian Workers Union ("AWU") and the Australian Manufacturing Workers Union ("AMWU").

A number of the employees of the Pasminco Group were members of the AWU and the AMWU and the nominated representatives represented those employees in negotiating industrial relation issues with the Pasminco Group.

The creditors of the Pasminco Group resolved, pursuant to section 439C of the Act, that the companies in the Pasminco Group would execute deeds of company arrangement which provided for restructure of the Pasminco Group.

The second creditors' meeting of companies in the Pasminco Group was scheduled by the administrators and one of the items on the agenda for the meeting was the consideration of a resolution to vary the deeds of company arrangement of companies in the Pasminco Group.

There was reason to believe that the rights of union members who are creditors in the Pasminco Group would be significantly affected by the execution of the deeds of company arrangement at the creditors' meeting.

(3) The decision

Goldberg J referred to his previous decision in re Amstrad Australia Limited (admin APPTD); Rappas v Ansett Australia Limited (admin APPTD) (2001) 39 ACSR 296 in which he made a similar order to enable 12 unions whose members included employees of companies in the Ansett Group, to have their nominated officials appointed as attorneys for their members, for the purpose of voting at the first meeting of creditors of companies in the Ansett Group.

In that decision, Goldberg J considered that he had the power to make the order under section 447A of the Act having regard to the interpretation placed on that section by the High Court in Australasian Memory Pty Ltd v Brien (2000) 200 CLR270 at 279.

Goldberg J held that the Court had an obligation to ensure that creditors did not face difficulties when attempting to have their voice heard or cast their vote at a meeting of creditors of companies subject to a deed of company arrangement. Goldberg J made particular reference to the fact that in this case a large body of creditors were employees whose claims, although somewhat insignificant compared to the overall indebtedness of the Company, were still substantial and significant for each employee.

Goldberg J concluded that the difficulties in obtaining proxies or power of attorney from the members could not have been avoided since the difficulty was due to the remote locations in which the employees worked and the relatively short period of time available to the officials of the AWU and the AMWU to obtain proxies and powers of attorney from the members who are creditors of the Pasminco Group.

(O) BREACH OF FIDUCIARY DUTIES AND THE APPROPRIATENESS OF PERSONAL VERSUS PROPRIETARY REMEDIES
(By Andrew Komesaroff and Robert Trowbridge, Corrs Chambers Westgarth)

Robins v Incentive Dynamics Pty Ltd (in liq) [2003] NSWCA 71, Supreme Court of New South Wales Court of Appeal, Mason P, Stein JA and Giles JA, 9 April 2003

The full text of the judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswca71.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/april/2003nswca71.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

(1) Introduction

The NSW Court of Appeal ("Court") found that a third party in knowing receipt of company funds, being privy to the misapplication of those funds by the directors of the company in breach of their duties, is obliged to make restitution as a constructive trustee for the company.

The case dealt with, amongst other things, section 232(6) of the Corporations Law (now section 182 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)). This section forbids officers from making improper use of their position to gain an advantage for themselves or others or to cause detriment to the body corporate.

In allowing the appeal to set aside the order of the trial judge, the Court (Mason P, Stein JA and Giles JA) held that the primary judge erred in rejecting the proprietary claim in favour of a personal claim on the basis that there was no dishonest intent on the part of the company officers at the time of the transaction. The Court held that such intent was not necessarily an element of the duty imposed on the directors under section 232(6). The Court held that the appropriate order was a proprietary remedy in the form of a remedial constructive trust.

(2) Facts

Incentive Dynamics Pty Ltd ("Incentive") was a business that established and marketed "incentive schemes" for employees of large companies. Coldwick Pty Ltd ("Coldwick") was established solely as a corporate vehicle to facilitate the purchase of two properties. Incentive paid Coldwick $375,064.63, which Coldwick used in the purchase of the properties. Incentive received no benefit from Coldwick's acquisition of the properties with its money; nor was a benefit intended.

Incentive and its liquidator brought personal and proprietary claims against Coldwick. The personal claim asserted that the money advanced by Incentive to Coldwick was in terms of a repayable loan. The proprietary claim was based on the principles of Barnes v Addy (1864) LR 9 Ch App 244 relating to "knowing receipt". Incentive sought a remedial constructive trust over the two properties by virtue of the purchase money having been provided without any material benefit to Incentive and in breach of fiduciary and statutory duties (including section 232(6)) owed by Incentive's officers (two of whom were also directors and shareholders of Coldwick at the time).

In the Federal Court, Mansfield J accepted the personal claim and ordered that the $375,064.63 used by Coldwick to purchase the properties was to be paid back to Incentive. However, he rejected the proprietary claim as he was not persuaded that Incentive's officers had any dishonest and improper intent at the time of the transaction sufficient to render Coldwick a constructive trustee of the properties for Incentive.

It was the rejection of proprietary relief by Mansfield J that formed the basis of Incentive's appeal. By way of cross-appeal, Incentive sought to have the personal money judgment in its favour set aside and replaced with relief based upon a more valuable remedial constructive trust vesting the entire sale proceeds of the properties in Incentive.

(3) Decision

Mason P (with Stein JA agreeing) delivered the primary judgment allowing the appeal to set aside the order of the primary judge. Giles JA agreed with additional comments. The Court declared that Coldwick held its interest in the properties on trust for Incentive and ordered that the whole of the proceeds of sale of the several properties (including accrued interest) be paid to the liquidator on behalf of Incentive.

(a) Dishonesty or improper intent is not a necessary condition of a breach of section 232(6)

Section 232(6) of the Corporations Law forbids officers from making improper use of their position to gain an advantage for themselves or others or to cause detriment to the body corporate. The primary judge rejected the proprietary claim because there was no dishonest and improper intent on the part of Incentive's officers at the time of the transaction. The Court found that dishonesty or improper intent (in a conscious sense) is not a necessary component of "impropriety" imposed by section 232(6). Mason P referred to the similar sentiments voiced by the High Court in R v Bynes and Hopwood (1995) 183 CLR 501 in which the High Court held that, save for instances where impropriety is said to consist in an abuse of power, the assessment of impropriety involved an objective test. Thus, impropriety may consist in the doing of an act which a director or officer knows or ought to know that he or she had no authority to do.

(b) "Knowing receipt" and company monies as trust monies

Where a third party to a fiduciary relationship receives trust property as a result of impropriety on the part of the trustee or fiduciary, the third party will be liable as constructive trustee if it can be shown that he or she had notice or knowledge of the impropriety. The Court referred to this as the "knowing receipt" rule in Barnes v Addy.

Whereas the Court acknowledged that the principles relating to knowing receipt were in a considerable state of flux, the facts of this case did not warrant clarification of those principles. The Court noted that as no evidence from the officers of Incentive could be produced to suggest an honest basis for the receipt of Incentive moneys by Coldwick, it followed that the entire transaction was an improper diversion of Incentive funds. It was then clear that Coldwick, through its officers in common with Incentive, had actual knowledge of the circumstances of impropriety in which the money was paid.

It was further held that although the money was not property held in trust at the time of the misappropriation or misdirection, the "knowing receipt" principle extended to cover the situation here where the money was protected by fiduciary or statutory fiduciary obligations (including those owed by Incentives directors under section 232(6)).

The result of having found Coldwick to be in "knowing receipt" of trust funds was that Coldwick then became constructive trustee for Incentive of the misapplied funds.

(c) The form of the transaction does not preclude the hand of equity

The personal money judgment entered against Coldwick by the primary judge rested upon the finding that the money had been provided to Coldwick upon a loan basis. The Court held that the imposition of a remedial constructive trust was not precluded merely because Coldwick took the money under a transaction having a particular form such as a gift, loan or purchase.

Thus, in this case where the recipient liability of Coldwick was established, Incentive could ignore the form and terms of the loan transaction and be permitted to trace its money and use this as a springboard for the imposition of a remedial constructive trust.

(d) The question of rescission

A loan contract entered into by a corporation in circumstances involving statutory contravention may be void for illegality or merely voidable at the option of the corporation. Where it is void for illegality, the Court held that it was not required to consider the rights of third parties when imposing the Barnes v Addy constructive trust. However, in this case the loan transaction was at best voidable for breach of fiduciary duty or analogous statutory duty. As such, rescission was considered essential; and affirmation, delay, intervention of third party rights and an inability to give counter-restitution may cause any right of rescission to be lost.

Nevertheless, a remedial constructive trust was considered by the Court as entirely appropriate in this case because (1) there were no third parties such as creditors having a legitimate claim to the property of Coldwick; (2) Incentive never sought to affirm the contract for the "loan" transaction and (3) the profit could be traced into identifiable property in the hands of Coldwick as the defaulting party.

Further, the Court held that in this case, "equity would be abrogating its role of vindicating and protecting fiduciary relationships and deterring improper profit-making conduct if it looked just at the capital sums advanced under the 'loans'". If only the loans were repaid, the defaulting officers would be unjustly enriched (insofar as they reaped the benefit of having to spend nothing to obtain enjoyment of the two properties) in consequence of their own wrongdoing.

The further comments by Giles JA noted that the personal remedy sought by the applicant under the statement of claim alleged that the moneys were "lent". The proprietary claim, stated as an alternative, alleged that the moneys were "provided". Incentive's position was that the money was provided to Coldwick and the properties purchased with the money were held for it, but if that were not so it could recover the money as money lent. Thus, for Incentive's proprietary claim, the allegation suggested that the moneys had, in effect, been stolen. As such, Giles JA held that there was no question of rescission.

Incentive was then held to its preferred position that the money was provided rather than lent, so that there could be no double recovery.

5. CORPORATE LAW TEACHERS' ASSOCIATION: ANNUAL CONFERENCE 2004 - REGULATING CORPORATIONS

Date: 8 - 10 February 2004

Venue: The Australian National University Canberra, Australia

Debates about how and why we should regulate corporations have been given renewed vigour in the early years of the 21st century. The theme of this conference invites presenters to reconsider these debates - are we looking at the same old arguments about regulation v de-regulation, or investor protection v efficiency, or have there been shifts in the way we conceive of corporate regulation?

Possible topics to be considered include:

- the contemporary relevance of the legal model of the corporation;
- whether regulatory goals are best achieved via a framework of legal duties, or social responsibilities and ethical standards;
- the regulatory role of the 'market';
- the globalisation of corporate regulation; and
- the role and regulation of corporate professional advisers (eg proposals in CLERP 9, the HIH Royal Commission)

(1) Call for papers

The conference organisers encourage offers of papers that address the conference theme.

Offers of papers on other topics of relevance to corporate law teaching, research and contemporary developments are also welcome.

Please send your name and contact information, the proposed title of your paper and a brief description (approximately 100 words) to clta.law@anu.edu.au by Monday, 18 August 2003.

Full conference details will be available on the CLTA website at [http://users.austlii.edu.au/clta/](http://users.austlii.edu.au/clta/%22%20%5Ct%20%22_new) by 30 May 2003.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

G Fleming, 'Event studies in law and finance: Australian research' (2003) 21 Company and Securities Law Journal 151

Event studies have been used successfully in many areas of commercial law to quantify the wealth and redistributional effects of legal change. Topics of analysis have included the wealth effects of litigation and competition for corporate charters, the impact of mergers and acquisitions on shareholders and other stakeholders, materiality and fraud in securities litigation, the relative merits of alternative corporate governance structures, and the redistributional impact of regulatory change. This article reviews the use of event studies in Australian commercial law with focus on two questions: what is the current state of event study research and, what do we need to do to make Australian research best practice?

T Cynthia, 'The multi-tier contest - competing priorities in an indirect holding system' (2003) 21 Company and Securities Law Journal 168

Refashioned by the high-technology era, the modern custody business embodies sophisticated operational features and employs a network of intermediaries to hold securities for the investor, giving rise to a multi-tiered custodial system. Each party in the tiered structure potentially acquires different interests in the securities, which may be offered as collateral to third parties. This article describes the custody business and distils the legal principles governing the interests of the intermediaries and investor. It examines the workability of applying existing priority principles to competing claims in the collateral arrangements and whether such arrangements accord with duties owed by the intermediaries to the investor.

M Gronow, 'Insolvent corporate groups and their employees: The case for further reform' (2003) 21 Company and Securities Law Journal 188

This article discusses some of the practical and legal problems involved in claims by employee creditors where an employer company that is a member of a group of companies becomes insolvent, and has a receiver, administrator or liquidator appointed to it. The article considers the options for further reforming the current laws relating to recovery of such claims. It argues that further amendments should be made to the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and other legislation to provide more effective means of ensuring that such claims are paid.

In particular, further changes are needed to mitigate the effects of the frequent "separation" of employees from the assets of the business in which they work by using different companies in the corporate group structure. It is argued that a formal statutory scheme for "pooling" the assets of insolvent corporate groups is needed in Australia. Also, it is argued that the present approach of partially meeting unpaid employee claims from a government fund, while better than not meeting them at all, is fundamentally wrong-headed. It should be replaced by a compulsory scheme to force the businesses themselves to provide or insure for their employee wages and entitlements in full.

Note, 'Proposals on accounting standards in CLERP 9' (2003) 21 Company and Securities Law Journal 212

Note, 'De-crystallisation of floating charges by operation of contract' (2003) 21 Company and Securities Law Journal 214

Note, 'Winding up on the just and equitable ground in Singapore' (2003) 21 Company and Securities Law Journal 221

A Trichardt, 'Australian Green Shoes, price stabilisation and IPOs - Part 2' (2003) 21 Company and Securities Law Journal 75

Part 1 of this article, which was published in the previous issue of this journal, discussed price stabilisation and the over-allotment or Green Shoe option in general terms and concluded with a comparative review of the regulatory regimes in the United States of America and the United Kingdom. Part 2 analyses the market misconduct provisions of Chapter 7.10 of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to determine whether price stabilising activity, in particular the exercise of the Green Shoe option, is illegal in Australia. This Part also discusses the Australian Securities and Investments Commission's no-action letters and its Information Release of 13 September 2000 in respect of price stabilisation and the use of the over-allotment option. Part 2 concludes that the Australian regulatory regime pertaining to stabilisation should be reformed to take account of the internationalisation of securities markets, the developments in other major markets, and the changes in information technology, as well as novel forms of price-influencing activities. The regulatory regime in Australia should facilitate the integrity of the market, maintain investor confidence, promote competition and prevent market abuse.

S Woodward, '"Not-for-profit" motivation in a "for-profit" company law regime - national baseline data' (2003) 21 Company and Securities Law Journal 102

This article reports the findings of a recent survey of companies limited by guarantee. For the first time, national, large-scale profile data on this group of companies has been collected. This data provides a solid baseline for future reform and comparison. Understanding this data is a necessary first step in considering the particular (and often overlooked) needs of not-for-profit companies. Three key questions are explored in relation to the data - (1) why is a company limited by guarantee chosen as the legal structure rather than, say, an incorporated association and has it been suitable for these not-for-profit organisations? (2) what information should be available to the public and other stakeholders about these organisations? and (3) who is the most appropriate regulator for this group?

Note, 'When do directors retire at general meetings?' (2003) 21 Company and Securities Law Journal 134

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D Gordon Smith, 'The Critical Resource Theory of Fiduciary Duty' (2002) 55 Vanderbilt Law Review 1399

G Wix, 'Piercing the Corporate Veil: Should Michigan Consider Statutory Solutions?' (2002) 79 University of Detroit Mercy Law Review 637

Special Symposium Issue on Corporate Social Responsibility, Tulane Law Review, Vol 76 Nos 5 and 6, June 2002. Articles include:

- The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility
- Corporate Social Responsibility Redux
- Linking Progressive Corporate Law with Progressive Social Movements
- The SEC's Suspension and Bar Powers in Perspective
- Enron and the Dark Side of Shareholder Value
- The New Managerialism and Diversity on Corporate Boards of Directors
- September 11th and the End of History for Corporate Law
- Human Rights: The Emerging Norm of Corporate Social Responsibility
- Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination
- The Social Responsibility of Corporate Law Professors
- Law Matters. Lawyers Matter
- Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders and Society
- Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001
- If I Only Had a Heart: Or How Can We Identify a Corporate Morality
- Stakeholder Protection in Germany and Japan
- Corporate Governance in Global Capital Markets, Canadian and International Developments

J Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) Journal of Business Law 1

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E Gologina-Economou, 'Rights of Minority Shareholders' (2002) Hellenic Review of International Law 117

J Pascoe and H Anderson, 'Peeking Under the Veil: Creditors' Rights Against Directors Behaving Badly', Commercial Law Quarterly, December 2002-February 2003, 12

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- Securities Analysts' Undisclosed Conflicts of Interest: Unfairly Dealing or Securities Fraud?
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- Corporate Governance and Executive Remuneration: Rediscovering Managerial Conflict
- Corporate Governance: Substance Over Form
- Corporate Law and Ownership Structure: A Darwinian Link?
- Another Side of Accountability: The Fiduciary Concept and Rent-Seeking in the Governance of Government Corporations
- Sleepers Awake! Future Directions for Auditing in Australia
- Shareholder Democracy or Shareholder Plutocracy? Corporate Governance and the Plight of Small Shareholders
- Developing Corporate Governance in Greater China
- Family Capitalism and Corporate Governance of Family-Controlled Listed Companies in Indonesia
- Faultlines in the Intersection Between Corporate Governance and Social Responsibility
- An Alternative Voice In and Around Corporate Governance
- After Enron: The New Reform Debate
- Dual Listed Companies: Understanding Conflicts of Interest for Directors

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- Pills, Polls and Professors: A Reply to Professor Gilson
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- The Secured Creditor in Cross-border Finance Transactions Under the EU Insolvency Regulation
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